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THE  
INDIANA DIGEST

A DIGEST

OF THE

DECISIONS OF THE COURTS  
OF INDIANA

REPORTED IN

VOLS. 1-8, BLACKFORD'S REPORTS

SMITH'S REPORTS

WILSON'S SUPERIOR COURT REPORTS

VOLS. 1-\*172, INDIANA REPORTS

VOLS. 1-\*43, INDIANA APPELLATE COURT REPORTS

VOLS. 1-91, NORTHEASTERN REPORTER; VOL. 92, PP. 1-480

\*And parts of volumes not yet published, but reported in the Northeastern Reporter

COMPILED UNDER THE AMERICAN DIGEST CLASSIFICATION

VOLUME 4

DISTRICT AND PROSECUTING ATTORNEYS—  
EXEMPLIFICATIONS

ST. PAUL  
WEST PUBLISHING CO.,

1911



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**(4 IND. DIG.)**

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# EXPLANATORY NOTE

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**THIS DIGEST** is compiled on the **KEY-NUMBER SYSTEM**

This means that

**Topics and section numbers** of this Digest are identical with those in

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**Illustration:** A legal proposition found in this Digest under Carriers, section 93, Liability for Misdelivery, will also be found under

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# DIGEST

OF THE

## REPORTED DECISIONS OF ALL THE COURTS OF INDIANA

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### VOLUME 4

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#### DISTRICT AND PROSECUTING ATTORNEYS.

##### *Scope-Note.*

[INCLUDES public prosecutors for particular districts or counties in civil as well as criminal cases; their eligibility for the office; appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of public prosecutors and their assistants and associate counsel in general.

[EXCLUDES city attorneys and counsel of municipal corporations (see *Municipal Corporations*); election of district or county attorneys by popular vote (see *Elections*); and particular proceedings by prosecuting attorneys (see *Grand Jury; Indictment and Information*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

##### *Analysis.*

- § 1. Nature and functions of office.
- § 2. Appointment or election, and qualification and tenure.
- § 3. Deputies, assistants, and substitutes.
- § 4. Compensation and fees.
- § 5. — In general.
- § 7. Representation of state or county in general.
- § 8. Powers and proceedings in general.
- § 9. Prosecution or defense of civil actions.
- § 10. Liabilities for official acts, negligence, or misconduct.

##### *Cross-References.*

See—

Advice of as defense to action for malicious prosecution. MALICIOUS PROSECUTION, § 22.  
Communications to by prosecutor or witness in prosecution as privileged. WITNESSES, § 203.  
Liability of county for salary of prosecuting attorney. COUNTIES, § 139.  
Misconduct as ground for new trial. CRIMINAL LAW, § 919.  
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Rights and duties in trial of criminal cases. CRIMINAL LAW, § 700.  
Signature to indictment. INDICTMENT AND INFORMATION, § 33.  
To information. INDICTMENT AND INFORMATION, § 51.  
Verification of information. INDICTMENT AND INFORMATION, § 52.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.  
4 IND.DIG.—1

### § 1. Nature and functions of office.

[a] (Sup. 1860)

The offices of district attorney and of prosecuting attorney are distinct. The one is created by the constitution; the other, by the statute.—*Dodd v. Sweetser*, 14 Ind. 292.

[b] (Sup. 1870)

Within the meaning of 2 Gav. & H. St. p. 450, § 39, defining felonies, a prosecuting attorney is an officer intrusted with the administration of justice.—*State v. Henning*, 33 Ind. 189.

[c] (Sup. 1874)

Prosecuting attorneys are not state, county, or township officers.—*State ex rel. Pitman v. Tucker*, 46 Ind. 355.

[d] (Sup. 1878)

The duties of prosecuting attorneys of the circuit courts are prescribed by statute, and not by the state constitution, and such duties may be increased or diminished by the legislature, or they may be divided with the prosecuting attorneys of other courts.—*State ex rel. Hench v. Morrison*, 64 Ind. 141.

[e] (Sup. 1907)

A prosecuting attorney is a state, and not a county officer.—*Board of Com'rs of Elkhart County v. Albright*, 168 Ind. 564, 81 N. E. 578; *Mumaw v. Turner*, 169 Ind. 701, 81 N. E. 721.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. & Pros. Attys. § 1.  
See, also, 32 Cyc. p. 689.

### § 2. Appointment or election, and qualification and tenure.

Local and special laws, see STATUTES, § 101.  
Review by courts of abolition of office of city attorney, see CONSTITUTIONAL LAW, § 70.  
Usurpation of office, see OFFICERS, § 88.

[a] (Sup. 1853)

A prosecuting attorney elected under the act of 1849 holds his office during his full term, notwithstanding the election of another under the act of 1851, before the expiration thereof.—*Barkwell v. State ex rel. Robinson*, 4 Ind. 179.

[b] (Sup. 1878)

Acts 1865, p. 153, creating the Sixteenth judicial circuit, not having fixed the term of office of the prosecuting attorney, the same, under Const. art. 15, § 2, continues four years.—*Cropsey v. Henderson*, 63 Ind. 208.

[c] (Sup. 1878)

Act March 6, 1873 (1 Rev. St. 1876, p. 380), divided the state into judicial circuits. Prosecuting attorneys hold office for two years by provision of the constitution, and one elected in 1872 could not be removed by this act, but became attorney for the new circuit in which he resided. The act provided that an election should be held in October 1873, to elect prosecuting attorneys to offices held under appointment from the governor. *Held*, that

this provision was intended to apply to circuits in which, by reason of the new division, there was no resident prosecuting attorney, and that an appointee of the governor, after the act went into effect to fill a vacancy caused by the resignation of the resident attorney, was entitled to hold office until the expiration of the term in 1874. An election of the appointee to succeed himself in 1873 was therefore illegal, and his re-election in 1874 took effect from that date, and not from the expiration of the term under the illegal election of 1873.—*Moser v. Long*, 64 Ind. 180.

A mistake or error in the commission of a prosecuting attorney does not change the beginning or end of his official term.—*Id.*

The office of prosecuting attorney is provided for by the constitution, and the term thereof is fixed at two years, and the legislature cannot, therefore, abolish the office nor abridge the term thereof.—*Id.*

[d] (Sup. 1880)

The term of office of the prosecuting attorney of the Allen criminal circuit court was and is for two years, and no longer, under Act March 11, 1867, § 3, providing that such attorney should hold his office "in the manner required by law," and intended to apply to such office the term of two years prescribed by the constitution for the prosecuting attorney of the circuit court, and such term cannot be extended by the governor's commission for a longer period.—*Hench v. State ex rel. O'Rourke*, 72 Ind. 297.

[e] (Sup. 1881)

In 1878, relator was elected prosecuting attorney of the Thirty-Fifth judicial circuit for two years commencing October 28, 1879. Act March 21, 1879, provided that thereafter two counties formerly in the Thirty-Fifth circuit should constitute the Fortieth judicial circuit until October 1, 1880, when they should again become part of the Thirty-Fifth circuit, and that the prosecutor elect of the Thirty-Fifth circuit should be prosecutor of the Fortieth on and after his term commenced. Relator was appointed prosecutor of the Fortieth circuit under the act, and served till October 28, 1879, when he qualified under his election and continued to serve and designate himself as prosecutor of the Fortieth circuit till October 1, 1880, and after that date so styled and signed himself. In October, 1880, defendant was elected prosecutor of the Thirty-Fifth circuit, and thereafter qualified. *Held*, that relator, on qualifying under his election, became prosecutor of the Fortieth circuit so long as it lasted, and thereafter of the Thirty-Fifth circuit until October 28, 1881, when defendant's term would commence.—*State ex rel. Adams v. Peterson*, 74 Ind. 174.

Prior to March 21, 1879, the Thirty-Fifth judicial circuit was composed of the counties of N., D., and S. At the general election of 1878, relator was elected and commissioned as

prosecuting attorney of the Thirty-Fifth circuit to hold office from October 28, 1879, to October 28, 1881. Act March 21, 1879, declared the counties of D. and S. to constitute the Fortieth circuit, provided that such circuit should continue until October 1, 1880, when the counties composing the same should again become a part of the Thirty-Fifth circuit, and authorized the Governor to appoint a judge and prosecuting attorney. It further provided, in effect, that relator should be prosecuting attorney of the Fortieth circuit. The Governor immediately appointed relator as prosecuting attorney for the Fortieth circuit and he held office by appointment until October 28, 1879, when he entered upon his regular term of office. A prosecuting attorney of the Thirty-Fifth circuit was also appointed, and at the general election of 1880 defendant was elected prosecuting attorney of the Thirty-Fifth circuit. On the cessation of the existence of the Fortieth circuit on October 1, 1880, relator still continued to sign himself as prosecuting attorney of the Fortieth circuit as he had done while that circuit was in existence. *Held*, that he did not thereby abandon his right to the office of prosecuting attorney of the Thirty-Fifth circuit to which he had been elected.—*Id.*

[f] (Sup. 1881)

By Acts 1881, p. 111, §§ 7, 8, the "Marion criminal circuit court" became the "criminal court of Marion county," but the effect of the act was not to remove one who, at the time it took effect, was the prosecuting attorney of the former-named court. Such attorney will hold the office, under the constitution of the state, until his successor shall have been elected and qualified, and such "successor" will be the prosecuting attorney of the "Nineteenth judicial circuit," elected and qualified after said act took effect, and not the prosecuting attorney then in office who had been elected and qualified previously.—*Elam v. State*, 75 Ind. 518.

Under Act April 12, 1881, concerning criminal courts, and providing for the establishment of such courts in the county of Marion and other counties, and declaring that the criminal circuit courts of the several counties named shall become criminal courts and the judges and prosecuting attorneys thereof shall be the judges and prosecuting attorneys of the newly created courts, and further providing that the criminal court in Vigo county shall cease to exist after the third Monday in November, 1882, the term of office of the prosecuting attorney of the Marion circuit criminal court expires whenever, after the taking effect of the act, his successor is elected and qualified, but a person elected as such prosecuting attorney before the passage of the act is not entitled to the office.—*Id.*

[g] (Sup. 1885)

Though the legislature has power to divide a judicial circuit during the term of the prose-

cuting attorney of the circuit, it cannot legislate the attorney out of a circuit altogether, and to that extent Acts 1885, p. 20, is unconstitutional.—*State ex rel. Howard v. Johnston*, 101 Ind. 223.

Under Const. 1851, art. 7, §§ 9, 11 (Rev. St. 1881, §§ 169, 171), providing that the state shall be divided into judicial circuits, and that there be elected in each judicial circuit a prosecuting attorney, the prosecuting attorney must reside within the circuit for which he is elected.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. & Pros. Attys. §§ 2-9.

See, also, 32 Cyc. pp. 690-695.

### § 3. Deputies, assistants, and substitutes.

Disqualification of deputy as juror, see JURY, § 92.

Power of town trustees to employ assistant counsel, see MUNICIPAL CORPORATIONS, § 214.

[a] (Sup. 1859)

Persons acting as assistants to the prosecuting attorney, though they had not been appointed in writing and had not taken the oath as deputy prosecutors, are, it seems, officers de facto, and their acts are valid in the absence of a showing of fraud.—*Sbattuck v. State*, 11 Ind. 473.

[b] (Sup. 1882)

When, upon failure of the prosecuting attorney to attend, the court appoints some person to prosecute, the appointee may perform any duty in the office.—*Choen v. State*, 85 Ind. 209.

[c] (Sup. 1884)

The circuit court has authority to appoint attorneys to assist the prosecuting attorney, and to allow compensation payable out of the county treasury.—*Tull v. State ex rel. Glessner*, 99 Ind. 238.

[d] (Sup. 1902)

Under Acts 1890, p. 352, § 27, providing that no court, or division thereof, of any county, shall have power to bind the county by contract, agreement, or in any other way, except by judgment rendered in a cause where such court has jurisdiction, to any extent, beyond the amount of money at the time already appropriated for the purpose for which the obligation is attempted to be incurred, and all obligations attempted beyond such existing appropriations shall be absolutely void, an attorney appointed by the circuit court to assist the prosecuting attorney in the prosecution of a murder case therein cannot recover from the county for his services, where at the time he was appointed and rendered the services there was no existing appropriation for the purpose



of paying therefor.—*Turner v. Board of Com'rs of Elkhart County*, 63 N. E. 210, 158 Ind. 166.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Dist. & Pros. Attys. §§ 10-17.

See, also, 32 Cyc. pp. 718-727.

**§ 4. Compensation and fees.**

Docket fees of city attorney in prosecutions for violation of ordinances, see MUNICIPAL CORPORATIONS, § 644.

Local or special laws, see STATUTES, § 102.

Pleading claim for fees as set-off or counter-claim, see PLEADING, § 144.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Dist. & Pros. Attys. §§ 18-33.

See, also, 32 Cyc. pp. 695-709.

**§ 5. — In general.**

[a] (Sup. 1832)

A prosecuting attorney is entitled to a fee of \$2.50, where, previous to judgment on scire facias, the principal was surrendered in discharge of his bail, and judgment was rendered against the surety for the costs.—*State v. Armstrong*, 3 Blackf. 42.

[b] Under Rev. Code 1831, p. 252, giving the prosecuting attorney a fee for every conviction, he is entitled to several fees where several persons are jointly indicted for the same offense and jointly tried.—(Sup. 1838) *State v. Cripe*, 5 Blackf. 6; (1872) *Same v. Kinneman*, 39 Ind. 36.

[c] (Sup. 1853)

Act Feb. 14, 1851, p. 141, § 1, repeals Act Jan. 27, 1847, p. 54, § 6, giving the prosecuting attorney a fee of \$4 on plea of guilty on an indictment for gaming, and revives the law as it stood before that act, which, by Rev. St. 1838, p. 293, gives a fee of \$2.50.—*State v. Shuffelbarger*, 4 Ind. 532.

[d] (Sup. 1855)

The prosecuting attorney is entitled to but one fee where several persons are jointly indicted for the same offense, and jointly tried.—*Bunday v. State*, 6 Ind. 398.

[e] (Sup. 1858)

Docket fees of a prosecuting attorney are payable out of the state treasury.—*Jewett v. Talbott*, 11 Ind. 298.

[f] (Sup. 1860)

St. 1859, giving salaries to prosecuting attorneys, does not affect district attorneys.—*Dodd v. Sweetser*, 14 Ind. 292.

[g] (Sup. 1861)

A county is not chargeable with the district or circuit attorney's docket fees, accruing in the prosecution of cases in which the defend-

ants are acquitted.—*Nourse v. Board of Com'rs of Warren County*, 17 Ind. 355.

[h] (Sup. 1870)

A prosecuting attorney cannot recover from the county for the services rendered by him, in his official capacity, at the request of the county commissioners in prosecuting a suit against a defaulting officer; the services being within his official duty, and his compensation therefor being limited to his salary.—*Board of Com'rs of Jay County v. Templar*, 34 Ind. 322.

[i] (Sup. 1878)

The salary of the prosecuting attorney of the Marion criminal court created by Act Dec. 20, 1865 (Acts 1865, p. 153), is to be paid out of the county treasury.—*Cropsey v. Henderson*, 63 Ind. 268.

[j] (Sup. 1878)

A criminal prosecuting attorney has the exclusive right to prosecute the criminal cases in all the courts in his county having jurisdiction thereof, and, in counties where there is a criminal court and prosecuting attorney, such prosecuting attorney is entitled to prosecute before justices of the peace, and receive the incidental docket fee; and, in counties where there is no criminal court and prosecuting attorney, the constitutional prosecuting attorney of the constitutional circuit court may thus prosecute and receive the fees.—*State ex rel. Hensch v. Morrison*, 64 Ind. 141.

[k] (Sup. 1879)

No fee can be taxed in favor of the prosecuting attorney in a criminal case, wherein he does not appear either in person or by deputy.—*State ex rel. Orr v. Jackson*, 68 Ind. 58.

Act March 12, 1875 (§ 1, Rev. St. 1876, p. 467), fixing the fees of prosecuting attorneys among other officers, provides that the officers named in the act shall be entitled to receive "for the services herein provided for" the fees set forth, and none other. Section 35 declares that, if any of the officers named in the act shall make any charge for services not by him performed, any such officer shall be deemed guilty of a misdemeanor, and, upon conviction thereof, fined, etc. *Held*, that it is not the duty of a justice of the peace to tax a docket fee for a prosecuting attorney as part of the costs against the defendant in any criminal case where there is a judgment rendered for fine and costs, unless such prosecuting attorney, in person or by his deputy, has appeared and prosecuted the case on behalf of the state before such justice.—*Id.*

[l] (Sup. 1881)

On the forfeiture of money deposited as bail in a criminal case, the prosecuting attorney is entitled to the same docket fee to which he is entitled on a forfeited recognizance; but he is not entitled to a percentage on the money forfeited until after he has prosecuted a suit for the recovery of the forfeited money to final judgment.—*State v. Barron*, 74 Ind. 374.

[m] (Sup. 1881)

Under 1 Rev. St. 1876, p. 475, a prosecuting attorney is entitled to a percentage on money deposited as bail and forfeited, unless he has prosecuted a suit therefor to final judgment. The percentage is to be taken on the amount collected.—Ex parte Ford, 74 Ind. 415.

[n] (Sup. 1888)

Where the prosecuting attorney obtains a docket fee of \$5 in his favor on conviction of each defendant before a justice, and the case is appealed to the circuit court, where a further fee of \$7 is allowed on pleas of not guilty, under the statute, the appeal to the circuit court does not vacate the justice's judgment so as to deprive such attorney of the fees and costs as taxed by and before such justice.—Ard v. State, 114 Ind. 542, 16 N. E. 504.

[o] (Sup. 1890)

A prosecuting attorney who obtains judgment on the relation of a county auditor upon the official bond of a defaulting county treasurer has no lien on such judgment for his fee.—Wood v. State ex rel. Canady, 125 Ind. 219, 25 N. E. 190.

[p] (Sup. 1890)

Rev. St. 1881, § 6506, provides that the prosecuting attorney shall receive as compensation a percentage "upon all sums collected after judgment" in a suit against a defaulting county treasurer. *Held*, that he was only entitled to his percentage on such portion of the amount collected as inures to the benefit of the county itself, and not to the school and road funds.—Wood v. Board of Com'rs of Madison County, 125 Ind. 270, 25 N. E. 188; Board of Com'rs of Madison County v. Wood, 126 Ind. 168, 25 N. E. 190.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. & Pros. Attys. §§ 18-25.

See, also, 32 Cyc. pp. 695-707.

### § 7. Representation of state or county in general.

Appearance in divorce suits, see DIVORCE, § 74.

[a] (Sup. 1875)

The prosecuting attorney is the proper person to represent the state in proceedings to set aside the forfeiture of a recognizance for the appearance of a defendant to answer to an indictment.—State v. Shideler, 51 Ind. 64.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. & Pros. Attys. § 34.

See, also, 32 Cyc. pp. 710-713.

### § 8. Powers and proceedings in general.

Powers of attorney employed to bring action for city, see MUNICIPAL CORPORATIONS, § 219.

[a] (Sup. 1843)

A prosecuting attorney has no authority to remit any portion of the sentence of a person convicted of an offense.—State v. Brewer, 7 Blackf. 45.

[b] (Sup. 1876)

It is the duty of the prosecuting attorney to prosecute suits against administrators for malfeasance in office.—Führer v. State ex rel. Attorney General, 55 Ind. 150.

[c] (Sup. 1879)

In counties where no criminal court has been established, the prosecuting attorney may appear in all criminal cases before justices of the peace, for and on behalf of the state.—State ex rel. Orr v. Jackson, 68 Ind. 58.

[d] (Sup. 1908)

It is the duty of prosecuting attorneys to assist the court in the preparation of instructions in cases on trial.—State v. Fisk, 170 Ind. 166, 83 N. E. 995.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. & Pros. Attys. §§ 34, 35.

See, also, 32 Cyc. p. 710.

### § 9. Prosecution or defense of civil actions.

Necessary parties to quo warranto proceedings, see QUO WARRANTO, § 30.

Prosecution of proceedings to enforce forfeiture of corporate franchise and dissolution of corporation, see CORPORATIONS, § 613.

[a] (Sup. 1883)

Where the attorney general has brought an action on a forfeited recognizance, after the prosecuting attorney has neglected to do so for a year, the latter cannot antagonize the action in any way; and an appearance by him after leaving office to a motion to set aside the forfeiture is a nullity.—State v. Schloss, 92 Ind. 293.

[b] (Sup. 1907)

The prosecuting attorney may maintain quo warranto proceedings to oust an ineligible officer.—State ex rel. Clawson v. Bell, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. (N. S.) 1013, 124 Am. St. Rep. 203.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. & Pros. Attys. §§ 36, 37.

See, also, 32 Cyc. pp. 715-717.

### § 10. Liabilities for official acts, negligence, or misconduct.

Liability to action for malicious prosecution, see MALICIOUS PROSECUTION, § 42.

[a] (Sup. 1890)

The sureties on the official bond of a prosecuting attorney, conditioned that he will hon-

estly discharge the duties of his office, are not responsible for his neglect to take default and judgment of forfeiture on a recognizance where the defendant fails to appear, in the absence of any express statutory direction that he should take such default.—*State ex rel. Michener v. Egbert*, 123 Ind. 448, 24 N. E. 256.

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. Dist. & Pros. Attys. § 38.  
See, also, 32 Cyc. pp. 717-718.

## DISTRICT COURTS.

See COURTS, §§ 418-424.

# DISTRICT OF COLUMBIA.

## Scope-Note.

[INCLUDES the district ceded to the United States as the seat of government; the cessions and their effect in general; status of the District as a body politic and corporate; establishment and control of the capitol and other public buildings and public reservations; power of the national government over the District; local laws and laws of the United States applicable thereto; establishment and organization of the local government, appointment of officers thereof, and rights, powers, proceedings, and liabilities of such government, its officers and agents; public improvements and assessments therefor; property, contracts, indebtedness, bonds, and other securities of the District; taxation by the District and its revenue; and actions by or against the District.

[EXCLUDES citizens in the District and their rights in general (see *Citizens; Constitutional Law; Civil Rights*); and courts of the District (see *Courts*; and particular subjects of jurisdiction), and judges and other officers thereof (see *Judges; Clerks of Courts*; and other specific heads).

### § 3. Legislative power of Congress.

[a] (Sup. 1878)

Congress cannot, under the constitution, create a private corporation, but, in its capacity as the local legislature of the District of Columbia, it may create such a corporation within and for said District.—*Daly v. National*

Life Ins. Co. of United States of America, 64 Ind. 1.

### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dist. of Col. § 3.  
See, also, 14 Cyc. pp. 528, 529.

## DISTRICTS.

See—

County commissioners' districts, change as affecting term of commissioner. COUNTIES, § 43.

Drainage or reclamation districts. DRAINS, §§ 2, 12-20.

Election districts. ELECTIONS, § 48.

Highway districts. HIGHWAYS, § 90.

Judicial districts in which suits in federal courts must be brought. COURTS, §§ 267-272.

Legislative districts. STATES, § 27.

School districts. SCHOOLS AND SCHOOL DISTRICTS, §§ 9-177.

Taxing and assessment districts—  
MUNICIPAL CORPORATIONS, § 450.  
TAXATION, §§ 29, 252-286.

## DISTRINGAS.

Against corporation, see CORPORATIONS, § 507.

## DISTURBANCE.

See—

BREACH OF THE PEACE.

EASEMENTS, §§ 56-58.

Ferry franchise. FERRIES, § 19.

Possession of demised premises. LANDLORD AND TENANT, §§ 131-133.

Affecting liability for rent. LANDLORD AND TENANT, § 186.

Constituting eviction of tenant. LANDLORD AND TENANT, § 172.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

# DISTURBANCE OF PUBLIC ASSEMBLAGE.

## Scope-Note.

[INCLUDES acts or conduct interfering with the peace or order of a lawful assemblage of persons for religious or other purposes; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts or conduct as public offenses.

[EXCLUDES breach of public peace (see *Breach of the Peace*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature and elements of offenses.
- § 5. Indictment or information.
- § 6. — Requisites and sufficiency.
- § 7. — Issues, proof, and variance.
- § 8. Evidence.
- § 10. — Admissibility.
- § 11. — Weight and sufficiency.
- § 12. Trial.
- § 14. — Questions for jury.
- § 17. Prevention or suppression of disturbance, and expulsion of offenders.

## Cross-References.

See—

BREACH OF THE PEACE.

Jurisdiction of justice. CRIMINAL LAW, § 90.

### § 1. Nature and elements of offenses.

[a] (Sup. 1882)

A conviction cannot be had under the section of the statute prohibiting the disturbing of a religious meeting, for want of a statutory definition of what such disturbance is.—*Marvin v. State*, 19 Ind. 181.

[b] (Sup. 1867)

Under Act March 3, 1859, providing that any person who shall molest or disturb any public meeting held for a lawful purpose shall be fined, etc., the offense intended to be prohibited by the statute is sufficiently defined.—*State v. Oskins*, 28 Ind. 364.

[c] (Sup. 1870)

Under Acts Sp. Sess. 1865, p. 201, prohibiting the sale of articles enumerated, or "other articles," within one mile of a religious assemblage, without permission, the sale, under the conditions prohibited, of any articles, though not among those enumerated, is an offense.—*State v. Solomon*, 33 Ind. 450.

[d] (Sup. 1879)

The protection of a religious meeting from disturbance does not cease with the benediction of the minister, but continues until an actual dispersion takes place.—*State v. Lusk*, 68 Ind. 264.

[e] (Sup. 1889)

Defendant entered a meeting of the Salvation Army with a cigar in his mouth, and refused to remove his hat, as requested. *Held*, that he was guilty of violating Rev. St. 1881, § 1968, forbidding the disturbance of public worship.—*Hull v. State*, 120 Ind. 153, 22 N. E. 117.

A Salvation Army, though its method of worship be uncommon, is within the protection of the statute relative to disturbing persons assembled for the purpose of religious worship.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. §§ 1-5.

See, also, 14 Cyc. pp. 540-543.

### § 5. Indictment or information.

Duplicity, see INDICTMENT AND INFORMATION, § 125.

Election between counts, see INDICTMENT AND INFORMATION, § 132.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. §§ 7-12.

See, also, 14 Cyc. pp. 545-549.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

### § 6. — Requisites and sufficiency.

[a] (Sup. 1841)

An indictment for disturbing a religious society need not state the name of the society.—*State v. Ringer*, 6 Blackf. 109.

[b] (Sup. 1867)

An information against the defendants for molesting a meeting of the inhabitants of the state met together for the purpose of holding a singing school charged that the disturbance was occasioned by the defendants' forcing their way into the house in which the school was held, against the rules, and making a great noise, by talking loudly and boisterously. *Held*, that the information was sufficient, under Act March 3, 1859 (2 Gav. & H. St. p. 469), providing a penalty for molesting or disturbing public meetings.—*State v. Oskins*, 28 Ind. 364.

[c] (Sup. 1876)

In a prosecution under Act Nov. 30, 1865 (Davis' Rev. St. Supp. 1870, p. 257), for molesting or disturbing a meeting other than those for the purposes specifically named in said act, the affidavit, information, or indictment should aver that it was a meeting for a lawful purpose; and an affidavit which described the meeting as "a certain collection of divers inhabitants of the state of Indiana, met together as a singing school," was bad, on motion to quash.—*State v. Zimmerman*, 53 Ind. 360.

[d] (Sup. 1877)

An indictment under Act March 3, 1859, "for the better protection of religious meetings, agricultural fairs, and other lawful assemblages," which charges that defendant at a certain time and place unlawfully interrupted, molested, and disturbed a lawful assemblage of persons met together to transact certain matters pertaining to the business of a certain church, "by talking in a loud and boisterous manner, and charging said meeting with being a mob," etc., is sufficient.—*Kidder v. State*, 58 Ind. 68.

[e] (Sup. 1882)

Under Rev. St. § 1988, punishing the disturbing of "any collection of any inhabitants of this state convened for the purpose of worship, or any agricultural fair or exhibition, \* \* \* or any meeting of inhabitants of this state met together for any lawful purpose," an indictment charging the disturbance of "a meeting of inhabitants of S. county, and state of Indiana, met together for a lawful purpose," is sufficient.—*Howard v. State*, 87 Ind. 68.

[f] (App. 1897)

An information under Rev. St. 1894, § 2074 (Horner's Rev. St. 1897, § 1968), for disturbing "a meeting of inhabitants of this state, met together for a lawful purpose," need not state what the particular purpose was.—*Blake v. State*, 47 N. E. 942, 18 Ind. App. 280.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. §§ 7-11.

See, also, 14 Cyc. pp. 545-549.

### § 7. — Issues, proof, and variance.

[a] (Sup. 1879)

Under an indictment based on 2 Rev. St. 1876, p. 472, § 1, for molesting or disturbing a "certain collection of divers inhabitants of the state of Indiana, then and there met together for religious worship," the state is not limited to proof that defendant disturbed the collection of inhabitants referred to in the indictment while engaged in religious worship, but is entitled to show anything that such defendant did tending to make a disturbance at any time while the congregation remained assembled together, after having met for religious worship.—*State v. Lusk*, 68 Ind. 264.

[b] (Sup. 1881)

Under 2 Rev. St. 1876, p. 472, which refers to a "collection of any inhabitants of this state," the allegation in the affidavit in a prosecution for disturbing a religious meeting that such meeting was a collection of inhabitants of the state was material, and must be proved.—*Cooper v. State*, 75 Ind. 62.

[c] (Sup. 1889)

An allegation in an information for disturbing public worship that by such conduct certain persons named were disturbed is surplusage, and it is not necessary to prove it as laid.—*Hull v. State*, 120 Ind. 153, 22 N. E. 117.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. § 12.  
See, also, 14 Cyc. p. 549.

### § 8. Evidence.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. §§ 13, 14.  
See, also, 14 Cyc. p. 550.

### § 10. — Admissibility.

Res gestæ, see CRIMINAL LAW, § 364.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. § 13.

### § 11. — Weight and sufficiency.

[a] (Sup. 1882)

One cannot be convicted of the offense of disturbing a singing school upon evidence that he was one of a crowd, lawfully assembled, from which the disturbance proceeded; there being no other evidence to connect him with the disturbance.—*Miller v. State*, 83 Ind. 334.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. § 14.

### § 12. Trial.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Distur. of Pub. A. §§ 15-18.

See, also, 14 Cyc. p. 551.

**§ 14. — Questions for jury.**

[a] (Sup. 1880)

It is a question for the jury whether, immediately after the benediction, and before the members have dispersed, the society is "met together for religious worship," within the meaning of the statute against disturbers of meetings.—*State v. Snyder*, 14 Ind. 429.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Disturb. of Pub. A. § 16.  
See, also, 14 Cyc. p. 551.

**§ 17. Prevention or suppression of disturbance, and expulsion of offenders.**

[a] (Sup. 1856)

A religious society may use the necessary force to remove one who is disturbing the society by a willful violation of the rule of the church that males and females should sit apart.—*McLain v. Matlock*, 7 Ind. 525, 65 Am. Dec. 746.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Disturb. of Pub. A. § 19.

**DITCHES.**

See—

Ditching associations. ASSOCIATIONS, § 16.  
DRAINS.

WATERS AND WATER COURSES, §§ 161–179.

**DIVERSE CITIZENSHIP.**

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REMOVAL OF CAUSES, §§ 27–61.

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Property on assignment of dower. DOWER, §§  
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Rents and profits on assignment of dower.  
DOWER, § 93.

**DIVISION FENCES.**

See FENCES.

**DIVISION LINES.**

See BOUNDARIES, § 8.

# DIVORCE.

## *Scope-Note.*

[INCLUDES dissolution of the relation of marriage, total or partial, by legislative or judicial action, and judicial separation of husband and wife; nature and scope of the remedy in general; grounds of actions for divorce or separation and defenses thereto; jurisdiction to grant divorces or separations, and proceedings therefor; incidental relief as to alimony, disposition of property, custody and support of children, etc.; judgments or decrees and operation and effect thereof; review of proceedings; costs in actions for divorce or separation; and status, rights, and liabilities of divorced persons.

[EXCLUDES actions to annul marriage (see *Marriage*); separations by agreement, and actions for separate maintenance without divorce (see *Husband and Wife*); and effect of divorce on rights of dower (see *Dower*), curtesy (see *Curtesy*), or homestead (see *Homestead*). For complete list of matters excluded, see cross-references, post.]

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## I. NATURE AND FORM OF REMEDY.

### § 2. What law governs.

[a] (Sup. 1831)

In a suit for a divorce, the *lex domicilii* is to govern the courts in their decision.—*Tolen v. Tolen*, 2 Blackf. 407, 21 Am. Dec. 742.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 3.

See, also, 14 Cyc. p. 581; note, 59 L. R. A. 135.

### § 4. Constitutional and statutory provisions.

[a] (Sup. 1865)

The proceeding for divorce is so far special as to allow all the provisions of the divorce act to have their full force, unaffected by the Code.—*Ewing v. Ewing*, 24 Ind. 468; *Id.*, 25 Ind. 155.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 5.

See, also, 14 Cyc. p. 578.

### § 5. Legislative divorces.

[a] (Sup. 1857)

The Legislature could, under the old Constitution, grant divorces by direct enactment, and may under the new Constitution, by general enactment, provide regulations by which the courts may decree them, independent of the rules governing the rescission of contracts, and without regard to inchoate rights.—*Noel v. Ewing*, 9 Ind. 37.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 14-21.

See, also, 14 Cyc. pp. 574-576; note, 18 L. R. A. 95; note, 48 Am. Dec. 437.

### § 6½. Mode and forms of procedure in general.

[a] (Sup. 1885)

Divorce cases having been of equitable cognizance before the adoption of the Constitu-

tion are not included in the term "civil cases" as used in the Bill of Rights; but under Rev. St. 1881, § 249, they are civil actions in such a sense at least that the rules of pleading and practice will apply to them, except that a different procedure may be provided in the divorce act, and to the extent that it may be apparent that the Legislature intended otherwise.—*Powell v. Powell*, 3 N. E. 639, 104 Ind. 18.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 2, 8.

See, also, 14 Cyc. pp. 579, 580.

### § 8. Joinder of causes and proceedings.

[a] (Sup. 1864)

In a petition for divorce, it was not a misjoinder to ask that the husband be compelled to execute a deed of certain lands to plaintiff in accordance with an agreement for separation entered into between them.—*Fritz v. Fritz*, 23 Ind. 388.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 10; 1 CENT.

DIG. Action, § 45.

See, also, 14 Cyc. p. 662.

### § 11. Interest of state or public.

[a] (Sup. 1855)

In a libel for divorce, a decree for the plaintiff, without appearance on the part of the defendant or the prosecuting attorney, could not be reversed, on account of the absence of the prosecuting attorney.—*Green v. Green*, 7 Ind. 113.

[b] (App. 1909)

The courts will consider the interest of the public, as well as that of the parties, in granting divorces.—*Bacon v. Bacon*, 43 Ind. App. 218, 86 N. E. 1030.

[c] (App. 1909)

The state is a third party to all suits for divorce.—*Yeager v. Yeager*, 43 Ind. App. 313, 87 N. E. 144.

When at the trial it appears that the action is collusive or barred, it is the court's duty, regardless of the pleadings, to inquire of its own motion, as the state's representative, into such facts or circumstances, and to act in accordance with the facts developed.—Id.

The power of the court to fully investigate the facts in divorce cases does not depend on Acts 1901, p. 336, c. 151, imposing duties on the prosecuting attorney, and the court may accept the services of any officer or member of its bar; and, in refusing to strike out the answer of former adjudication filed by the prosecuting attorney, as well as in entering his appearance in a pending cause, it only indicated to the parties the general course the investigation would take on the evidence, even though formal intervention by the prosecuting attorney was unallowable.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 13.  
See, also, 14 Cyc. p. 578.

## II. GROUNDS.

Pleading grounds, see post, § 93.

### § 12. Causes for divorce in general.

[a] (Sup. 1894)

No divorce can be granted except in the manner provided by law, and there must be an injured party and a guilty party.—Alexander v. Alexander, 38 N. E. 855, 140 Ind. 555.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 22, 51.

### § 13. Statutory provisions.

As delegation of legislative power to judiciary, see CONSTITUTIONAL LAW, § 61.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 23-26.  
See, also, 14 Cyc. pp. 593, 594; note, 65 Am. Dec. 708.

### § 18½. Illegality of marriage.

[a] (Sup. 1859)

Under Rev. Code 1831, p. 213, enumerating a prior and subsisting marriage as one of the causes for divorce, the mere lapse of many years since the first marriage or since the wife's abandonment by the first husband is no defense.—James v. Janes, 5 Blackf. 141.

[b] (Sup. 1871)

Where a man marries a woman whom he knows to be the wife of another, the courts will not relieve him from the consequences of his act by granting him a divorce.—Tefft v. Tefft, 35 Ind. 44.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 39.

### § 19. Personal infirmities and conditions arising after marriage.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 40-51.  
See, also, 14 Cyc. pp. 598, 622, 623; note, 39 L. R. A. 264.

### § 23. — Insanity or other mental incompetency.

[a] (Super. 1872)

Authority is not conferred, by the statute, upon the courts of Indiana, to decree a divorce to a party on the sole ground that the defendant has become hopelessly insane, at least when such insanity has not been superinduced by a vicious or reckless course of conduct on the part of the defendant.—Curry v. Curry, Wils. 236.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 46.  
See, also, 14 Cyc. p. 623; note, 34 L. R. A. 161.

### § 24. — Conviction and imprisonment for crime.

Pleading, see post, § 98.

[a] (App. 1901)

Burns' Rev. St. 1894, § 1044, subd. 7, specifies as a ground of divorce the conviction, subsequent to marriage, of an infamous crime. Section 1642 denominates crime punishable by imprisonment in state's prison a felony. Held, that a conviction of manslaughter, being a conviction of a felony, was a ground for divorce, notwithstanding Rev. St. 1843, c. 54, § 79, repealed by Rev. St. 1852, c. 92, § 1, in defining infamous crimes, mentions murder, but omits manslaughter.—Sutherland v. Sutherland, 61 N. E. 206, 27 Ind. App. 301.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 47-50.  
See, also, 14 Cyc. p. 598; note, 31 L. R. A. 515.

### § 27. Cruelty.

Pleading, see post, § 93.

Proof, see post, § 116.

[a] (Sup. 1867)

A husband separated from his wife on the alleged ground of religious scruples, she having been divorced from one still living, and afterwards entreated her to live with him again. Held, on appeal, that the facts did not justify a divorce, on her application on the ground of "cruel treatment."—Ruby v. Ruby, 29 Ind. 174.

[b] (Sup. 1877)

A groundless prosecution of the husband, by the wife, for an alleged crime, resulting in his trial and acquittal, is not "cruel and inhuman treatment," within the meaning of the statute, entitling him to a divorce.—Small v. Small, 57 Ind. 568.

## [c] (Sup. 1881)

On trial of a wife's petition for divorce, evidence that the husband falsely charged her with adultery, and published the charge to her neighbors, is sufficient to warrant a finding of cruel and inhuman treatment.—*Graft v. Graft*, 76 Ind. 136.

## [d] (Sup. 1881)

Allegations that defendant, within three years after his marriage to plaintiff, abandoned her and her infant child, and absconded from the state, without any explanation or excuse, leaving her dependent on her own labor, and the charity of friends, shows "cruel and inhuman treatment" sufficient to justify a divorce, within the meaning of Rev. St. 1881, § 1032.—*Eastes v. Eastes*, 79 Ind. 363.

## [e] (Sup. 1888)

A complaint by the wife alleged that, for 12 years, defendant had treated her in a cruel and inhuman manner; that he had struck, kicked, and choked her, neglected to secure for her medical attention during illness, or to give her any attention himself. *Held*, that the specific acts charged constituted cruel and inhuman treatment, and the complaint was sufficient.—*Mercer v. Mercer*, 114 Ind. 558, 17 N. E. 182.

## [f] (App. 1901)

Under Burns' Rev. St. 1894, § 1044, providing that a divorce may be decreed for cruel and inhuman treatment of either party by the other, a divorce may be granted to a husband for such treatment of him by his wife, though the facts should present a strong case to authorize a court to grant a separation on the application of the husband.—*Spitzmesser v. Spitzmesser*, 60 N. E. 315, 26 Ind. App. 532.

## [g] (App. 1907)

To constitute cruel and inhuman treatment as ground for divorce, it is not necessary that there be physical violence, and whether the alleged conduct is cruel and inhuman should be determined from a consideration of the character of the parties and of their physical, social, intellectual, and moral natures.—*Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

## [h] (App. 1907)

An allegation that a wife has hindered her husband from making large sums of money by refusing to join with him in the conveyance of real estate owned by him does not show cruel treatment within the meaning of the divorce law.—*Hofman v. Hofman*, 40 Ind. App. 476, 82 N. E. 477.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 62-83.

See, also, 14 Cyc. pp. 508-611; note, 2 L. R. A. (N. S.) 669; notes, 29 Am. Dec. 674, 73 Am. Dec. 619; notes, 40 Am. Rep. 463, 51 Am. Rep. 736; note, 65 Am. St. Rep. 69.

## § 31. Failure to support.

## [a] (App. 1901)

Under the statute making the failure of a husband to make reasonable provision for his family for a period of two years a ground of divorce, a wife is not entitled to a divorce if it appears that she deserted her husband, or that they separated and remained apart by mutual consent, and that during the two years the husband was not requested, and did not refuse, to contribute to the support of the absent members of his family.—*Barnett v. Barnett*, 61 N. E. 737, 27 Ind. App. 466.

Plaintiff in an action for divorce testified that, as she was starting for a visit to her sister, her husband told her that, if she went, she had better take her things home, or he would throw them out in the road. He did not do so, however, and about a week later she returned. She also testified that the following morning he asked her if she was going home, and said that she had better go or he would throw her things out, and the sooner she went the better, to which she replied that she could go. After he had left the house she removed her things to the home of her parents in the same town, where she remained; neither of the parties nor her parents making any efforts towards a reconciliation. No request was thereafter made upon the husband to furnish support to her or her child, nor did he refuse to do so. *Held*, that from her own testimony it did not appear that she was compelled to leave against her will, but rather that the separation was by her consent, and without sufficient justification to entitle her to a divorce on the ground of failure to support.—*Id.*

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Divorce, §§ 95, 96.

See, also, 14 Cyc. pp. 624, 625.

## § 37. Desertion or absence.

Abandonment of wife as barring curtesy, see CURTESY, § 11.

Abandonment of wife, liability for necessities, see HUSBAND AND WIFE, § 19.

Pleading, see post, § 93.

Proof, see post, §§ 119, 133.

## [a] (Sup. 1882)

The statute requiring that a divorce be granted in all cases where the husband fails to provide for the wife is not applicable where the inability to make provision arises from the mental or physical disease of the husband.—*Baker v. Baker*, 82 Ind. 146.

## [b] (App. 1901)

To justify a wife in leaving the domicile of her husband with the purpose of remaining away and dissolving the marriage relation, so that he will be chargeable with desertion or abandonment in a legal sense, which will entitle her to a divorce, his conduct which induced her action must have been such as would afford ground for divorce, and it must further appear that the separation was against her will.

—Barnett v. Barnett, 61 N. E. 737, 27 Ind. App. 466.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 107-138.

See, also, 14 Cyc. pp. 611-620; note, 4 L. R. A. (N. S.) 145; note, 119 Am. St. Rep. 617.

**§ 38. Causes deemed by court sufficient.**

[a] (Sup. 1867)

A husband separated from his wife on the alleged ground of religious scruples,—she having been divorced from one still living,—and afterwards entreated her to live with him again. *Held*, on appeal, that the facts did not justify a divorce, on her application, under the "discretionary power" of the court.—Ruby v. Ruby, 29 Ind. 174.

[b] (Super. 1872)

Insanity, though long continued and incurable, is not cause for divorce, within the divorce act (2 Gav. & H. St. p. 351), authorizing the court, on the application of the "injured" party, to grant a divorce for any cause for which it "shall deem it proper that a divorce should be granted," libellant not being an injured party, as the sufferer is not a wrongdoer.—Curry v. Curry, Wils. 236.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 139.

See, also, 14 Cyc. p. 594.

**III. DEFENSES.**

Pleading, see post, § 90.

**§ 43. Insanity.**

[a] (Sup. 1882)

Rev. St. 1881, § 1032, making failure to provide for a wife ground for divorce, does not entitle a wife to a divorce on that ground where the failure was caused by the husband's insanity.—Baker v. Baker, 82 Ind. 146.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 142, 143.

See, also, 14 Cyc. p. 628; note, 47 Am. Dec. 469.

**§ 47. Condonation.**

Defense to action for criminal conversation, see HUSBAND AND WIFE, § 642.

Evidence admissible under pleading, see post, § 108.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 169-187.

See, also, 14 Cyc. pp. 637-643; note, 5 L. R. A. (N. S.) 729; note, 90 Am. Dec. 611.

**§ 48. — In general.**

[a] (Sup. 1870)

In actions for divorce, the doctrine of condonation applies to cruel treatment as well as to adultery.—Sullivan v. Sullivan, 34 Ind. 368.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 169, 170, 184.

See, also, 14 Cyc. pp. 637, 638.

**§ 49. — Acts constituting condonation.**

[a] (Sup. 1885)

A husband who cohabits with his wife after knowledge of her having committed adultery cannot maintain a bill for a divorce on the ground of such adultery.—Phillips v. Phillips, 4 Blackf. 131.

[b] (Sup. 1877)

After one of the married parties has been wronged in a way that would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offense.—Burns v. Burns, 60 Ind. 259.

[c] (Sup. 1895)

Evidence that a wife had heard that her husband had committed adultery, but refused to believe the report, and lived with him for a short time thereafter, but, on being convinced of its truth, left him, and caused his arrest, is sufficient to support a finding that there was no condonation of the offense.—Polson v. Polson, 140 Ind. 310, 39 N. E. 498.

[d] (App. 1901)

Where, in an action for divorce, the complaint shows the continued course of defendant's ill treatment for years, and, of necessity, forbearance on the plaintiff's part during such time, such fact does not show condonation.—Breedlove v. Breedlove, 61 N. E. 797, 27 Ind. App. 560.

[e] (Sup. 1904)

Defendant, a man 40 years of age, had persisted for years before final separation in practicing extreme brutality towards plaintiff, his wife, who was 13 years his junior. On the last occasion, while endeavoring to go with him and her children to a circus, he jerked her from the carriage three different times, injuring her severely, and breaking two of her ribs. She finally succeeded in going, and returned with defendant and her children that night, during which she occupied the same room and bed with him, and on the succeeding morning left him, and brought suit for divorce. *Held*, that plaintiff's act in cohabiting with defendant during the remainder of such night did not constitute such condonation of his offense as precluded her from obtaining a divorce.—Wolverton v. Wolverton, 71 N. E. 123, 163 Ind. 26.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 171-179.

See, also, 14 Cyc. pp. 638-641.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

**§ 51. — Revival of offenses condoned.**

[a] (Sup. 1866)

Condonation is not absolute remission, but proceeds upon the idea of repentance, and is not operative where subsequent acts show that there was no repentance.—*Armstrong v. Armstrong's Adm'r*, 27 Ind. 180.

[b] (Sup. 1870)

Where, in an action for a divorce on the ground of cruel treatment, the complaint shows a condonation, and that the condition which constitutes an element of condonation, that the offense shall not be repeated, and that the forgiven party shall treat the other with kindness has been broken, as well as where in such an action the condonation is shown by answer, and the violation of such condition is shown by reply, the plaintiff is entitled to introduce evidence of acts of cruel treatment before the condonation as well as those after it; and it is not necessary, in order to entitle the plaintiff to a divorce, that the acts occurring after the condonation should of themselves, independent of those occurring before, constitute a cause for divorce.—*Sullivan v. Sullivan*, 34 Ind. 368.

[c] (Sup. 1882)

Upon repetition by a husband of cruel treatment towards his wife, after condonation, the former wrongs are revived.—*Rose v. Rose*, 87 Ind. 481.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 185-187.

See, also, 14 Cyc. pp. 641-643.

**§ 52. Recrimination.**

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 188-197.

See, also, 14 Cyc. pp. 648-651; note, 15 Am. Dec. 211; note, 86 Am. St. Rep. 333.

**§ 53. — In general.**

[a] (Sup. 1866)

To a complaint by a wife for divorce, alleging cruel treatment, the defendant answered by general denial, and also by cross complaint, alleging causes of divorce against the plaintiff. During the trial, plaintiff filed an answer to the cross complaint, charging adultery committed after the commencement of the suit. *Held*, that the answer of adultery was a good defense to the cross petition.—*Armstrong v. Armstrong's Adm'r*, 27 Ind. 186.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 188, 189.

See, also, 14 Cyc. p. 648.

**§ 54. — Grounds.**

[a] (Sup. 1864)

In a suit for divorce brought by the wife, the special findings of the jury showed that the husband had thrown the wife upon the floor, and choked her, and that she had reason to fear further personal violence; that she was induced to abandon him by his abuse and ill

treatment, and by means used by other persons: that, while they lived together and since their separation, he has endeavored to destroy her character for chastity; that he did not discharge his duty as a husband, and that the wife had cause to abandon him; and that she had not endeavored to discharge the duties of a faithful and affectionate wife, and win and retain the affection of her husband. *Held*, that she was entitled to a divorce.—*Shores v. Shores*, 23 Ind. 546.

[b] (Sup. 1894)

Where the ground of an action for divorce is cruel and inhuman treatment, and the cross bill alleges the same ground, and it is found that both parties are at fault, neither is entitled to a divorce.—*Alexander v. Alexander*, 140 Ind. 555, 38 N. E. 855.

[c] (App. 1904)

A wife guilty of adultery, under *Burns' Ann. St. 1901*, § 1045, cannot obtain a divorce on the ground of abandonment by the husband.—*Eikenbury v. Burns*, 70 N. E. 837, 33 Ind. App. 69.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 190-196.

See, also, 14 Cyc. pp. 648-650; note, 90 Am. Dec. 611.

**§ 55. — Operation and effect.**

[a] (Sup. 1833)

If a man apply for a divorce on account of the adultery of his wife, and it be proved that, after the offense complained of, he himself lived in adultery with another woman, his application must fail.—*Christianberry v. Christianberry*, 3 Blackf. 202, 25 Am. Dec. 96.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 197.

**IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**

Effect of pendency of divorce suit on right of husband to maintain action against wife to enforce trust, see HUSBAND AND WIFE, § 205.

Lis pendens, see LIS PENDENS, § 3.

**(A) JURISDICTION, VENUE, AND LIMITATIONS.**

Exclusive or concurrent jurisdiction, see COURTS, § 472.

Jurisdiction in proceedings for alimony, see post, § 201.

Jurisdiction of person of child, see post, § 290.

Jurisdiction to sustain foreign divorces, see post, § 327.

**§ 57. Courts invested with jurisdiction.**

[a] (Sup. 1832)

Suits for divorce under *Rev. Code 1831*, p. 214, § 8, were required to be instituted in courts

of common law, and not in chancery.—*Varner v. Varner*, 3 Blackf. 163.

[b] (Sup. 1835)

Under the statutes of 1833 and 1835, courts of chancery have exclusive jurisdiction in cases of divorce, and associate judges cannot, in the absence of the circuit judge, determine such cases.—*Smith v. Smith*, 4 Blackf. 132.

[c] (Sup. 1861)

An action for divorce is a civil case, within Act May 14, 1852, giving the court of common pleas concurrent jurisdiction with the circuit court in certain kinds of civil cases.—*Herron v. Herron*, 16 Ind. 129.

[d] (Sup. 1863)

The statute of 1848 giving the common pleas court jurisdiction "in all civil cases, both in law and in equity," covers cases for divorce.—*Ellis v. Hatfield*, 20 Ind. 101.

[e] (Sup. 1865)

The court of common pleas has jurisdiction in divorce cases.—*Ewing v. Ewing*, 24 Ind. 468; *Id.*, 25 Ind. 155.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 198, 199.  
See, also, 14 Cyc. pp. 581–583.

#### § 58. Jurisdiction of cause of action.

##### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 200–220, 282.

See, also, 14 Cyc. pp. 584–591; note, 59 L. R. A. 142.

#### § 59. — In general.

[a] (Sup. 1896)

A decree of divorce of a court of general jurisdiction of a foreign state, reciting that defendant was summoned "as the law directs," and that plaintiff was a resident of the county, cannot be collaterally attacked because the affidavit required to precede and authorize publication of notice to defendant, a nonresident, does not appear from the record, or because the petition does not allege plaintiff's residence.—*Hilbish v. Hattle*, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783.

##### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 200–204.  
See, also, 14 Cyc. p. 584.

#### § 61. — Place of occurrence of cause for divorce.

[a] (Sup. 1858)

On application by the husband for a divorce for abandonment, the plaintiff made an affidavit of residence here, and, after notice by publication, the defendant was defaulted. There was evidence of abandonment. *Held*, that a divorce might be granted, though the cause originated in New York, where both parties at the time resided.—*Wilcox v. Wilcox*, 10 Ind. 436.

##### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 201, 206, 207.

See, also, 14 Cyc. p. 591.

#### § 62. — Domicile or residence of parties.

Affidavits of, see post, § 106.

Pleading residence, see post, §§ 91, 102.

Presumptions and burden of proof, see post, § 109.

Presumptions on appeal, see post, § 184.

Weight and sufficiency of evidence, see post, §§ 124, 125.

[a] (Sup. 1831)

Marriage was entered into in another state, where both parties resided, and the causes of divorce arose there. Afterwards the wife removed to this state, where she resided at the time of filing her petition for divorce. The husband never resided in this state, and notice to him of the pendency of the petition was by publication. *Held*, that the circuit court had jurisdiction of the cause, under the statute providing that proceedings may be had against non-residents as well as residents by giving constructive notice to such nonresidents of the pendency of such proceedings.—*Tolen v. Tolen*, 2 Blackf. 407, 21 Am. Dec. 742.

[b] (Sup. 1865)

The courts of this state have jurisdiction, under the statute, to grant a divorce upon a cross-petition by a nonresident, where they had jurisdiction of the original cause.—*Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335.

[c] (Sup. 1866)

Under 2 Gav. & H. St. p. 350, § 6, providing that divorces may be decreed on petition filed by any person who at the time of filing such petition shall have been a bona fide resident of the state, or of the county, for one year; and section 10, providing that the clerk of the court in which said petition is filed shall issue a summons, which shall be personally served on defendant, "if a resident of the state," either by reading or leaving a copy at his or her usual place of residence,—the residence of plaintiff, and not the residence of defendant, gives jurisdiction.—*Ewing v. Ewing*, 24 Ind. 468; *Id.*, 25 Ind. 155.

[d] To give the court jurisdiction in an action for divorce, at least one of the parties must be a bona fide resident of the state or territory where the action was brought.—(Sup. 1877) *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; (1890) *Watkins v. Watkins*, 125 Ind. 163, 25 N. E. 175, 21 Am. St. Rep. 217.

[e] (Sup. 1890)

Marriage gives to the parties a peculiar legal status, and the courts of one state cannot by judgment or decree fix the status of the citizens of another state.—*Watkins v. Watkins*, 25 N. E. 175, 125 Ind. 163, 21 Am. St. Rep. 217.



## [1] (App. 1904)

A wife brought an action for support against her husband, under Burns' Ann. St. 1901, §§ 6977, 6978, but no process was issued, or publication had, and the defendant did not appear, and was never in court. Thereafter a third paragraph of complaint was filed for divorce under section 1043, and later an amended complaint, setting out the same facts as stated in the third paragraph. To this amended complaint the husband appeared, and divorce was decreed the wife. When the complaint for support was filed plaintiff had not been a resident of the state long enough to entitle her to maintain a suit for divorce, but by the time the third paragraph of complaint was filed she had been a resident a sufficient time. *Held* that, as the actions for support and divorce are entirely separate and distinct, the contention that the complaint for divorce was prematurely filed is untenable.—Roshniakowski v. Roshniakowski, 72 N. E. 485, 34 Ind. App. 128.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 200-202, 208-216, 220, 282.

See, also, 14 Cyc. pp. 584-589; note, 16 L. R. A. 497.

## § 63. — Separate domicile.

## [a] (Sup. 1865)

For the purpose of bringing a suit for a divorce, the wife may acquire a domicile or residence distinct from that of her husband.—Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335.

## [b] (App. 1908)

A husband, who with his wife was domiciled in D. county, Ind., being afflicted with tuberculosis, went to Colorado in May 1905, with "the intention of establishing a residence somewhere in the West at some future time, if his health was benefited and he was otherwise suited." His wife and daughter remained in D. county in charge of his business until the close of the public schools in June, 1905, when they removed the household goods to the home of the wife's parents in H. county. In September, 1905, the wife and daughter joined the husband, intending to live with him in Colorado, where he had determined to reside. The daughter died shortly after their arrival, and the wife returned with her body to Indiana, and did not return to Colorado, but took up her residence with her parents in H. county. She had no intention of establishing a residence apart from her husband until after her return from Colorado in September, 1905. In January, 1906, she brought suit for divorce in H. county. *Held*, that she had not been a bona fide resident of H. county for six months and of the state for two years, so as to entitle her to maintain an action for divorce.—Petty v. Petty, 42 Ind. App. 443, 85 N. E. 995.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 201, 217.

See, also, 14 Cyc. p. 584.

## § 65. Jurisdiction of the person.

## [a] (Sup. 1862)

An applicant for divorce, being a resident in good faith at the time of filing his application, and having been so for one year previous thereto, does not deprive the court of jurisdiction by removing his residence before the time of trial.—Waltz v. Waltz, 18 Ind. 449.

## [b] (Sup. 1872)

Where a party files a complaint for a divorce, alleging one or more of the statutory causes, and files the affidavit of a disinterested person of the nonresidence of the defendant, and gives the notice required by law, and proves it legitimately to the satisfaction of the court, the court has jurisdiction of the cause, and may adjudicate and decide upon the matters in controversy, and the proceedings and judgment thereon will be valid and binding upon the parties in Indiana.—McFarland v. McFarland, 40 Ind. 458.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 201, 221-226.

See, also, note, 59 L. R. A. 162; note, 53 Am. St. Rep. 182.

## § 66. Venue.

Application of general statutes relating to change, see VENUE, § 36. Confirming wife's title to land lying in another county, see VENUE, § 15.

## [a] (Sup. 1873)

A suit for divorce is not a civil action, within the meaning of Code, § 207, which provides for a change of venue in civil actions.—Musselman v. Musselman, 44 Ind. 106.

## [b] (Sup. 1885)

A proceeding for divorce is so far a special proceeding that where the procedure is prescribed in the divorce act, or where it is apparent that the legislature intended that any part of the Civil Code should not apply, the provisions of the divorce act will govern, and those of the Code will be of no effect; but, there being no provisions in the divorce act in regard to change of venue from a judge, and it not appearing that the legislature did not intend the provisions of the Civil Code on that subject to apply in such cases, such provisions are applicable, and a change may be had on filing the proper affidavit.—Powell v. Powell, 104 Ind. 18, 3 N. E. 639.

Rev. St. 1881, § 412, relative to changes of venue upon application, is applicable to divorce proceedings, and either party may have a change from the judge by filing the proper affidavit.—Id.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 227-231.

See, also, 14 Cyc. pp. 591-593.

**(B) PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.****§ 70. Parties.****FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 237-246.

See, also, 14 Cyc. pp. 653-655.

**§ 72. — Defendants.**

[a] (Sup. 1873)

In a suit for divorce, where one cause alleged in the petition for a divorce was that defendant conspired with certain other persons to, and did, cause the petitioner to be adjudged insane, such persons are not necessary or proper parties to the suit.—*Musselman v. Musselman*, 44 Ind. 106.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 240-244.

See, also, 14 Cyc. pp. 654, 655.

**§ 74. — Defense on behalf of state or public.**

Striking out answer of prosecuting attorney, see post, § 97.

[a] (Sup. 1861)

Divorce suits are not mere questions between the parties; but all applications for divorce not otherwise defended must be opposed by the prosecuting attorney, for the sake of the public interests and to secure the rights of third persons.—*Scott v. Scott*, 17 Ind. 309.

[b] (Sup. 1898)

A prosecuting attorney, who has been discharged by the court from further service in a divorce suit which he had defended on the ground of collusion between the parties, has no authority to move for a new trial, or to tender a bill of exceptions.—*State v. Friedley*, 51 N. E. 473, 151 Ind. 404.

[c] (App. 1909)

The act of the prosecuting attorney in appearing and filing pleas of former adjudication in a divorce case might be done by any amicus curiæ.—*Yeager v. Yeager*, 43 Ind. App. 313, 87 N. E. 144.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 240.

See, also, 14 Cyc. p. 655.

**§ 75. Process or notice.****FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 247-265.

See, also, 14 Cyc. pp. 655-660.

**§ 76. — In general.**

[a] (Sup. 1881)

The act of March 6, 1877, amending Civ. Code 1852, § 315, in regard to process or publication in civil actions, is not applicable to suits or proceedings for divorces, which are governed

and controlled by the provisions of Act March 10, 1873, "regulating the granting of divorces," etc. (2 Rev. St. 1876, p. 324).—*Eastes v. Eastes*, 79 Ind. 363.

Though 2 Rev. St. 1876, p. 320, § 13 (Rev. St. 1881, p. 198, § 1032), provides that the cause shall stand for issue and trial at the first term after the summons has been personally served on defendant 10 days, or publication made 30 days before the first day thereof, a summons issued in term time, and made returnable at a future day in the same term, is not necessarily inoperative and wholly void, but such a summons and the service thereof is sufficient notice, under the law, of the pendency of the suit for the next succeeding term.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 247-250, 255.

See, also, 14 Cyc. pp. 655, 656.

**§ 77. — Personal service.**

[a] (Sup. 1883)

If a resident of this state, while temporarily absent, in constructively notified of the pendency of an action for divorce, such service is void, because the same should have been made by copy of process left at his last place of residence.—*Beard v. Beard*, 21 Ind. 321.

[b] (Sup. 1865)

Under 2 Gav. & H. St. p. 351, § 10, providing that a clerk of the court in which the petition for a divorce is filed shall issue a summons, which shall be personally served on defendant, if a resident of the state, either by reading or leaving a copy at his or her usual place of residence, process may be served in any county in the state; a service by copy being personal service.—*Ewing v. Ewing*, 24 Ind. 468; *Id.*, 25 Ind. 155.

[c] (Sup. 1881)

The fact that the summons was not served 10 days before the first day of the term, as required by section 13 of the act concerning divorces, is cause for a continuance merely, and not a ground for a motion to set aside the service and quash the writ.—*Bratton v. Bratton*, 79 Ind. 588.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 251-254.

See, also, 14 Cyc. pp. 656, 657.

**§ 79. — Service by publication.**

[a] (Sup. 1855)

In a libel for divorce, publication of notice is sufficient service on the absent defendant to give jurisdiction, without issuing summons.—*Green v. Green*, 7 Ind. 113.

[b] (Sup. 1872)

An affidavit to authorize publication of notice of a pending proceeding for divorce may be sufficient, though it states, "as deponent is

informed and verily believes.”—*Bonsell v. Bonsell*, 41 Ind. 476.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 258-263;  
40 CENT. DIG. Proc. § 131.

See, also, 14 Cyc. p. 659; note, 19 L. R. A. 814.

### § 80. — Return and proof of service.

[a] (Sup. 1882)

In divorce proceedings, a false return of service fraudulently procured by plaintiff was not conclusive on defendant.—*Cavanaugh v. Smith*, 84 Ind. 380.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 264.

See, also, 14 Cyc. p. 660.

### § 81. Appearance.

[a] (Sup. 1859)

The court cannot, in a divorce suit, appoint an attorney for an adult compos mentis party to the suit against the consent of such party.—*Chandler v. Chandler*, 13 Ind. 492.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 266, 267.

See, also, 14 Cyc. p. 660; note, 23 L. R. A. 287.

### § 85. Discovery.

[a] (Sup. 1869)

2 Gav. & H. St. p. 352, § 13, requiring a defendant in a divorce suit to answer the petition under oath, if required to do so by the petitioner, does not authorize the filing of interrogatories with an answer to a cross petition.—*Barr v. Barr*, 31 Ind. 240.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 276.

See, also, 14 Cyc. p. 661.

## (C) PLEADING.

Aider by verdict or judgment, see PLEADING, § 433.

Time to take deposition, see DEPOSITIONS, § 7.  
Waiver of objections, see PLEADING, § 406.

### § 89. Bill, libel, complaint, or petition.

Sufficiency to sustain award as to custody and support of children, see DIVORCE, § 291.

Sufficiency to sustain award of alimony or other allowances, see post, § 203.

Waiver of objections, see PLEADING, § 406.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 283-309.

See, also, 14 Cyc. pp. 662-670.

### § 90. — Form and requisites in general.

[a] (App. 1907)

The petition in a divorce case is to be liberally construed as to all matters of form, but

ambiguous, doubtful, and defective statements of fact are to be construed strictly against the pleader.—*Hays v. Hays*, 40 Ind. App. 471, 82 N. E. 90.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 283-286.

See, also, 14 Cyc. p. 662.

### § 91. — Residence of parties.

[a] (Sup. 1895)

In an action for divorce, an allegation “that plaintiff is now and has been for more than two years last past a bona fide resident of the state of Indiana, and for more than six months last past a bona fide resident of the county of Allen,” is sufficient under the statute.—*Polson v. Polson*, 39 N. E. 498, 140 Ind. 310.

[b] (App. 1910)

Under *Burns’ Ann. St.* 1908, § 1066, providing that the party applying for a divorce shall allege that he is a bona fide resident of the state for at least two years prior to the filing of the complaint and a bona fide resident of the county for at least six months immediately preceding the filing thereof, a complaint in a suit for divorce is insufficient if it fails to aver the statutory requirements as to residence of the plaintiff.—*Canther v. Canther*, 91 N. E. 813.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 287-289.

See, also, 14 Cyc. p. 663.

### § 93. — Grounds for divorce.

[a] (Sup. 1864)

The provision, in the act regulating the granting of divorces, that “it shall be deemed sufficient evidence of good character if the petitioner satisfies the court or jury that she had, for two years previous to the filing of her petition, maintained a good reputation for chastity and virtue,” does not require that the petition for divorce should allege that she maintained such reputation for said time.—*Fritz v. Fritz*, 23 Ind. 388.

[b] (Sup. 1866)

A petition for divorce by the husband contained no allegation that the plaintiff was without fault, but alleged that the peace and happiness of the family were destroyed in consequence of the violent temper and misconduct of the defendant. *Held*, that the allegations were sufficient to charge the fault upon the defendant.—*Kenemer v. Kenemer*, 26 Ind. 330.

[c] (Sup. 1871)

A complaint in an action for divorce, charging that at some time in the month of June, 1865, defendant, without cause or provocation on his part, abandoned and deserted the plaintiff, since which time she has been living in adultery with one —, etc., while not sufficiently charging adultery to make of it an available ground of divorce because the party with

whom it was committed is not stated, nor any reason given for the omission, sufficiently charges continuous abandonment, as the allegation that since the abandonment she has been living in adultery in common acceptance means that she had thus been living in adultery ever since the abandonment, and, if so, the abandonment must have been continuous.—*Lewis v. Lewis*, 36 Ind. 218.

[d] (Sup. 1894)

A complaint alleging an assault and battery, and that defendant drew on, and threatened to kill, plaintiff, with a knife, and clandestinely removed their two year old child to another state, is not demurrable, though it also contains general charges which might be reached by motion to make more specific.—*Brown v. Brown*, 138 Ind. 257, 37 N. E. 142.

[e] (Sup. 1895)

A complaint for divorce on the ground that defendant "was convicted of the crime of rape upon a little girl, the daughter of plaintiff," sufficiently charges a conviction of an infamous crime, within the meaning of Rev. St. 1894, § 1044 (Rev. St. 1881, § 1032), making such a conviction ground for divorce.—*Polson v. Polson*, 140 Ind. 310, 39 N. E. 498.

A complaint in an action for divorce was sufficient, though one of the grounds relied on was insufficient.—*Id.*

[f] (App. 1901)

In an action by a husband for divorce, the complaint alleged that defendant was frequently cross, and would scold and upbraid him without cause; that at times she would refuse to speak to him for a whole week; that she would get angry and break up dishes and household utensils, and would frequently leave home for a week or more without his consent, when he would be compelled to do the household work in addition to his own work; that she squandered the crops of the farm without his knowledge or consent, and dissipated his property, and drove him to poverty and financial ruin. *Held*, that the complaint stated a cause of action for divorce for cruel and inhuman treatment, though some of the charges should have been made more specific, had a motion for that purpose been filed.—*Spitzmesser v. Spitzmesser*, 60 N. E. 315, 26 Ind. App. 532.

[g] (App. 1907)

Plaintiff's complaint for divorce alleged that his wife had stated to numerous citizens of the community that he was unchaste, all of which she knew to be false; that she endeavored to destroy his business; that she was petulant and irritable, frequently asserting that she cared nothing for him, for his home, or business; that she refused to take any interest in the home, or to prepare the daily meals for himself and his hands; that she read frivolous literature, to the neglect of her household duties, and was cold, abusive, and indifferent to

plaintiff's happiness, by reason of which she kept complainant in continual distress and trouble, destroying his peace of mind and breaking up his home. *Held*, to charge cruel and inhuman treatment authorizing a divorce as provided by Burns' Ann. St. 1901, § 1044.—*Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977. 81 N. E. 732.

[h] (App. 1907)

Where the only averment in a petition for divorce with reference to separation at the time the complaint was filed was the allegation that plaintiff and defendant were married on June 11, 1875, and lived together as husband and wife until November 17, 1904, when defendant, by a continuous and systematic course of abuse, which had been kept up for more than five years, drove plaintiff from his home, such allegation was inconsistent with the fact that they were living together at the time the complaint was filed, and therefore rendered the petition fatally defective.—*Hays v. Hays*, 40 Ind. App. 471, 82 N. E. 90.

[i] (App. 1907)

Where a complaint for divorce on the ground of abandonment shows upon its face that the statutory period of two years had not elapsed when the complaint was filed, it is insufficient.—*Hofman v. Hofman*, 40 Ind. App. 476, 82 N. E. 477.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 202-307.

See, also, 14 Cyc. pp. 664-669.

§ 96. Answer.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 310-318.

See, also, 14 Cyc. pp. 670-672.

§ 97. — Form and requisites in general.

[a] (Sup. 1889)

If a defendant appears to and answers a complaint for divorce after the prosecuting attorney has appeared thereto for the purpose of resisting the action, as is his duty in such case when there is no appearance by defendant, under Rev. St. 1881, § 1038, it is not error of which the state can complain to strike out the prosecuting attorney's answer. If the appearance of defendant is collusive, the striking out of the answer will not prevent the prosecuting attorney from resisting the action.—*State v. Brinneman*, 120 Ind. 357, 22 N. E. 332.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 310-314.

See, also, 14 Cyc. p. 670.

§ 99. — Affirmative defenses.

[a] (Sup. 1857)

Where cohabitation, as a matter of defense in a suit for divorce, is not set up in the an-

swer, it cannot be proved on the trial.—*Lewis v. Lewis*, 9 Ind. 105.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 316-318.

See, also, 14 Cyc. pp. 671, 672.

**§ 101. Counterclaim or cross-bill, libel, complaint, or petition.**

[a] (Sup. 1899)

Money left with a wife for safe-keeping, and goods and chattels of the husband converted by the wife to her own use, may be recovered under a cross complaint by the husband in an action by the wife for divorce.—*Murray v. Murray*, 53 N. E. 946, 153 Ind. 14.

[b] (App. 1895)

Act Feb. 28, 1903 (Acts 1903, p. 114, c. 48), provides for separations from bed and board for a limited time. Section 3 provides that obtaining such a temporary separation shall not bar a suit for absolute divorce by either party. Section 4 (page 115) makes the practice and proceedings the same as in case of absolute divorce. *Burns' Ann. St.* 1901, § 1052, provides that in a divorce suit the defendant may file a cross-complaint for divorce. *Held* that, in an action for temporary separation, the defendant may file a cross-complaint for absolute divorce, though the act of 1903 makes no provision for filing cross-complaints.—*Harrington v. Harrington*, 75 N. E. 1082, 36 Ind. App. 536.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 322-327.

See, also, 14 Cyc. pp. 672-674.

**§ 102. Replication or reply.**

[a] (Sup. 1890)

In an action for divorce by a wife, the husband answered in bar that he had obtained a decree in the court of a territory. It appeared from the answer that he made an affidavit that he had been a resident of the territory for more than a year prior to the institution of his suit, and that the territorial statute required that a plaintiff in a suit for divorce should have been a resident of the territory for one year next preceding the filing of his complaint. The wife in her reply alleged that he had not been a resident of the territory at any time, but had always been a resident of Indiana, that she had always been a resident of Indiana, and that the court in the territory had no jurisdiction. *Held*, that the allegation in the reply that neither of the parties was a resident of the territory made the reply good.—*Watkins v. Watkins*, 25 N. E. 175, 125 Ind. 163, 21 Am. St. Rep. 217.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 319.

See, also, 14 Cyc. p. 672.

**§ 104. Amended and supplemental pleadings.**

[a] (Sup. 1868)

To a complaint by a wife for divorce, alleging cruel treatment, the defendant answered by general denial, and also by cross complaint, alleging causes of divorce against the plaintiff. During the trial, plaintiff filed an answer to the cross complaint, charging adultery committed after the commencement of the suit. *Held* that, as evidence of the adultery was admissible under the general denial, the court committed no available error in allowing the additional answer to be filed.—*Armstrong v. Armstrong's Adm'r*, 27 Ind. 186.

[b] (Sup. 1895)

In an action for divorce on the ground of cruel treatment, defendant having answered that he struck plaintiff in self-defense, it was not error to permit an amendment to the answer, pending the trial, alleging that defendant was informed of the adulterous conduct of plaintiff, and that he inquired of plaintiff as to the truth of the report, whereupon plaintiff attacked defendant so that defendant was compelled to strike in self-defense.—*Olleman v. Olleman*, 143 Ind. 172, 42 N. E. 470.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 328-339.

See, also, 14 Cyc. pp. 674-677.

**§ 105. Verification of pleadings.**

[a] (Sup. 1873)

A petition or a cross-petition for divorce need not be sworn to. 2 Gav. & H. Rev. St. p. 352, § 13, providing that the defendant shall answer the petition under oath if required to do so by the petitioner, relates only to the answer.—*Musselman v. Musselman*, 44 Ind. 106.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 340-343.

See, also, 14 Cyc. p. 678.

**§ 106. Affidavits accompanying pleadings.**

[a] (Sup. 1881)

The requirement of Rev. St. 1881, § 1031, that plaintiff, in an action for divorce, shall file an affidavit stating the length of his residence in the state, and the exact location thereof, need be only substantially complied with.—*Eastes v. Eastes*, 79 Ind. 363.

[b] (Sup. 1894)

The provision of Rev. St. 1881, § 1031, that the affidavit of residence, occupation, etc., shall be sworn to before the clerk of court, is directory merely, and such affidavit is sufficiently sworn to before a justice of the peace.—*Brown v. Brown*, 138 Ind. 257, 37 N. E. 142.

[c] (App. 1902)

Rev. St. 1881, § 1031, provides that the plaintiff in a divorce suit shall, with his petition, file in the clerk's office his affidavit, sworn to before such clerk, that he has been a

resident of the state (stating particularly the place, town, city, or township in which he has resided) for the preceding two years; also stating his occupation. *Held*, that where the petition contained the matters required to be stated in such affidavit, and was itself sworn to by the petitioner before the clerk, the court had jurisdiction, although no affidavit was filed. —*Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 344, 345.  
See, also, 14 Cyc. p. 678.

#### § 108. Issues, proof, and variance.

[a] (App. 1901)

Where, in an action for divorce, it is claimed that the acts of cruelty complained of have been condoned, such condonation must be pleaded to admit evidence thereof.—*Breedlove v. Breedlove*, 61 N. E. 797, 27 Ind. App. 530.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 349–352.  
See, also, 14 Cyc. pp. 679, 680.

#### (D) EVIDENCE.

Admission in rebuttal of evidence in chief, see TRIAL, § 63.

Competency of husband or wife as witnesses, see WITNESSES, § 60.

Competency of witness as affected by interest, see WITNESSES, § 96.

Cross-examination of party, see WITNESSES, § 275.

Right of witness to explain testimony on cross-examination, see WITNESSES, § 287.

#### § 109. Presumptions and burden of proof.

Presumptions by withholding evidence, see EVIDENCE, § 75.

[a] (Sup. 1877)

The fact that a husband and wife live together raises a presumption that they have sexual intercourse together.—*Burns v. Burns*, 60 Ind. 259.

[b] (App. 1904)

Under *Burns*' Ann. St. 1901, § 1043, making certain proof of residence necessary to the maintaining of a divorce action, plaintiff in such an action must establish affirmatively a residence for at least two years in the state and six months in the county immediately preceding the filing of the petition.—*Rosniakowski v. Rosniakowski*, 34 Ind. App. 128, 72 N. E. 485.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 354–364.  
See, also, 14 Cyc. p. 681.

#### § 110. Admissibility.

Admissions as evidence, see EVIDENCE, § 220.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 365–391.

See, also, 14 Cyc. pp. 682–686; note, 30 Am. Dec. 544.

#### § 115. — Adultery.

[a] (Sup. 1899)

Where, in an action for divorce, plaintiff alleged and introduced evidence to prove particular acts of indiscretion by his wife with other men, she was entitled to give evidence of her general reputation and character for chastity in the neighborhood where she resided.—*Hilker v. Hilker*, 55 N. E. 81, 153 Ind. 425.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 371–378.  
See, also, 14 Cyc. p. 684.

#### § 116. — Cruelty or other ill treatment.

[a] (Sup. 1864)

In an action of divorce on the ground of cruel treatment, instituted by a wife against her husband, a deed of land, given by the latter to the petitioner in consideration of a sum of money which was her separate property, is admissible in evidence for the purpose of showing the conduct of the husband to the wife, and in order that the court may learn the circumstances under which it was executed, in order to give it validity.—*Fritz v. Fritz*, 23 Ind. 388.

[b] (Sup. 1881)

In an action by a wife for a divorce on the ground of cruel and inhuman treatment, consisting of false charges of adultery made by her husband against her, it is not error to permit her to prove her good character in making out her case in chief.—*Graft v. Graft*, 76 Ind. 136.

[c] (Sup. 1881)

In a suit for divorce, evidence of nonsupport of wife and infant is admissible to show cruel and inhuman treatment.—*Eastes v. Eastes*, 79 Ind. 303.

[d] (Sup. 1884)

In a suit for divorce, it was not error to refuse to permit a witness to state how the defendant treated his wife at such times as he was present, where the alleged cruel treatment specifically complained of occurred within a few months before the separation.—*Metzler v. Metzler*, 99 Ind. 384.

[e] (App. 1901)

Where, in an action for divorce, no attack has been made on the general character of defendant, it is not error to exclude testimony as to his general reputation for morality in the neighborhood.—*Breedlove v. Breedlove*, 61 N. E. 797, 27 Ind. App. 560.

Where, in an action for divorce for cruel treatment, acts of defendant's cruelty and neglect were in evidence; also that he said all that was the matter with plaintiff was that she

lacked the grit his mother had,—it was not error to admit plaintiff's testimony of getting out of bed and crawling across the room for water while sick, defendant being in the bed asleep.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 379-385.  
See, also, 14 Cyc. p. 685.

### § 119. — Desertion.

[a] (App. 1901)

Where defendant in divorce claimed that the separation was caused by plaintiff's mother and was due to no fault of his, evidence as to an action brought by him against his mother-in-law a short time after the separation for inducing the same, in which a verdict was rendered for defendant, was admissible to show that he was willing to vex his wife by an action against her mother.—Turner v. Turner, 60 N. E. 718, 26 Ind. App. 677.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 388.  
See, also, 14 Cyc. p. 686.

### § 123. Weight and sufficiency of evidence.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 392-456.  
See, also, 14 Cyc. pp. 687-700.

### § 124. — In general.

[a, b] (Sup. 1876)

The proof of residence for the statutory time of a petition for divorce need not be by the testimony of two resident householders and freeholders. Evidence of the fact satisfactory to the court is sufficient.—Maxwell v. Maxwell, 53 Ind. 363.

[c] (Sup. 1876)

Where, in an action for divorce, the residence of the petitioner is not proved as required by Act March 10, 1873 (2 Rev. St. 1876, p. 326, § 7), regulating the granting of divorces, the court has no power to decree a divorce.—Powell v. Powell, 53 Ind. 513.

[d] (Sup. 1890)

The statute declaring that the bona fide residence of the petitioner in a suit for divorce shall be proved by at least two witnesses who are resident freeholders and householders of the state is a positive requirement, and there must be actual proof to the satisfaction of the court by witnesses possessing the statutory qualifications.—Prettyman v. Prettyman, 25 N. E. 179, 125 Ind. 149.

[e] (Sup. 1894)

Proof of residence, to be made on the trial by two witnesses who are "resident freeholders and householders of the state" (Rev. St. 1881, § 1031), is not made where one of the two merely testifies that he is a freeholder and householder, without stating his residence.—Brown v. Brown, 138 Ind. 257, 37 N. E. 142.

[f] (Sup. 1899)

Proof that the witnesses called to prove plaintiff's residence were resident freeholders and householders of the state is a prerequisite to the court's jurisdiction to determine an action for divorce, under Burns' Rev. St. 1894, § 1043 (Horner's Rev. St. 1897, § 1031), requiring proof of plaintiff's residence "by at least two witnesses who are resident freeholders and householders of the state."—Driver v. Driver, 54 N. E. 389, 153 Ind. 88.

[g] (Sup. 1903)

In an action for divorce it must be made to appear that the two witnesses offered to prove plaintiff's residence in the county and state are "resident freeholders and householders of the state," as required by Burns' Rev. St. 1901, § 1043 (Rev. St. 1881, § 1031; Horner's Rev. St. 1901, § 1031).—Becker v. Becker, 66 N. E. 1010, 160 Ind. 407.

[h] (App. 1903)

Under Burns' Rev. St. 1901, § 1043 (Horner's Rev. St. 1901, § 1031), requiring that the residence of the plaintiff in divorce must be proved by two witnesses who are resident householders and freeholders of the state, proof by two witnesses, only one of whom possesses the required qualifications, is insufficient, and confers no jurisdiction on the court.—Cummins v. Cummins, 66 N. E. 915, 30 Ind. App. 671.

[i] (App. 1904)

Under Burns' Ann. St. 1901, § 1043, the bona fide residence of the plaintiff is required to be proved in a divorce proceeding by at least two witnesses who are resident freeholders and householders. In a divorce suit one of plaintiff's witnesses testified to plaintiff's residence for the statutory period and of his own residence in the county where the suit was pending, and stated that he was a householder, had a wife and family, and owned real estate "out there." Another witness testified likewise as to plaintiff's residence, as to the witness being a householder in the county, and as to his "lot" in comparing the size of some other person's lot. Held sufficient to qualify the witnesses under the statute.—Roshniakowski v. Roshniakowski, 72 N. E. 485, 34 Ind. App. 128.

In a divorce action evidence held to show plaintiff's residence as required by Burns' Ann. St. 1901, § 1043, relating to the residence of a person bringing a divorce action.—Id.

[j] (App. 1906)

Burns' Ann. St. 1901, § 1043, provides that the bona fide residence within the state of the petitioner for divorce for at least two years previous to the filing of the petition must be shown by two competent witnesses. One of two witnesses in a suit for divorce, who testified a month after the filing of the petition, stated that the petitioner had been continuously a resident of the state for the two years last past. Held not to show that the petitioner had resided in the state continuously for the last two years previous to the filing of the petition.

essential to confer jurisdiction on the court.—*West v. West*, 38 Ind. App. 659, 78 N. E. 987.

Under Burns' Rev. St. 1901, § 1043 (Rev. St. 1881, § 1031), it is necessary to give the court jurisdiction to decree a divorce, that the residence of plaintiff within the state for at least two years previous to the filing of a petition shall be established by two witnesses who are freeholders and householders of the state.—*Id.*

[k] (App. 1906)

Evidence, on an issue under a plea in abatement, held sufficient to sustain a finding that the paper in which notice to defendant, a non-resident, of pendency of the action for divorce was published was a newspaper of general circulation, as required by Burns' Ann. St. 1901, § 1048.—*Ruth v. Ruth*, 39 Ind. App. 290, 79 N. E. 523.

[l] (App. 1908)

Burns' Ann. St. 1908, § 1066, requiring proof of residence of plaintiff by at least two resident witnesses, is mandatory, and cannot be waived.—*Blauser v. Blauser*, 87 N. E. 152.

No formal proof of plaintiff's residence is required by Burns' Ann. St. 1908, § 1066, so long as the qualifications of the required number of witnesses are clearly shown, and their testimony, with proper inferences, is sufficient to fully prove residence to the court.—*Id.*

[m] (App. 1910)

Burns' Ann. St. 1908, § 1066 (Acts 1873, c. 41, § 7), requiring the residence of the petitioner in a suit for divorce to be proven by at least two witnesses who are freeholders and householders of the state, being mandatory, where one of the two witnesses called to prove petitioner's residence merely testified that he owned a little real estate, was a householder, and had known petitioner for five or six years, the proof of petitioner's residence was insufficient to authorize a decree.—*Emens v. Emens*, 91 N. E. 747.

[n] (App. 1910)

Under Burns' Ann. St. 1908, § 1066, providing that the party applying for a divorce shall allege that he is a bona fide resident of the state for at least two years prior to the filing of the complaint, and a bona fide resident of the county for at least six months immediately preceding the filing thereof, which bona fide residence shall be duly proven by at least two witnesses who are resident freeholders and householders, proof of the qualification of petitioner's witnesses is a prerequisite to the court's jurisdiction to determine the cause.—*Canther v. Canther*, 91 N. E. 813.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 392-398, 450, 455, 456.

See, also, 14 Cyc. pp. 687-689.

§ 125. — Admissions and confessions.

Effect on right to alimony, see post, § 213.

[a] (Sup. 1846)

To authorize a divorce under Rev. St. 1843, there must be satisfactory proof, independently of the confession of the defendant, of the alleged charge.—*McCulloch v. McCulloch*, 8 Blackf. 60.

[b] (Sup. 1890)

Under the statutory requirement that the residence of plaintiff in a suit for divorce shall be proved by at least two witnesses who are resident freeholders and householders of the state, an admission by defendant's counsel at the trial as to plaintiff's residence is not sufficient to excuse the absence of such proof.—*Prettyman v. Prettyman*, 125 Ind. 149, 25 N. E. 179.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 399-402.

See, also, 14 Cyc. p. 690.

§ 127. — Testimony of parties, and corroboration.

[a] (Sup. 1857)

*H.*, a party with whom adultery is alleged to have been committed, was examined as a witness. Held, that the following instruction was correct: "If the evidence shows him guilty, he is to be regarded as an accomplice, and his testimony is entitled to less weight, and so the jury should regard it."—*Lewis v. Lewis*, 9 Ind. 105.

[b] (Sup. 1884)

Where, in divorce proceedings, defendant files a cross petition for divorce, a divorce may be granted defendant solely on evidence introduced by plaintiff.—*Glasscock v. Glasscock*, 94 Ind. 163.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 403-407.

See, also, 14 Cyc. pp. 688, 689.

§ 129. — Adultery.

Testimony of party, see ante, § 127.

[a] (Sup. 1859)

An allegation in the answer in a suit for divorce that plaintiff and his niece were alone in a room at her house, he lying on a sofa, admitted by not being denied, does not constitute an admission of intercourse between them.—*Garrett v. Garrett*, 12 Ind. 407.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 411-441, 454.

See, also, 14 Cyc. pp. 692-698.

§ 133. — Desertion or absence.

[a] (Sup. 1852)

Upon a bill filed by husband against wife for a divorce on the alleged ground of abandonment, it was proved at the hearing that a separation had taken place, and that the wife had afterwards said she did not intend to live



again with her husband, but it did not appear which of the parties was in fault, and it was *held* that the bill was properly dismissed.—*McCoy v. McCoy*, 3 Ind. 555.

[b] (*App.* 1901)

Evidence *held* to sustain decree of divorce on the ground of desertion.—*Turner v. Turner*, 60 N. E. 718, 26 Ind. App. 677.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 446–448.

See, also, 14 Cyc. p. 690.

### § 137. Taking and filing proofs before hearing.

[a] (*Sup.* 1855)

In an action for divorce, under St. 1843, authorizing a divorce for cruel and inhuman treatment, the parties may examine their witnesses orally in court or take their depositions.—*Nave v. Nave*, 7 Ind. 122.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 457–460.

### (E) DISMISSAL, TRIAL OR HEARING, AND NEW TRIAL.

Dismissal on nonpayment of alimony or other allowances, see post, § 262.

### § 138. Dismissal before hearing.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 463–470.

See, also, 14 Cyc. pp. 701, 702.

### § 139. — Voluntary.

[a] (*Sup.* 1857)

In a petition for divorce by a husband, and answer and cross petition by the wife, the dismissal of the husband's petition carries the whole cause out of court.—*Stoner v. Stoner*, 9 Ind. 505.

[b] (*App.* 1892)

Rev. St. 1881, § 334, provides that plaintiff may dismiss his action in vacation by filing with the clerk a writing to that effect, that the clerk shall enter such dismissal in the order book, and that "the court shall enter judgment accordingly at the next term." *Held*, that where, pending a suit by a wife for divorce, she and her husband became reconciled, and she had such dismissal entered in vacation, the court retained its jurisdiction until the entry of judgment at the next term, for the purpose of requiring the husband to compensate the wife's attorneys.—*Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914, distinguishing *Hart v. Hart* (1858) 11 Ind. 384, and *St. John v. Hardwick* (1861) 17 Ind. 180.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 463–468, 470.

See, also, 14 Cyc. p. 701.

### § 139½. — Involuntary.

[a] (*Sup.* 1881)

Failure to serve the summons in an action for divorce 10 days before the first day of the term at which the suit was brought, as required by Divorce Act, § 13, is not ground for a dismissal of the proceedings, but is only a cause for continuance.—*Bratton v. Bratton*, 79 Ind. 588.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 469.

See, also, 14 Cyc. p. 702.

### § 140. Scope of inquiry and powers of court.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 474–476.

See, also, 14 Cyc. pp. 702, 703.

### § 141. — In general.

[a] (*Sup.* 1861)

In a husband's suit for divorce for cruel treatment, the wife by answer admitted the allegations, and they made and filed a joint agreement relating to the disposition of the children and property. Upon a disposition of the cause without further evidence, a refusal to grant the divorce was *held* to have been proper.—*Scott v. Scott*, 17 Ind. 309.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 474, 475.

### § 142. — On default of defendant.

[a] (*Sup.* 1861)

The court has no authority to decree a divorce on a bill being taken for confessed, without other proof to sustain its allegations.—*Scott v. Scott*, 17 Ind. 309.

[b] (*App.* 1904)

On the trial of an action for divorce, where defendant does not appear, the trial judge has the right, and it is his duty, as representing the state, to elicit facts as to matrimonial offenses committed by plaintiff, and grant or withhold the decree accordingly.—*Eikenbury v. Burns*, 70 N. E. 837, 33 Ind. App. 69.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 476.

See, also, 14 Cyc. p. 703.

### § 144. Submission of issues to jury.

Constitutional right to trial by jury, see JURY, § 12.

[a] (*Sup.* 1871)

It is discretionary with the court to allow or refuse a jury trial in suits for divorce.—*Leffel v. Leffel*, 35 Ind. 76.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 484–487.

See, also, 14 Cyc. pp. 704–707.

### § 146. Mode and conduct of trial in general.

[a] (Sup. 1846)

On the trial of a suit for a divorce, where the charge is adultery, the complainant may prove the offense, though he had known of its existence more than two years before the suit was instituted, and the defendant may prove scienter in defense.—*McCafferty v. McCafferty*, 8 Blackf. 218.

[b] (Sup. 1855)

Rev. St. 1843, p. 602, § 45, Laws 4, relating to divorce proceedings, providing that witnesses may be examined orally in court as in trials at law, did not concern public rights, but merely gave a privilege to the parties for their benefit or convenience which they might exercise or not at their pleasure.—*Nave v. Nave*, 7 Ind. 122.

[c] (Sup. 1871)

Where a jury trial is ordered in a divorce suit, and the jury failed to agree and are discharged, the court may proceed to try the case and find upon the issues without rehearing the evidence, and may decide the cause on the evidence which was given before the court and the jury and on which the jury did not agree.—*Leffel v. Leffel*, 35 Ind. 76.

Where a jury in a divorce suit has failed to agree, the case stands as it did before the jury was impaneled, and the court may then allow or refuse a jury trial, such allowance or refusal having been discretionary with the court in the first instance.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 164, 471-473, 477, 488-492.

See, also, 14 Cyc. p. 701.

### § 149. Verdict and findings by jury.

[a] (Sup. 1857)

In actions for divorce, the rule of procedure contemplates a trial of the cause by the court; and, though the court may submit questions raised by the pleadings to a jury, the verdict may not be in all respects conclusive. On a final hearing of the cause, the court may look into the whole case and disregard so much of the finding of the jury as is plainly without the issues.—*Lewis v. Lewis*, 9 Ind. 105.

[b] (Sup. 1865)

The statute regulating divorces contemplates a trial by the court, and though the court may, of its own motion, or by consent, or upon the motion of either party, submit the issues to a jury, still the verdict is not conclusive, and, on the final hearing, the court may look into the whole case, and disregard so much of the finding as is without the issue.—*Morse v. Morse*, 25 Ind. 156.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 496-498.

See, also, 14 Cyc. pp. 706, 707.

### § 150. Decision and findings by court or referee.

[a] (Sup. 1857)

Where cohabitation after knowledge of adultery is not set up as a defense, a finding based on proof of such fact can have no legal effect on a decision of the cause, and may be rejected as surplusage, since such fact, not having been set up as a matter of defense, cannot be proved on the trial.—*Lewis v. Lewis*, 9 Ind. 105.

[b] (Sup. 1866)

Upon the trial of a suit for divorce, where the defendant had filed a cross petition, the court found that a divorce ought to be granted, "not upon the application of either party, but upon the whole case." Held that, under the statute, a divorce can only be granted upon the application of the injured party; and a finding in favor of one party and against the other is necessary to authorize a divorce.—*Gullett v. Gullett*, 25 Ind. 517.

[c] (Sup. 1894)

Where, in divorce, neither the complaint nor the cross-complaint stated facts sufficient to authorize a finding and judgment in favor of either party, but nevertheless a finding was made in favor of each of the parties, it could not be the foundation of any judgment.—*Alexander v. Alexander*, 38 N. E. 855, 140 Ind. 555.

[d] (Sup. 1904)

Where, in an action for divorce on the ground of extreme cruelty, defendant set up as special defenses unsoundness of mind and condonation, and the court failed to find on such issues, but granted plaintiff a divorce, the court's failure so to find was equivalent to an express finding that such defenses had not been established.—*Wolverton v. Wolverton*, 71 N. E. 123, 163 Ind. 26.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 490-508.

See, also, 14 Cyc. pp. 703, 704, 708-710.

### § 151. New trial or rehearing.

[a] (Sup. 1864)

A. sued for and obtained a divorce from his wife, B., for reasons alleged and held by the court to be sufficient, and asked that certain property might be set off to her, which the court consented to, and did order. Afterwards, at the same term at which the divorce was granted and the order made, he moved the court for a new trial, for other reasons, of which he was not cognizant when the decree and order were made, and which would have enabled him, if known and disclosed, to have obtained the divorce without letting her have the property. Held that, under the circumstances of the case, the motion for a new trial was correctly overruled.—*Rindge v. Rindge*, 22 Ind. 31.

**[b] (App. 1901)**

Where, in an action for divorce by a husband, the wife answered, and a trial was had on the issues raised, the decree should not be set aside on the ground that she was misled and did not appear at the trial, where it was not claimed that there was any fraud, or that plaintiff was connected in any way with her being misled.—*Spitzmesser v. Spitzmesser*, 60 N. E. 315, 26 Ind. App. 532.

**[c] (App. 1902)**

The ruling of the court in a divorce suit upon a motion to dismiss the complaint for the reason that plaintiff did not, with her complaint, file the affidavit of residence and occupation required by Rev. St. 1881, § 1031, is not a cause for a new trial.—*Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378.

**FOR CASES FROM OTHER STATES.**

SEE 17 CENT. DIG. Divorce, §§ 509-513.

See, also, 14 Cyc. pp. 730, 731.

**(F) JUDGMENT OR DECREE.**

Award of custody of children, see post, § 302.

Award of permanent alimony, see post, §§ 243-245.

Copy of decree as evidence, see EVIDENCE, § 175.

Decree as claim under attachment, see ATTACHMENT, § 282.

Disposition of property, see post, § 254.

Enforcement of award of alimony, see post, §§ 260-276.

Enforcement of award of custody of children, see post, § 305.

Enforcement of provision for support of children, see post, § 311.

Lien of judgment for alimony or other allowances, see post, § 256.

Provision for support of children, see post, § 308.

**§ 159. By default or pro confesso.**

Conclusiveness of adjudication, see post, § 172.

Scope of inquiry and powers of court on default of defendant, see ante, § 142.

**FOR CASES FROM OTHER STATES.**

SEE 17 CENT. DIG. Divorce, §§ 521-526.

See, also, 14 Cyc. pp. 713-715.

**§ 160. — Requisites and validity.****[a] (Sup. 1866)**

When a judgment of divorce is entered by default, the record must show that defendant has been properly notified of the pendency of the suit.—*Cochnower v. Cochnower*, 27 Ind. 253.

Where the record of a decree of divorce, taken by default, contained this entry, "Comes now the plaintiff and makes proof of publication in this cause," but the notice and proof were not contained in the record, it was *held*

that the record did not show legal notice to the defendant of the pendency of the suit.—*Id.*

**FOR CASES FROM OTHER STATES.**

SEE 17 CENT. DIG. Divorce, § 521.

See, also, 14 Cyc. p. 713.

**§ 161. — Opening or setting aside.****[a] (Sup. 1851)**

The provisions of Rev. St. c. 46, §§ 98, 99, that parties against whom a decree in chancery has been rendered may have such decree opened, and be let in to a hearing by publication in a newspaper within five years, are not applicable to suits for divorce.—*McJunkin v. McJunkin*, 3 Ind. 30.

**[b] (Sup. 1877)**

In an action by a widow to set aside a decree of divorce granted her husband in his lifetime, the complaint alleged that she had no notice of the divorce proceeding; that no summons had been issued for, or served upon, her; that she had not appeared to the action; and that the plaintiff had fraudulently filed with his complaint a paper, purporting to be signed by her, waiving the issue and service of summons. *Held* that, under the averments of the complaint, the court, in the divorce proceeding, had no jurisdiction of the defendant, and that the proceedings subsequent to the filing of a complaint therein were void.—*Willman v. Willman*, 57 Ind. 500.

[c] A widow brought an action against the heirs and devisees of her husband to set aside a judgment in a divorce proceeding brought by him during his lifetime, and seeking to be recognized as his widow, and allowed to contest the validity of his will. The complaint alleged that no summons was issued for or served upon her, nor was there any voluntary appearance by her in the divorce proceeding, and that the decree was obtained by the fraudulent act of the husband in filing with his complaint a paper, purporting to be signed by her, waiving the issue and service of summons. *Held*, on demurrer, that the complaint was sufficient.—*Id.*

**[d] (Sup. 1883)**

A decree of divorce obtained by fraud will be vacated in a direct proceeding.—*Earle v. Earle*, 91 Ind. 27.

While the courts have no power, under the statute, to review a decree of divorce, they may vacate and set aside such decree when the circumstances under which it was obtained render it void.—*Id.*

One who would vacate a decree of divorce obtained by fraud must act promptly. Many years' acquiescence after the discovery of the fraud, the party obtaining the divorce having in the meantime married again, will bar relief.—*Id.*

The provisions of the statutes in relation to opening decrees for defense in certain cases does not apply to decrees of divorce.—*Id.*

## [e] (Sup. 1888)

An application to set aside a decree of divorce made four years after plaintiff had been informed of the alleged fraudulent decree, no excuse being shown for the delay other than that proceedings to review the decree had been instituted, and an action brought to set it aside in another court, is properly denied; plaintiff being charged with knowledge of the law that proceedings to review or vacate a decree in divorce can only be brought in the court which made the decree.—*Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223.

## [f] (Sup. 1903)

Where it appears that the complainant in a divorce suit has died leaving considerable property, and it does not appear that she was possessed of the property when she obtained the divorce, the court will hesitate in setting the divorce judgment aside, as the only effect of such action will be to permit the defendant to inherit the property.—*Day v. Nottingham*, 66 N. E. 998, 160 Ind. 408.

The defendant in an action for divorce, who has notice by publication, is not entitled to have the judgment granting the divorce vacated for fraud on the part of the complainant in making affidavit that the place of his residence was unknown to her, where it appears that he is in fact a nonresident, and that the notice actually given him is such as the law prescribes.—*Id.*

The court will be extremely cautious in setting aside a divorce obtained on service by publication where the complainant in the divorce proceeding is dead or has remarried, though fraud in obtaining the divorce is alleged, and the application to set it aside must be timely made and must present a strong case of fraud.—*Id.*

Burns' Rev. St. 1901, § 1048, provides that, if it appear by the affidavit of a disinterested person that the defendant in divorce is a nonresident, the clerk shall give notice of the pendency of such petition by publication, etc. The affidavit, in an action by a wife for divorce, was made by herself instead of by a disinterested person. The husband afterwards instituted a proceeding to set aside the judgment of divorce, his complaint alleging that he was a nonresident. It appeared that the notice given him was in substantial compliance with the statute. *Held*, that he could not complain of the defect, if any, in the affidavit.—*Id.*

Burns' Rev. St. 1901, § 1042, which provides that parties against whom a judgment of divorce shall be rendered, without other notice than publication, may, within two years after judgment, have the same opened, and be allowed to defend as well on the granting of the divorce as in relation to the allowance of alimony and the disposition of property, has no application to a case where the party obtaining the divorce is dead at the time the application to open the judgment is made.—*Id.*

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Divorce, §§ 522-526.  
See, also, 14 Cyc. pp. 714, 715.

## § 162. On trial of issues.

## [a] (Sup. 1894)

Where, in divorce, there was a finding for plaintiff and one for defendant on her cross-complaint, a judgment giving both parties a divorce should have been arrested on motion.—*Alexander v. Alexander*, 38 N. E. 855, 140 Ind. 555.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 527.

## § 165. Opening or vacating.

Judgment or decree by default, see ante, § 161.

[a] The common-law right to set aside a judgment of a superior court by bill in chancery for fraud, or by a complaint in the nature of such a bill, has been superseded by the provisions of the statutes, so that judgments of divorce can only be set aside on a motion for a new trial made within the time allowed by statute.—(Sup. 1859) *McQuigg v. McQuigg*, 13 Ind. 294; (1860) *Hoffman v. Hoffman*, 15 Ind. 278; (1864) *Rindge v. Rindge*, 22 Ind. 35.

[b] It seems that the common-law practice will not be revived to supply an omitted case upon an application to set aside a decree for divorce and alimony; because the Code has special provisions for the case, and it is not in accordance with the usages, the practice, or the legislation in this state to disturb judgments of divorce for any cause.—(Sup. 1859) *Woolley v. Woolley*, 12 Ind. 663; (1864) *Rindge v. Rindge*, 22 Ind. 35.

Under 2 Rev. St. p. 48, § 99, a judgment for divorce and alimony cannot be set aside after the expiration of a year.—*Id.*

## [c] (Sup. 1865)

Code, § 99, providing for relieving a party from a judgment rendered against him through his mistake, inadvertence, surprise, or excusable neglect, and section 356, providing for granting a new trial within one year on cause shown, do not apply to decrees for divorce.—*Ewing v. Ewing*, 24 Ind. 468; *Id.*, 25 Ind. 155.

## [d] (Sup. 1888)

Judgments in divorce proceedings are subject to the same power of the court as to vacation or annulment as are judgments in other proceedings, save where there are special statutory restrictions.—*Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223.

## [e] (Sup. 1888)

Where a husband procured a petition for divorce to be filed in the name of his wife, who was ill at the time, and almost blind, and answered the complaint, the wife having no notice or knowledge of the proceedings for more than 20 years, the decree thus fraudulently ob-

tained will be annulled.—*Brown v. Grove*, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823.

[f] (*Sup.* 1894)

A judgment in divorce will not be disturbed unless there was fraud on the jurisdiction of the court.—*Keller v. Keller*, 139 Ind. 38, 38 N. E. 337.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 533-542, 546, 548.

See, also, 14 Cyc. pp. 715-722; note, 1 L. R. A. (N. S.) 551; note, 61 Am. Dec. 459.

#### § 167. Actions to vacate or set aside.

Grounds for new trial, see NEW TRIAL, § 105. Setting aside judgment by default, see ante, § 161.

[a] (*Sup.* 1883)

Where one against whom a decree of divorce had been obtained by fraud delayed in bringing any action to set it aside for fifty years after she knew of the fraud, and meanwhile the other party had remarried and had children by the second marriage, the decree would not be set aside; it having been regular and valid on its face.—*Earle v. Earle*, 91 Ind. 27.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 533-548.

See, also, 14 Cyc. pp. 721, 722.

#### § 168. Collateral attack.

Foreign divorces, see post, §§ 326, 327.

[a] (*Sup.* 1878)

A decree of divorce, though granted on an insufficient state of facts to constitute a cause of action, cannot, for that reason alone, be collaterally impeached.—*Ayers v. Harshman*, 66 Ind. 291.

[b] (*Sup.* 1882)

Where it is made to appear that there was no jurisdiction of the person in an action for divorce, judgment will not be simply erroneous, but absolutely void, and therefore subject to collateral attack.—*Cavanaugh v. Smith*, 84 Ind. 380.

[c] (*Sup.* 1888)

Where a decree of divorce remains in force, not being directly attacked, the defendant cannot sue for damages on the ground that the decree was obtained by fraud, and ought not to have been rendered; such decree being conclusive as to the right to the divorce until directly attacked.—*Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 549, 550.

See, also, 14 Cyc. pp. 722-724.

#### § 169. Construction and operation in general.

[a] (*Sup.* 1870)

In an action for divorce, the jury found that "there was an agreement before the suit to a separation, and we find that the plaintiff agreed to pay the defendant \$250, and we therefore find that the defendant is entitled to the above amount, and the defendant is to leave the place by the 1st day of February, 1869." *Held*, that a minute on the record reading "divorce decreed" should be construed as awarding a divorce only, and not to include any payment of money by the wife to the husband, and a vacation by the husband of the wife's premises.—*Hardy v. Kirtland*, 34 Ind. 365.

[b] (*Sup.* 1898)

A decree of divorce affirms the capacity of the parties to enter into the marriage contract.—*Walker v. Walker*, 50 N. E. 68, 150 Ind. 317.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 551.

See, also, 14 Cyc. pp. 727-729; note, 83 Am. St. Rep. 616.

#### § 172. Conclusiveness of adjudication.

Award of alimony, see post, § 253.

Award of custody of child, see post, § 302.

Foreign divorce, see post, § 326.

[a] (*Sup.* 1861)

Under the general chancery practice, a default in a divorce suit does not supersede the necessity of proof, or lighten the burden on the plaintiff to establish his case; but a default, acknowledgment, or consent for judgment is generally considered to settle the case as against the defendant, so that he cannot complain of any lawful disposition afterwards made of the case by the court.—*Scott v. Scott*, 17 Ind. 309.

[b] (*Sup.* 1888)

Where a husband procured a petition for divorce to be filed in the name of his wife without her knowledge, he filing an answer thereto, and the divorce is granted, the wife was not bound to know of the existence of the decree merely because it was of record.—*Brown v. Grove*, 18 N. E. 387, 116 Ind. 84, 9 Am. St. Rep. 823.

[c] (*Sup.* 1892)

A divorce, though procured pursuant to an agreement between the parties, is prima facie valid.—*Cook v. Claybaugh*, 29 N. E. 483, 130 Ind. 133; *Same v. Armstrong*, 29 N. E. 484, 130 Ind. 597.

[d] (*Sup.* 1898)

A decree for divorce as between the divorced parties conclusively settles the fact that they were duly married to each other.—*Walker v. Walker*, 50 N. E. 68, 150 Ind. 317.

## [e] (App. 1906)

A judgment for defendant in a suit by a wife for divorce and alimony on the ground of cruel treatment and habitual drunkenness is not res judicata of the issues in a subsequent action by the wife under Burns' Ann. St. 1901, §§ 6977, 6978, for separate support on the ground of desertion and neglect to provide by reason of drunkenness.—*Smith v. Smith*, 74 N. E. 1008, 35 Ind. App. 610.

## [f] (App. 1909)

After an adverse judgment an applicant for divorce cannot apply to another court, or for a change of judge, and try the same issues again.—*Yeager v. Yeager*, 43 Ind. App. 313, 87 N. E. 144.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 559-561.

See, also, 14 Cyc. pp. 726, 727; note, 65 Am. Dec. 355.

## § 174. Evidence of fact of divorce.

## [a] (Sup. 1883)

A transcript of record as follows: "April term, 1869, to wit: On the 28th of May, A. D. 1869, decree for divorce and custody of a child, and at the November term, 1869, of our said court, this cause continued, and at the January term, 1870, of our said court, this cause was continued, and at the April term, 1870, this cause is dismissed by the plaintiff, at her costs, taxed at —, which it is adjudged she pay,"—shows no valid decree of divorce; it being a mere memorandum, and not the entry of a decree.—*Teter v. Teter*, 88 Ind. 494.

## [b] (Sup. 1883)

A presumption of a divorce does not arise from a separation, however protracted; nor will the oral statements of husband or wife that they have been divorced constitute sufficient evidence of the fact.—*Wiseman v. Wiseman*, 89 Ind. 479.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 532.

## (G) APPEAL.

From judgment or order as to custody and support of children, see post, § 312.

From judgment or order for alimony, see post, §§ 278-286.

## § 176. Appellate jurisdiction.

Appellate jurisdiction as dependent on whether title to real property is involved, see COURTS, § 220 (13).

## [a] (Sup. 1839)

The discretion which the circuit courts are to exercise, under that part of the statute regulating divorces which, after the enumeration of specific causes of divorce, enacts that

the circuit courts shall have power to grant divorces "for any other cause or in any other case where the courts in their discretion shall consider it reasonable, and proper that a divorce should be granted," is subject to the revision of the supreme court on appeal or writ of error.—*Ritter v. Ritter*, 5 Blackf. 81.

## [b] (Super. 1872)

Appeal lies from the judgment of the court in exercising the discretion invested in it by the divorce act (2 Gav. & H. St. p. 351), authorizing the court to grant divorce for any cause for which it shall deem it proper that a divorce should be granted.—*Curry v. Curry*, Wills. 236.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 563.

## § 178. Right of review.

## [a] (Sup. 1871)

A defendant in a divorce suit cannot prosecute an appeal from a judgment of divorce after having contracted a second marriage.—*Garner v. Garner*, 38 Ind. 139.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 564.

See, also, 14 Cyc. pp. 731, 732.

## § 179. Presentation and reservation in lower court of grounds of review.

## [a] (Sup. 1899)

In an action for divorce, plaintiff's failure to show that the witnesses called on to prove her residence were resident freeholders and householders of the state is not waived by defendant's proceeding with the trial after plaintiff rested, and not calling the court's attention to the point at once, where the point was urged in the motion for a new trial.—*Driver v. Driver*, 54 N. E. 389, 153 Ind. 88.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 565.

## § 183. Record.

## [a] (Sup. 1866)

An objection that the record of a divorce suit fails to show any notice to defendant may be made on appeal, without any application to the court below for relief.—*Cochnower v. Cochnower*, 27 Ind. 253.

A record of a divorce decree, taken by default, containing the entry, "Comes now the plaintiff, and makes proof of publication in this cause," does not show any legal notice to defendant of the pendency of the suit, where the notice and proof are not in the record.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 569.

See, also, 14 Cyc. p. 733.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

**§ 184. Review.**

[a] (Sup. 1867)

To justify this court in reversing the judgment of the court below refusing a divorce, under the clause giving "discretionary power," a very clear case must be shown of an improper exercise of that power.—*Ruby v. Ruby*, 29 Ind. 174.

[b] (Sup. 1871)

The discretion vested in the circuit and common pleas courts by the seventh subdivision of the seventh section of the act concerning divorces is subject on appeal to revision by the Supreme Court.—*Tefft v. Tefft*, 35 Ind. 44.

[c] (Sup. 1871)

The court is not absolutely bound by the verdict of a jury in divorce cases, but may disregard the verdict and determine the case for itself.—*Leffel v. Leffel*, 35 Ind. 76.

[d] (Sup. 1884)

Where the evidence tends to sustain some of the material allegations of the complaint in a suit for divorce, the court's finding will not be disturbed for any supposed insufficiency of the evidence to sustain it.—*Metzler v. Metzler*, 99 Ind. 384.

[e] (Sup. 1887)

A decree granting or refusing a divorce, based on conflicting evidence, will be affirmed.—*Henderson v. Henderson*, 110 Ind. 316, 11 N. E. 432.

[f] (App. 1901)

Though the court in a suit for divorce for desertion and failure to support allows plaintiff to state that she could not be reconciled to live with defendant, it will be presumed that it did not grant the divorce on that account.—*Turner v. Turner*, 60 N. E. 718, 26 Ind. App. 677.

[g] (App. 1901)

On appeal from a decree granting a divorce on conflicting evidence, the court cannot disturb the decision of the trial court on the ground of insufficiency of evidence, unless it is shown to be erroneous by evidence which was uncontradicted.—*Barnett v. Barnett*, 61 N. E. 737, 27 Ind. App. 466.

[h] (App. 1906)

Much discretion is allowed to the trial court in actions for divorce, and the appellate court is not disposed to interfere with the trial court's exercise of its discretion in favor of the preservation of the family relation.—*Darman v. Darman*, 78 N. E. 89, 38 Ind. App. 279.

Where the parties are both young, and the alleged cruel treatment as shown by the evidence consisted of small disputes and bickerings caused largely by foolish and stubborn pride and by the husband's failure to make allowances for his young wife's weaknesses, refusal of the trial court to grant him a divorce will not be disturbed on appeal.—*Id.*

[i] (App. 1909)

A decision denying a divorce will not be disturbed on appeal, on the ground of insufficiency of evidence, unless there is a clear abuse of discretion by the trial court.—*Bacon v. Bacon*, 43 Ind. App. 218, 86 N. E. 1030.

[j] (App. 1910)

While all presumptions are to be indulged in favor of the action of the trial court and that the necessary jurisdictional facts were found, yet, where the record affirmatively shows that the residence of a petitioner in a divorce suit was not proven by at least two witnesses possessing the qualifications provided by the statute, there was no evidence to sustain an essential fact necessary to support the judgment.—*Emens v. Emeus*, 91 N. E. 747.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 570-573.

See, also, 14 Cyc. pp. 734-736.

**§ 185. Determination and disposition of cause.**

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 574, 575.

See, also, 14 Cyc. p. 737.

**§ 186. — In general.**

[a] The Supreme Court may upon appeal reverse a judgment granting a divorce.—(Sup. 1870) *Sullivan v. Sullivan*, 34 Ind. 368; (1871) *Garner v. Garner*, 38 Ind. 139.

[b] (Sup. 1896)

The reversal of a judgment for divorce vacates all orders of court made in pursuance of and to carry out the judgment.—*Alexander v. Alexander*, 140 Ind. 560, 40 N. E. 53.

By the reversal of a judgment of divorce, the relations of the parties are restored to their original condition as if no action for divorce had ever been given between them.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 574.

**§ 187. — Effect of marriage of party.**

[a] (Sup. 1875)

It is a good ground for the dismissal of an appeal to the supreme court from a decree of divorce that the appellant and another person, not the appellee, have intermarried since the rendition of the decree, and are still living together as husband and wife.—*Stephens v. Stephens*, 51 Ind. 542.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 575.

**(H) FEES AND COSTS.**

Allowance for counsel fees and expenses, see post, §§ 220-229.

**§ 189. Parties to and against whom costs may be awarded.**

[a] (Sup. 1867)

When divorce is decreed to the husband on his own petition, it is not error to render judgment against him for the costs of the suit.—Hedrick v. Hedrick, 28 Ind. 291.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 577.

See, also, 14 Cyc. pp. 738, 739.

**§ 192. Amount and items of costs.**

[a] (Sup. 1856)

Under 2 Rev. St. pp. 236, 237, § 17, an allowance to defend can only be made on a decree directly for or against the divorce, and not on a discontinuance.—Hart v. Hart, 11 Ind. 384.

[b] (Sup. 1859)

The court cannot tax an adult compos mentis, a party to a divorce suit, with a compensation for the services of an attorney appointed by the court for such party against his consent.—Chandler v. Chandler, 13 Ind. 492.

[c] (Sup. 1881)

2 Rev. St. 1876, p. 379, authorizing the court, on decreeing a divorce, to "require the husband to pay all reasonable expenses of the wife," includes her attorney's fees.—McCabe v. Britton, 79 Ind. 224.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 579.

See, also, 14 Cyc. p. 739.

**§ 196. Counsel fees and expenses of wife.**

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 582-584.

See, also, 14 Cyc. pp. 740, 741.

**§ 197. — Liabilities of husband wife.**

[a] (Sup. 1851)

In an application by the husband for a divorce, which is dismissed, he is not liable for the attorney's fees of his wife, without a promise to that effect.—McCullough v. Robinson, 2 Ind. 630.

[b] (Sup. 1871)

The state laws do not enable a married woman to make a contract for compensation of an attorney employed to conduct a divorce suit for her. The proper mode of securing the attorney's compensation is by an order in the divorce suit requiring the husband to pay a proper sum.—Cook v. Walton, 38 Ind. 228.

[c] (Sup. 1875)

A wife's contract with an attorney to pay him a certain sum to prosecute a suit for divorce is void because of the wife's coverture; and the rendering of the services and procuring a divorce, and the promise thereafter to pay the amount, does not validate the contract,—the

promise being without consideration.—Putnam v. Tennyson, 50 Ind. 456.

[d] (Sup. 1881)

Where, in a suit for divorce, the court makes a specific allowance and order against the husband for the fees of the wife's attorneys, such persons cannot enter a lien for fees beyond the amount fixed by the court.—McCabe v. Britton, 79 Ind. 224.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 582, 583;

26 CENT. DIG. Hus. & W. § 137.

See, also, 14 Cyc. pp. 740, 741.

**V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.**

Actions for separate maintenance, see HUSBAND AND WIFE, §§ 285-290.

Agreement to release alimony in consideration of remarriage as within statute of frauds, see FRAUDS, STATUTE OF, § 2.

Compromise of claim for alimony, see COMPROMISE AND SETTLEMENT, § 4.

Contracts between husband and wife as to alimony, validity, see HUSBAND AND WIFE, § 39.

Lis pendens, see LIS PENDENS, § 3.

Pleading partial defense in action by wife after divorce for support as consideration of deed, see PLEADING, § 80.

Reformation for agreement of alimony, see REFORMATION OF INSTRUMENTS, § 8.

**§ 199. Nature and form of remedies in general.**

[a] (Sup. 1825)

No court has original jurisdiction to grant alimony. It can be given only as incidental to a decree of divorce; and, if sufficient alimony be not granted by the court on decreeing a divorce, no other court can supply the deficiency.—Fischli v. Fischli, 1 Blackf. 360, 12 Am. Dec. 251.

[b] (Sup. 1867)

Adjusting alimony is not controlled by definite rules, and the determination in each case must depend upon its own circumstances and an enlightened sense of justice and public policy.—Hedrick v. Hedrick, 28 Ind. 291.

[c] (Sup. 1873)

The decree for alimony is an absolute personal judgment collectible by execution, belongs to the wife, and is in lieu and bar of her interest in the real and personal estate of her husband.—Musselman v. Musselman, 44 Ind. 1061.

[d] (Sup. 1884)

A decree for alimony is a personal judgment in the wife's favor in lieu of her interest as a wife in her husband's estate, and of the support which he is bound to provide.—Hills v. Hills, 94 Ind. 436.



## [e] (App. 1901)

Alimony must be adjudged in the divorce case, or not at all.—*Stanbrough v. Stanbrough*, 60 N. E. 714, 27 Ind. App. 25.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 585, 586, 721.

See, also, 14 Cyc. pp. 742-747.

### § 200. Power to make allowance or award.

## [a] (Sup. 1825)

Where a divorce was granted in Kentucky, at the suit of the wife, and the court granting the divorce decreed to her, as alimony, a certain sum of money, and the use of one-third of the lands of the husband, in Kentucky, for her life, it was held that no court in Indiana had jurisdiction to decree the wife any portion of the lands of the husband, in Indiana, in addition to what was allowed her in Kentucky.—*Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251.

## [b] (Sup. 1872)

On an appeal from a judgment in a proceeding for a divorce, the supreme court cannot, on the application of the wife, originally made to that court, order an allowance to the wife, to be paid by the husband, for her support and the support of her children during the pendency of the appeal.—*Kesler v. Kesler*, 30 Ind. 153.

## [c] (Sup. 1898)

The court has power in divorce cases to make necessary allowances to enable the wife to prepare for trial, and for her support during the pendency of the action.—*McCue v. McCue*, 49 N. E. 382, 149 Ind. 466.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 587-590, 658.

See, also, note, 86 Am. Dec. 657.

### § 201. Jurisdiction of person and property.

## [a] (Sup. 1863)

It is competent for the Legislature to authorize the courts of the state to render personal judgments for alimony, in divorce cases, upon constructive notice, against citizens of the state; but it cannot authorize such judgments, upon such notice, against the citizens of another state, unless the latter submit to the jurisdiction of our courts, by voluntarily appearing to such actions therein.—*Beard v. Beard*, 21 Ind. 321.

If a nonresident is constructively notified of the pendency of an action for divorce, no personal judgment for alimony rendered against him will be operative, unless made so by his voluntary appearance to the action.—Id.

## [b] (Sup. 1874)

A personal judgment for alimony rendered against the defendant in a cause where there has been no personal service of summons, but only constructive notice, and no appearance of the defendant in person or by attorney, cannot be made the foundation of an action by the party in whose favor it was rendered, or be filed and used as a claim under an attachment sued out by another person.—*Lytle v. Lytle*, 48 Ind. 200.

## [c] (Sup. 1881)

Title to real estate, derived through a purchase at sheriff's sale under a judgment for alimony and decree of divorce, rendered against the owner of such real estate upon notice of the action by publication only, is invalid as against such owner; and, in an action by him to recover the same, such judgment, execution, levy, and sale thereunder, and deed in pursuance thereof, are inadmissible.—*Sowers v. Edmunds*, 76 Ind. 123.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 591, 592.

See, also, 14 Cyc. pp. 745, 746.

### § 203. Sufficiency of allegations and prayers in pleadings.

## [a] (Sup. 1857)

A decree for divorce on account of the misconduct of the husband decreed that he pay alimony, and, until payment or security given, he be enjoined from selling his land in another county. There was no prayer in the complaint for such injunction. Held, that the injunction should not have been granted; 2 Rev. St. p. 123, § 380, providing that the relief granted to the plaintiff, if there be no answer, cannot exceed the relief demanded in his complaint.—*Rourke v. Rourke*, 8 Ind. 427.

## [b] (Sup. 1859)

Alimony will not be allowed, where it is not asked nor desired.—*Chandler v. Chandler*, 13 Ind. 492.

## [c] (Sup. 1884)

The subject of alimony is necessarily involved in every suit wherein a divorce is granted, though no alimony is asked for in the pleadings.—*Hills v. Hills*, 94 Ind. 436.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 594-596, 598.

See, also, 14 Cyc. pp. 746, 747.

### § 206. Injunction against disposition of property before award.

## [a] (Sup. 1830)

Pending a bill for a divorce by a wife against her husband, the court may make an order restraining the husband from conveying his property pending the bill; but such order

will not affect purchasers of him without notice of it.—*Frakes v. Brown*, 2 Blackf. 295.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 600-603.

See, also, 14 Cyc. p. 747.

**§ 208. Temporary alimony.**

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 605-641, 735-737.

See, also, 14 Cyc. pp. 748-760.

**§ 209. — Nature and right in general.**

[a] (Sup. 1873)

On granting a decree of divorce to the wife or refusing one to the husband, the court should make an allowance to the wife to pay all her reasonable expenses in the suit.—*Musselman v. Musselman*, 44 Ind. 106.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 605-609.

See, also, 14 Cyc. p. 748; notes, 19 L. R. A. 811, 62 L. R. A. 974.

**§ 211. — Discretion of court.**

Review, see post, § 286.

[a] (Sup. 1877)

It is not imperative upon the court, in an action for divorce, where the custody of a minor child of the parties is granted to the wife, to decree an allowance to the wife, from the husband, for its support.—*Conn v. Conn*, 57 Ind. 323.

[b] (Sup. 1882)

A motion to require defendant in divorce to pay plaintiff's expenses in the prosecution of the suit was addressed to the sound discretion of the court, and no agreement that she could make with her attorneys could have any binding force as to how much should be allowed.—*Corey v. Corey*, 81 Ind. 469.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 613.

See, also, 14 Cyc. p. 749.

**§ 213. — Defenses and objections.**

[a] (Sup. 1861)

If the wife, being defendant, admits of record the charges in the complaint entitling the plaintiff to a divorce, she deprives herself of any right to an order for alimony pending the proceedings.—*Scott v. Scott*, 17 Ind. 309.

[b] (Sup. 1898)

On an application for temporary alimony defendant's offer to support plaintiff if she would return to his home should be disregarded where, under the allegations of the complaint, if true, plaintiff had the right to abandon such home.—*McCue v. McCue*, 49 N. E. 382, 149 Ind. 466.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 619-624.

See, also, 14 Cyc. pp. 754, 755.

**§ 214. — Application and proceedings thereon.**

[a] (App. 1902)

Permitting plaintiff in a divorce suit to give oral testimony in support of her application for alimony, after having supported such application by affidavit, was not error.—*Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 626-631.

See, also, 14 Cyc. p. 756.

**§ 215. — Amount.**

[a] (Sup. 1890)

Rev. St. 1881, § 1042, gives the court discretionary power to allow alimony and counsel fees pendente lite. After an order for \$100 for such purpose had been made, the court reduced the allowance to \$50. Defendant's affidavits alleged that plaintiff was of unsound mind; that her charges against him were wholly imaginary; and that she had property of her own. Held, that the allowance of \$50 was not an abuse of judicial discretion, since the case could not be decided on its merits on such affidavits, and the plaintiff's property, if she were of unsound mind, would not be available for raising money.—*Gruhl v. Gruhl*, 123 Ind. 86, 23 N. E. 1101.

[b] (Sup. 1895)

Where the evidence on motion for an allowance for the maintenance of the wife and for her attorney's fees shows the wife's property to consist only of a \$50 note, of doubtful value, and realty in a foreign state, valued at \$1,200, which is subject to a tax lien, it is not an abuse of discretion to direct the payment by the husband of \$4 a week allowance, and \$20 for attorney's fees; the wife not being in a position to raise money soon enough to make her defense.—*Sellers v. Sellers*, 141 Ind. 305, 40 N. E. 699.

[c] (Sup. 1898)

In determining the amount of an allowance for temporary alimony it was the duty of the court to take into consideration the nature of the charges in the complaint for divorce as well as the allegations of the answer.—*McCue v. McCue*, 49 N. E. 382, 149 Ind. 466.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 632-634.

See, also, 14 Cyc. p. 756.

**§ 216. — Order.**

Appealability, see APPEAL AND ERROR, § 73.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 635, 636.

See, also, 14 Cyc. pp. 759, 760.

**§ 220. Allowance for counsel fees and expenses.**

Counsel fees and expenses of wife as costs, see ante, §§ 196, 197.

Counsel fees as necessities for which husband is liable, see **HUSBAND AND WIFE**, § 19.  
Liability of married woman on contract of employment of attorney to procure divorce, see **HUSBAND AND WIFE**, § 82.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Divorce, §§ 642-657.  
See, also, 14 Cyc. pp. 761-766.

### § 222. — Condition of cause.

[a] (App. 1892)

Under Rev. St. 1881, § 1042, which vests in the court, "pending a petition for divorce," power in its discretion to require the husband to pay such sum as will enable the wife to prepare her case for trial, an order may be made requiring him to pay her attorneys for services already rendered, although the parties become reconciled, and the action is dismissed.—*Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914.

[b] (Sup. 1895)

Rev. St. 1881, § 1042 (Rev. St. 1894, § 1054), provides that pending a petition for divorce the court may make such orders relative to the expenses of such suit as will insure to the wife an efficient preparation of her case, and a fair trial thereof. *Held*, that the court may, in its discretion, make an allowance to the wife proportionate to the means of the husband, and, after a finding for defendant husband, may set aside a judgment improvidently entered, and make an allowance for expenses incurred.—*Davis v. Davis*, 141 Ind. 367, 40 N. E. 803.

The words "pending a petition for a divorce," as used in the statute authorizing the allowance of suit money to a wife, means that period of time intervening between the commencement of the action and the rendition of the final judgment of the lower court.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 644.  
See, also, 14 Cyc. p. 761.

### § 225. — Defenses and objections.

[a] (Sup. 1866)

Where the wife has sufficient funds or credit for the purposes of her defense to a suit for divorce and present support, the husband cannot be required to furnish money for such purposes pending the action.—*Kenemer v. Kenemer*, 26 Ind. 330.

[b] (Sup. 1899)

*Burns'* Rev. St. 1894, § 1054, authorizes a court, pending a petition for divorce, to make such orders relative to the expenses of such suit as will insure the wife a sufficient preparation of her case, and provides that the court shall, on refusing a husband's application for divorce, require him to pay his wife's reasonable expenses in defending such action. *Held*, that where a wife obtained a temporary allowance to enable her to defend, and subsequently agreed

to withdraw her petition therefor on the husband's agreement to pay the same, the husband was not entitled to have the wife's subsequent motion for an allowance for counsel fees at the close of the evidence on the trial stricken out on the ground that the motion was in violation of the written agreement, since such agreement related to a temporary allowance pending action only.—*Hilker v. Hilker*, 55 N. E. 81, 153 Ind. 425.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 647-650.  
See, also, 14 Cyc. p. 762.

### § 227. — Amount.

[a] (Sup. 1872)

During the pendency of a proceeding for a divorce, the wife filed an affidavit that her husband was the owner of real estate of the value of \$6,000 and personal property worth \$800, and that she had no money or property to enable her to prepare her case for trial. *Held*, that it was proper for the court to order the payment, by her husband, into the clerk's office, of \$100 for her use.—*Harrell v. Harrell*, 39 Ind. 185.

[b] (Sup. 1899)

Since the amount of counsel fees allowed a wife in a divorce suit under *Burns'* Rev. St. 1894, § 1054, requiring the court to order her expenses of suit to be paid by the husband where his application for divorce has been refused, is within the trial court's discretion, the appellate court will not set aside an allowance of \$150 for counsel fees, where the record shows that 37 witnesses were examined at the trial, which occupied two days, exclusive of argument.—*Hilker v. Hilker*, 55 N. E. 81, 153 Ind. 425.

[c] (App. 1901)

The fact that the plaintiff in an action for divorce was a childless second wife does not affect the amount of alimony to which she is entitled, where a judgment is rendered in her favor.—*De Ruiter v. De Ruiter*, 62 N. E. 100, 28 Ind. App. 9, 91 Am. St. Rep. 107.

*Burns'* Rev. St. 1901, § 1054, provides that in decreeing a divorce to the wife the court shall order the husband to pay all reasonable expenses of the wife in the prosecution of the suit. *Held*, that an allowance of \$500 attorney's fees in an action for divorce was not excessive, though the wife owned property worth \$2,500, which was incumbered for \$600.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 653, 654.  
See, also, 14 Cyc. pp. 764, 765.

### § 228. — Order.

[a] (Sup. 1881)

When, in an action for divorce, the court has determined the reasonable amount for the wife's attorney fees, the determination is conclusive on all concerned, parties and attorneys.—*McCabe v. Britton*, 79 Ind. 224.

[b] (Sup. 1898)

An allowance to meet expenses of the wife in a suit for divorce, including solicitor's fees, should be to her and in her name, and not in favor of her solicitor or in his name.—*Garrison v. Garrison*, 50 N. E. 383, 150 Ind. 417.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 655.

See, also, 14 Cyc. p. 766.

**§ 229. — Modification, vacation, or setting aside of order.**

[a] (Sup. 1895)

The trial court in a divorce suit was justified on a proper showing to make additional allowances during the progress of the action.—*Davis v. Davis*, 40 N. E. 803, 141 Ind. 367.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 656.

See, also, 14 Cyc. p. 766.

**§ 230. Permanent alimony.**

Foreign divorces, see post, § 331.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 658-700, 733, 736.

See, also, 14 Cyc. pp. 767-788.

**§ 231. — Nature and right in general.**

[a] (Sup. 1818)

Alimony is a term generally used to denote the portion allotted to a divorced wife out of her husband's property.—*Kinney v. Kinney*, 1 Blackf. 481.

[b] A wife, though not herself entitled to a divorce, may have alimony when a divorce is decreed against her.—(Sup. 1865) *Cox v. Cox*, 25 Ind. 303; (1866) *Coon v. Coon*, 26 Ind. 189; (1867) *Hedrick v. Hedrick*, 28 Ind. 291.

[c] (App. 1909)

A claim for alimony rests upon the common-law obligation of the husband to support his wife during the existence of their marriage, and he is not relieved from the obligation after a marital offense which entitles the wife to a divorce, and judgment for alimony.—*Rogers v. Rogers*, 89 N. E. 901.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 658 661, 664.

See, also, 14 Cyc. pp. 767, 771.

**§ 236. — Stipulations and agreements of parties.**

[a] (Sup. 1868)

A wife agreed, pending a divorce suit wherein alimony was granted to her, to take certain lands of the husband in satisfaction of the alimony, and the deed was delivered to the agent of the wife in satisfaction of the judgment. *Held*, that it was not essential to the validity of the agreement that it should be

ratified by the wife after judgment.—*Dutton v. Dutton*, 30 Ind. 452.

[b] (Sup. 1877)

Alimony being incidental to a divorce, it can be obtained only by a decree of court upon the granting of a divorce; and an agreement by the husband pending a divorce suit, to pay a stipulated sum as alimony, without the sanction of a decree granting a divorce, is a mere voluntary act of the husband, which can neither be enforced nor reformed in an action therefor by the wife.—*Moon v. Baum*, 58 Ind. 194.

[c] (App. 1906)

A decree of divorce not only terminates the marital relation, but property rights growing out of the marriage relation are included in the proceedings and there settled, regardless of any contract the parties may have made in contemplation of marriage.—*Watson v. Watson*, 77 N. E. 355, 37 Ind. App. 548.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 666, 667.

See, also, 14 Cyc. pp. 770, 771; note, 2 L. R. A. (N. S.) 241.

**§ 237. — Grounds.**

[a] (Sup. 1895)

In awarding alimony, it is proper for the trial court to consider the conduct of the defendant towards his wife, his income, and his ability to earn money.—*Gussman v. Gussman*, 140 Ind. 433, 39 N. E. 918.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 668, 669.

**§ 238. — Defenses and objections.**

[a] (Sup. 1892)

Where a wife promiscuously commits adultery, and leaves her husband to live with her paramour, her husband, on being granted a divorce, need not pay alimony.—*Spaulding v. Spaulding*, 133 Ind. 122, 32 N. E. 224, 36 Am. St. Rep. 534.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 670-672.

**§ 239. — Application and proceedings thereon.**

[a] (Sup. 1883)

In a divorce case on the question of alimony, there was evidence that, after the separation, the husband lived with his father, and was engaged in farming about 300 acres of land, but whether as a hired man, tenant, or partner did not appear. *Held*, that it was not error to admit evidence that his father owned such land.—*Logan v. Logan*, 90 Ind. 107.

[b] (Sup. 1884)

Where a cross petition is filed by a wife, asking for a divorce and alimony, the burden of proof as to the alimony is on her.—*Glasscock v. Glasscock*, 94 Ind. 163.

[c] (App. 1898)

While it is proper in a divorce case, on the question of alimony, to consider the wife's separate property, it is only to determine what would be a fair allowance to the wife out of the husband's property.—*Fredericks v. Sault*, 49 N. E. 909, 19 Ind. App. 604.

[d] (App. 1902)

Permitting plaintiff in a divorce suit to give oral testimony in support of her application for alimony, after having supported such application by affidavit, is not a proper subject of an assignment of error to an order denying a new trial.—*Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 673, 674, 683.

See, also, 14 Cyc. pp. 772-776.

#### § 240. — Amount.

Modification of judgment or decree, see post, § 245.

[a] (Sup. 1847)

A complaint for divorce by the husband charged the wife with adultery and other misconduct. The answer denied the charge, and alleged that the husband had received personal property belonging to the wife of the value of \$200. The court decreed a divorce, and provided by the decree that the husband should pay to the wife \$100 in certain payments. *Held*, that the allowance was proper.—*Fulk v. Fulk*, 8 Blackf. 561.

[b] (Sup. 1854)

In a case of divorce, it appeared, at the trial, that the husband was worth between \$4,000 and \$5,000, and had been guilty of grossly improper conduct and habitual abuse and cruelty. *Held* that, on a decree of divorce, \$1,180 was not excessive alimony.—*Rudman v. Rudman*, 5 Ind. 63.

[c] (Sup. 1857)

In a suit for divorce and alimony on the ground of the husband's habitual drunkenness and cruel treatment, the complaint alleged that defendant owned 80 acres of land worth \$2,000, and that he had no personal property except what plaintiff brought him by marriage, and that plaintiff owned 40 acres of land in her own right. *Held*, that a decree for alimony in the sum of \$850,—\$200 to be paid within 6 months, and \$200 within 18 months, and \$450 within three years,—was excessive.—*Rourke v. Rourke*, 8 Ind. 427.

[d] (Sup. 1865)

In a suit by the wife for divorce and alimony, evidence of the value of the wife's separate property is admissible, and should be considered, in connection with the value of the husband's property, in fixing the amount of alimony.—*Morse v. Morse*, 25 Ind. 156.

[e] (Sup. 1866)

In a suit for divorce, it appeared that it was a second marriage on the part of the husband, who had a family of children by his previous marriage, and at the time of his second marriage, and for some time afterwards, he had also as members of his family an idiotic sister-in-law, and a helpless son, who was subject to fits, to be attended and cared for. The children used abusive and insolent language to the second wife, who was cross, ill-natured, and of a turbulent disposition. They lived together nearly three years, when she abandoned her husband. His property amounted in value to \$2,500. *Held*, that an allowance of \$250 alimony to the wife was not an abuse of the discretionary power of the trial court.—*Coon v. Coon*, 26 Ind. 189.

[f] (Sup. 1866)

In a suit for divorce, it appeared that the parties had both been married before, and that each had real property and had also children by their former marriages, and none by the marriage sought to be dissolved and which had existed only about three years. The property of the husband amounted in value to about \$10,000. It was not shown that the wife contributed during the three years she resided with her husband to increase his resources. The income from her property did not go into the common fund. *Held*, that an allowance of \$1,500 alimony to the wife was not an abuse of discretion.—*Kenemer v. Kenemer*, 26 Ind. 330.

[g] (Sup. 1867)

Where parties having two children were divorced, and each allowed the custody of one, and the husband owned property to the amount of \$13,000, *held*, that the court would not disturb an allowance of alimony of \$3,500 as unreasonable.—*Hedrick v. Hedrick*, 28 Ind. 291.

[h] (Sup. 1867)

An adulteress is not entitled to the same alimony as against a husband who is faultless, whose advanced years have disabled him from earning a livelihood, and whose whole estate is but a scanty provision for his own support, as a virtuous wife without fault against a husband whose fault entitles her to claim a divorce.—*Conner v. Conner*, 29 Ind. 48.

Where a divorce was granted to a husband for the adultery of the wife,—three several acts with as many men within a period of one year,—and she had charged him, in a cross petition, with incest with their youngest daughter, of infirm mind, but had failed to prove it, it was *held* that an allowance of \$433 for alimony—an amount equal to one-third of his estate—was excessive, although the infirm daughter had been given to her charge; and the allowance was changed to \$150.—*Id.*

[i] (Sup. 1870)

Where, in an action by a husband for divorce, in which a cross complaint was filed by the wife, each alleging cruel treatment, the evidence showed that the husband was most in

fault, and that he owned property of the value of more than \$30,000, an allowance of \$2,000 alimony to the wife, who was also given the care and custody of her infant child, was insufficient and unjust, and should be increased to \$5,000, with an additional allowance for the support of the child.—*Hyatt v. Hyatt*, 33 Ind. 309.

[j] (Sup. 1871)

Where there is an estate of \$20,000 accumulated by the joint efforts of the husband and wife, where a divorce is granted for the misconduct of the husband, alimony to the extent of one-fourth of the estate is not unreasonable.—*Bush v. Bush*, 37 Ind. 184.

[k] (Sup. 1873)

Where the amount allowed as alimony on the decree of divorce is not quite equal to one-third the value of the husband's property, alimony cannot be regarded as excessive.—*Musselman v. Musselman*, 44 Ind. 106.

Where the wife, by her industry and economy, has contributed to the accumulation of her husband's property, and the divorce has been granted on account of the latter's misconduct, the rule, in granting alimony, is that she should not be placed in a worse condition than if she survived him.—Id.

[l] (Sup. 1881)

The husband's estate was worth \$7,000, and consisted largely of a farm of 120 acres. Alimony of \$4,000 was allowed, but no provision was made for the maintenance and education of a minor child, the custody of which had been awarded to the mother. *Held*, that this allowance was excessive by \$1,500.—*Graft v. Graft*, 76 Ind. 136.

[m] (Sup. 1881)

Upon a suit for divorce, it appeared that the husband was worth \$2,500, but that the wife had denied him conjugal privileges without reason. *Held*, that \$100 was sufficient alimony.—*Tumbleson v. Tumbleson*, 79 Ind. 558.

[n] (Sup. 1882)

There was no error in refusing to give a wife greater alimony, where she had received since her marriage more than she contracted for by the antenuptial agreement.—*Corey v. Corey*, 81 Ind. 469.

[o] (Sup. 1883)

In an action for divorce, it is not error for the court, on the issue as to the amount to be allowed for alimony and the support of a minor child, to fail to limit the testimony in relation to the amount of the property of the husband to that owned by him at the date of the beginning of the action, but it was proper to permit evidence of the amount owned at the time of the separation.—*Logan v. Logan*, 90 Ind. 107.

In allowing alimony, the court, in addition to considering the amount of the husband's

property, may consider his ability to earn money.—Id.

Where, in an action for divorce, on the question as to the amount to be allowed for alimony, it appeared that the husband was working for his father on the father's land under some agreement with the father which was not shown, it was not error to permit testimony as to the amount of land owned by the father; evidence as to the value of the land being excluded.—Id.

[p] (Sup. 1884)

When a divorce is granted the wife for the husband's fault, an allowance of alimony of \$1,500, out of property amounting to \$3,500, is not excessive.—*Metzler v. Metzler*, 99 Ind. 384.

[q] (Sup. 1891)

Where the custody of two minor children is awarded to the wife, and the husband has \$2,200 worth of property above his debts, in the purchase of which he used \$300 of his wife's money, an allowance of \$1,100 as alimony is not excessive.—*Hedrick v. Hedrick*, 128 Ind. 522, 26 N. E. 768.

For the purpose of determining the amount of alimony to be awarded it is proper to show the amount of pension money which the husband receives.—Id.

[r] (Sup. 1895)

Rev. St. 1894, § 1057 (Rev. St. 1881, § 1045), provides that the court shall give such alimony as the circumstances render proper; and section 1054 (section 1042) provides that, pending divorce, the court may make such orders as to the expenses as will insure the wife an efficient preparation of her case, and, on decreeing a divorce in favor of the wife, shall require the husband to pay all reasonable expenses of the wife. *Held*, in divorce where the wife prevailed, that it was error to allow only \$100 for alimony, counsel fees, and reasonable expenses, where the defendant's property, accumulated before marriage, was valued at about \$3,000, and the parties were married 9 years, were respectively, 65 and 68 years old, and the wife was without any other means of support.—*Yost v. Yost*, 141 Ind. 584, 41 N. E. 11.

[s] (Sup. 1898)

In an action for divorce, evidence was given in behalf of the wife that she was destitute, and owned no property except a house, valued at \$400, and \$10 balance on some property, not yet due; that the monthly income from the house was little more than enough to pay for repairs and taxes thereon; that she is unable to work; that defendant owned property to the value of several thousand dollars, and was able to pay such sum as was necessary to support plaintiff during the litigation. *Held* sufficient to sustain the making of an order allowing plaintiff \$100.—*McCue v. McCue*, 49 N. E. 382, 149 Ind. 466.

## [t] (App. 1901)

Where defendant's real estate was worth \$20,000, a judgment for \$4,000 alimony in an action for divorce is not excessive.—*De Ruiter v. De Ruiter*, 62 N. E. 100, 28 Ind. App. 9, 91 Am. St. Rep. 107.

## [u] (App. 1903)

Under Burns' Rev. St. 1901, § 1057, providing that in awarding alimony the court shall make such decree as the circumstances shall render just, the court may properly consider not only the value of the husband's estate, but also his income, the value of the wife's separate property, and the conduct of the husband toward the wife.—*Stutsman v. Stutsman*, 66 N. E. 908, 30 Ind. App. 645.

In a suit by a wife for divorce on the ground of abandonment, it appeared that the husband abandoned the plaintiff because he suspected her of unchastity, and the evidence was conflicting as to the foundation for such suspicion. At the time of trial the husband was earning from \$40 to \$50 a month, and was a substitute letter carrier in line of promotion to a position which would pay \$50 a month. He also owned a small tract of land of the value of about \$50. *Held*, that a judgment for \$1,000 alimony was excessive, and should be reduced to \$500.—*Id.*

## [v] (App. 1906)

The amount of alimony to be allowed is largely within the discretion of the trial court.—*Watson v. Watson*, 77 N. E. 355, 37 Ind. App. 548.

Where, on the granting of a divorce to a wife, it appeared that her property amounted to only \$550, while that of the husband was worth from \$6,000 to \$7,000, an award of \$600 alimony was not excessive.—*Id.*

## [w] (App. 1910)

In a divorce proceeding in which divorce was granted the wife on a cross-bill, evidence *held* sufficient to sustain an award of \$3,000 as alimony.—*Boggs v. Boggs*, 90 N. E. 1040.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 675-678, 680.

See, also, 14 Cyc. pp. 772-779; note, 4 L. R. A. (N. S.) 909.

## § 241. — Award of gross sum.

## [a] (Sup. 1853)

The court may direct alimony to be paid by installments; also, that any part be made payable in a shorter period than that allowed by law for the stay of execution.—*Houston v. Houston*, 4 Ind. 139.

## [b] (Sup. 1868)

Under 2 Gav. & H. St. § 22, the court may give a reasonable time for the payment of alimony by installments, on sufficient surety being given.—*Ifert v. Ifert*, 29 Ind. 473.

## [c] (Sup. 1884)

A decree for alimony must be for a sum in gross, though a reasonable time for the payment thereof by installments may be given.—*Hills v. Hills*, 94 Ind. 436.

## [d] (Sup. 1904)

An order in a suit for divorce directing defendant to pay to the clerk for the support of plaintiff the sum of \$4 a week until further order of the court, was in violation of Burns' Rev. St. 1901, § 1059, providing for a sum in gross.—*Marsh v. Marsh*, 70 N. E. 154, 162 Ind. 210.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 679, 680, 690.

See, also, 14 Cyc. pp. 777-779.

## § 242. — Award of specific property.

## [a] (Sup. 1855)

As 2 Rev. St. 1852, p. 237, § 22, enacts that alimony shall be for a sum in gross, the court has no authority, in granting a divorce to a wife, to set off to her any part of her husband's real estate.—*Rice v. Rice*, 6 Ind. 100.

A suit for divorce on behalf of the wife was submitted to a jury for trial, who returned a verdict in favor of the divorce, and who also ascertained the value of the husband's real estate and set off one-third of it to the wife. A decree was entered in accordance with this verdict. On appeal, that part of the decree was reversed which set off the real estate, and the cause remanded to the court below with instructions to decree one-third the net value of the real estate as alimony.—*Id.*

Alimony can only be allowed to the wife in money.—*Id.*

## [b] (Sup. 1855)

Under the statute, a decree for alimony must be of a sum in gross, and a decree awarding to the plaintiff certain property of the defendant by way of alimony is erroneous.—*Green v. Green*, 7 Ind. 113.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 681, 682.

See, also, 14 Cyc. pp. 780, 781.

## § 243. — Judgment or decree.

## [a] (Sup. 1825)

Under St. 1813, p. 119, and St. 1823, p. 156, in rendering a decree for alimony, the court may take into view the whole property of the husband wherever it may be. The allowance may be made by a decree in favor of the wife for a gross sum or for an annuity, which decree would give her an incontrovertible demand against the husband wherever he or his property might be found; or it may be made by giving her a sufficient part of her husband's property within the state.—*Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251.

## [b] (Sup. 1849)

On a proceeding for divorce by a wife for the misconduct of the husband, the court has not power to decree alimony in lieu of dower so as to devert her right of dower.—*Russell v. Russell*, 1 Ind. 510, Smith, 356.

## [c] (Sup. 1857)

Complainant applied for divorce and alimony, and alleged for causes habitual drunkenness, cruel treatment, and neglect to make provision for support. She alleged that her husband owned land in Miami county worth \$2,000, and had no personal property except what she brought him; that she owned 40 acres of land; that she had a child by a former husband, and that defendant had no children. She prayed for divorce and alimony. The defendant was defaulted. Divorce was decreed, and the husband ordered to pay as alimony \$850, in three installments, if surety should be given within 30 days; if not, execution to issue for the whole amount; and, until payment or surety given, the defendant was enjoined from selling his land in Miami county. On appeal, this court held that the order, though conditional, was good under the statute.—*Rourke v. Rourke*, 8 Ind. 427.

## [d] (App. 1910)

Where a decree for divorce provides for alimony payable in installments, and directs that if judgment is not stayed or security given for the payment thereof within 30 days the full amount shall be due, etc., the judgment is not erroneous because not showing the kind of security or by whom it is to be approved, since *Burns' Ann. St.* 1908, §§ 732, 733, provides how bail or stay of execution may be taken, prescribes the class of securities, and who shall approve the same.—*Boggs v. Boggs*, 90 N. E. 1040.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 684-686.  
See, also, 14 Cyc. pp. 782-788.

## § 244. — Security for payment.

## [a] (Sup. 1857)

A decree for divorce on account of the misconduct of the husband decreed that he pay as alimony \$850,—\$200 within 6 months, \$200 within 18 months, and \$450 within 3 years, if security should be given by defendant within 30 days; if not, execution to issue for the whole amount,—and, until payment or security given, defendant was enjoined from selling his land in another county. *Held*, that the order should have been more specific, by describing the nature of the security, and directing how it should be approved.—*Rourke v. Rourke*, 8 Ind. 427.

A decree for divorce on account of the misconduct of the husband decreed that he pay alimony, and until payment or security given he be enjoined from selling his land in another county. *Held* that, though the land lay in another county, the court had power to grant the injunction.—*Id.*

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Divorce, §§ 687, 688.  
See, also, 14 Cyc. p. 783.

## § 245. — Modification of judgment or decree.

## [a] (Sup. 1843)

After a final decree of divorce, the court has no power to enter an order for the payment of an additional sum to the wife in case of an appeal from the decree.—*Martin v. Martin*, 6 Blackf. 321.

## [b] (Sup. 1852)

Upon a bill to revise a decree for alimony on the ground of its inadequacy, the complaint showed that the divorce was granted on the complainant's petition, though for no fault of the husband, that the alimony was in conformity with her request at the time, and that she was permitted to retain all the property she had brought to her husband, and other sums which appeared to have been a liberal allowance. It did not allege that the husband had refused to make further allowances, but stated that further allowances made by him are small in amount, and accompanied by admissible conditions, without stating the amount or conditions. *Held*, that a demurrer to the bill was rightly sustained.—*Gregg v. Gregg*, 3 Ind. 305.

## [c] (Sup. 1894)

Under Rev. St. 1881, § 615 (Rev. St. 1894, § 627), providing that "no complaint shall be filed for the review of a judgment for a divorce," no complaint can be filed for a review of a judgment of attachment in aid thereof, to decree alimony against defendant's property.—*Keller v. Keller*, 139 Ind. 38, 38 N. E. 337.

## [d] (App. 1902)

A decree of divorce awarding alimony is final on the facts as they existed at the time of the decree, and can only be modified by reason of a change of conditions.—*Tobin v. Tobin*, 64 N. E. 624, 29 Ind. App. 382.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 691-695.  
See, also, 14 Cyc. pp. 784-788.

## § 248. Disposition of property.

Award of specific property as permanent alimony, see ante, § 242.  
Foreign divorces, see post, § 331.  
Property not disposed of by judgment or decree, see post, § 322.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 701-721.  
745.  
See, also, 14 Cyc. pp. 789-793.

## § 249. — Rights in general.

Division of property, see post, § 252.

## [a] (Sup. 1850)

When a divorce has been granted on account of the misconduct of both parties, the wife cannot afterwards claim dower in the



husband's lands, under Rev. St. 1843, p. 604, § 57.—*Cunningham v. Cunningham*, 2 Ind. 233.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 701-705, 707, 709, 710, 712.

See, also, 14 Cyc. pp. 789, 790.

**§ 252. — Division of property.**

[a] (Sup. 1895)

In an action for divorce, the court has no authority to make a division of lands between the parties which are held by them as tenants in the entirety.—*Alexander v. Alexander*, 140 Ind. 560, 40 N. E. 55.

Unless a husband and wife by their own voluntary deeds choose to convey to one another the lands held by them in such manner as they deem best with a view to an equitable division of their property, the court could not, by the aid of a commissioner or otherwise, make such provisions for them as an accompaniment of divorce proceedings.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 713-715.

See, also, 14 Cyc. p. 792; note, 34 L. R. A. 110.

**§ 254. — Judgment or decree.**

[a] (Sup. 1870)

A decree granting a divorce, and adjudging that the wife pay to the husband a certain sum, and that he vacate certain lands owned by her, cannot be rendered, since the husband is not entitled to alimony.—*Hardy v. Kirtland*, 34 Ind. 365.

[b] (Sup. 1896)

A judgment of divorce settles all questions of the right of the divorced wife to a provision by way of alimony. Such a decree is in lieu and a bar of her interest in the real estate of her husband. Such a decree settles all questions concerning property rights growing out of the marital relation, though the property of the wife is not affected by the decree.—*Fletcher v. Monroe*, 43 N. E. 1053, 145 Ind. 56.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 718-721.

See, also, 14 Cyc. p. 793.

**§ 255. Conclusiveness of adjudication.**

[a] (Sup. 1867)

In an action to recover the value of certain improvements on land, it appeared that during marriage plaintiff erected a building on land belonging to his wife, under an agreement that he should receive the rents until reimbursed for his expenditures. Afterwards, and before he had received any rents, the wife applied for and obtained a divorce. *Held*, that the claim of the husband on account of the improvements will be presumed to have been merged in the alimony in the divorce suit.—*Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345.

[b] (Sup. 1879)

B. was fraudulently persuaded by his wife and her paramour to convey certain lands to her through a trustee. B. and wife afterwards sold the lands to H., who executed to her his notes for the purchase money, and a mortgage to secure the same; whereupon she eloped with her paramour, taking with her the notes and mortgage. In an action by an assignee to collect the notes and foreclose the mortgage, *held*, that an answer and counterclaim were sufficient which set up a decree of divorce in B.'s favor, adjudging the notes and mortgage to be in equity B.'s, and enjoining H. from paying them to her or her assigns.—*Ayers v. Harshman*, 66 Ind. 291.

[c] (Sup. 1882)

Where a judgment for alimony is obtained against a nonresident without notice, and on a false return of service of process procured by the fraud of plaintiff, the judgment is void, and may be attacked collaterally.—*Cavanaugh v. Smith*, 84 Ind. 380.

[d] (Sup. 1884)

A decree of divorce precludes the wife from subsequently maintaining a suit to enforce an antenuptial contract, though the divorce was granted in her favor; it being presumed that all questions of property were adjudicated in the divorce suit.—*Behrley v. Behrley*, 93 Ind. 255.

[e] (Sup. 1888)

A wife having deposited funds with a bank, claiming them as her own, a subsequent decree of divorce, and a judgment in an action by the husband against the wife after divorce adjudging the funds to belong to the wife, are each conclusive as to the title, and constitute a perfect defense to an action by the husband against the bank for the same funds.—*Glaze v. Citizens' Nat. Bank of Crawfordsville*, 116 Ind. 492, 18 N. E. 450.

[f] (Sup. 1891)

There is no question of property rights between the husband and wife in a suit by the wife to reform a deed in which a provision for the support of the wife was fraudulently omitted, and it is not barred by a decree in favor of the wife, for a divorce and alimony, rendered after execution of the deed.—*Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

[g] (Sup. 1892)

A decree of divorce settling property rights between husband and wife does not bind her as to third persons holding her property by the fraudulent conveyance of the husband.—*Thompson v. Thompson*, 31 N. E. 529, 132 Ind. 298.

Where a husband, with the intention of raising a trust in his favor, compels his wife to execute a deed for her individual land to a third person, without any consideration, and without knowing the contents of the deed or who is named as grantee, and the title to the land remains in the grantee until after the

disposition of a suit for divorce and alimony, the divorce, although settling all property rights between the wife and her husband, does not operate as an adjudication of her right to set aside the deed.—Id.

[h] (Sup. 1899)

In an action for divorce the court has jurisdiction to determine and adjust all property rights between the parties, and the decree constitutes an adjudication of all such rights.—Murray v. Murray, 53 N. E. 946, 153 Ind. 14.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 722-724.

See, also, 14 Cyc. p. 794.

**§ 256. Lien of judgment or decree.**

[a] (Sup. 1830)

A decree for a divorce and for a certain sum as alimony for the wife is a lien on the real estate of the husband for the alimony.—Frakes v. Brown, 2 Blackf. 295.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 725, 726.

See, also, note, 102 Am. St. Rep. 700.

**§ 258. Payment of alimony or allowance.**

[a] (Sup. 1874)

A second judgment for alimony, upon a second divorce between parties who remarried after a divorce, does not merge a judgment for alimony granted on the first divorce.—Brenner v. Brenner, 48 Ind. 262.

[b] (Sup. 1888)

Under Rev. St. 1881, § 1047, providing that the decree for alimony shall be for a sum in gross, and not annual payments, but that the court may, in its discretion, give a reasonable time for payment in installments, such installments do not bear interest before due unless the decree expressly so provides, in spite of Rev. St. § 5199, providing that, in the absence of contract, money judgments shall bear 6 per cent. interest from the return of the verdict or finding.—Winemiller v. Winemiller, 114 Ind. 540, 17 N. E. 123.

[c] (Sup. 1898)

A husband agreed to pay his wife \$2,000 in consideration of a separation, and, on his obtaining a divorce, alimony was granted in the sum of \$1,800. Shortly after separation she became insane, symptoms of which she had manifested before separation. She had a daughter by a former marriage, who had been treated by the husband as his own child. The court, in awarding alimony, considered a payment of \$200 made by him on the \$2,000. *Held*, that the divorce must be deemed to have settled all property rights then existing between the parties, and therefore moneys paid to said wife after separation, and before divorce, and expended separately for the daughter's use, should not be allowed as a credit on the said \$2,000.—Natcher v. Clark, 51 N. E. 468, 151 Ind. 368.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 690, 729, 730.

**§ 260. Enforcement of order, judgment, or decree.**

Exemptions, see EXEMPTIONS, § 74.

Presentation as claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, § 224.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 738-763.

See, also, 14 Cyc. pp. 795-802; note, 24 L. R. A. 433; note, 102 Am. St. Rep. 700.

**§ 261. — In general.**

[a] (Sup. 1804)

In an action by a wife for divorce, neither the amount of attorney's fees allowed her nor the sum directed to be paid for the maintenance of the children constitute a part of the judgment, but they are allowances, the collection of which is enforceable by other means than execution.—Wolverton v. Wolverton, 163 Ind. 26, 71 N. E. 123.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 742, 745.

**§ 262. — Dismissal, striking out, or stay of proceedings on nonpayment.**

[a] (Sup. 1843)

After a final decree of divorce had been rendered, an order that the transcript which defendant had ordered for the purpose of an appeal should be withheld until he should make certain payments as alimony to the plaintiff was unauthorized, the right of appeal being absolute.—Martin v. Martin, 6 Blackf. 321.

[b] (Sup. 1881)

Where the court below ordered defendant to pay into court \$50 to enable plaintiff to prosecute her case if defendant should take an appeal, defendant's failure to make payment was no ground for dismissing the appeal.—Eastes v. Eastes, 79 Ind. 363.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 738.

See, also, 14 Cyc. p. 795.

**§ 263. — Execution.**

Default judgment on lapse by publication as basis for execution, see EXECUTION, § 7.

[a] (Sup. 1853)

There may be a stay of execution on a decree for alimony as in other cases for the payment of money.—Houston v. Houston, 4 Ind. 139.

[b] (Sup. 1879)

2 Rev. St. 1876, p. 352, exempting certain property from execution for the enforcement of a "debt growing out of or founded upon a

contract express or implied," does not exempt the property from the payment of a judgment for alimony.—*Menzie v. Anderson*, 65 Ind. 239.

[c] (**Sup.** 1881)

Where plaintiff purchased real estate under an execution issued on a personal judgment for alimony in a divorce case suit, where the notice to the defendant was by publication only, and there was no appearance by or on behalf of the defendant, the defendant was entitled to recover possession from the execution purchaser, since the judgment on which the execution was issued was void on its face.—*Sowers v. Edmunds*, 76 Ind. 123.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 739.

See, also, 14 Cyc. p. 796.

§ 268. — Attachment of the person.

[a] (**Sup.** 1865)

In a proceeding under section 17 of the divorce act to enforce by attachment an order of the court for the payment of money, it is not necessary, though not improper, that the husband should be notified and given a day in court to show cause why an attachment should not issue.—*Kernodle v. Cason*, 25 Ind. 362.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 754, 755.

See, also, 14 Cyc. pp. 799-802; note, 34 L.

R. A. 665; note, 37 Am. St. Rep. 763.

§ 269. — Contempt proceedings.

[a] (**Sup.** 1865)

In a proceeding under the divorce act (section 17) to enforce by attachment an order of court for the payment of money, the attachment may issue on a proper affidavit, and, after the arrest, defendant can purge himself of contempt by showing that he has complied with the order, or that a valid reason exists why he should not be compelled to comply with it.—*Kernodle v. Cason*, 25 Ind. 362.

[b] (**Sup.** 1904)

A judgment for alimony under *Burns' Rev. St. 1901*, § 1059, is enforceable by execution, and not by proceedings for contempt.—*Marsh v. Marsh*, 70 N. E. 154, 162 Ind. 210.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 756-763.

See, also, 14 Cyc. pp. 799-802.

§ 271. — Actions on judgment or decree.

By insane wife, see *INSANE PERSONS*, § 97. Grounds for demurrer to pleading, see *PLEADING*, § 194.

Right to trial by jury, see *JURY*, § 12.

[a] (**Sup.** 1871)

In a suit on a judgment, for alimony in a divorce proceeding, the appearance of the defendant in said proceeding for a divorce will

be presumed until the contrary appear.—*Lytle v. Lytle*, 37 Ind. 281.

[b] (**Sup.** 1881)

A decree awarding alimony is a judgment on which an action may be maintained in the same court in which it was rendered.—*Hansford v. Van Auker*, 79 Ind. 302.

[c] (**App.** 1891)

One having a right to enforce payment of alimony by proceedings in contempt may waive such summary mode of enforcing the claim, and afford the defendant common-law rights of defense by action.—*Traylor v. Richardson*, 28 N. E. 205, 2 Ind. App. 452.

It is no defense to an action on an order pendente lite in a suit for divorce, directing defendant to pay a certain amount to his wife's attorneys for their services, that after the order was made defendant's wife voluntarily returned to him, and dismissed the suit, where defendant has taken no steps to have such order modified or rescinded.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 744.

See, also, 14 Cyc. p. 797.

§ 275. — Conveyances in fraud of spouse's right to alimony.

Effect of fraud as to pre-existing creditors of grantor, see *FRAUDULENT CONVEYANCES*, § 209.

[a] (**Sup.** 1830)

A conveyance made by a husband pending a bill for a divorce brought by his wife against him, in order to defraud her of her alimony, if received by the grantee with the same purpose, is void as to her.—*Frakes v. Brown*, 2 Blackf. 285.

[b] (**App.** 1901)

A wife who had separated from her husband was induced, by means of overtures of reconciliation and misrepresentations as to the nature of the instrument, to execute a power of attorney authorizing the execution and delivery of deeds of all the husband's real estate. The property, which was worth \$20,000, was thereafter conveyed to the husband's daughter for an expressed consideration of \$4. *Held*, in an action for divorce, that the conveyance would be set aside as fraudulent, and the land subjected to satisfaction of a judgment for alimony.—*De Ruiter v. De Ruiter*, 62 N. E. 100, 28 Ind. App. 9, 91 Am. St. Rep. 107.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 750, 751.

See, also, 14 Cyc. p. 798.

§ 276. — Actions to set aside fraudulent conveyances.

Appellate jurisdiction of action to set aside fraudulent conveyance as dependent on whether title to real property is involved, see *COURTS*, § 220 (13).

## [a] (Sup. 1859)

A wife could not have an action for alimony simply at common law, and the common law has been followed in Indiana, but the statute of 1857 gives such an action, and, after the court, in such action, has given judgment for alimony, it may set aside a fraudulent conveyance standing in the way of its collection as in other cases.—*Chapman v. Chapman*, 13 Ind. 396.

## [b] (Sup. 1884)

A conveyance good when made, and not then designed to defraud the grantor's wife, cannot be attacked by her on her application for alimony.—*Metzler v. Metzler*, 90 Ind. 384.

## [c] (Sup. 1886)

A fraudulent conveyance cannot be set aside at the instance of one who participated in the fraud; and therefore a conveyance by a husband to his mother cannot be set aside, on the petition of the wife, as in fraud of her judgment against him for alimony, when it appears that the conveyance in question was made with the wife's consent, to forestall the effect of any possible judgment against the husband for breach of promise to a former sweetheart.—*Barrow v. Barrow*, 108 Ind. 345, 9 N. E. 371.

## [d] (Sup. 1888)

Under Rev. St. 1881, § 4920, providing that fraudulent conveyances shall be held void "as to persons sought to be defrauded," a wife who obtains a judgment for alimony after a conveyance by her husband of his property, to set aside such conveyance as fraudulent, must, as a subsequent creditor, allege a fraudulent intention therein on his part to defraud his subsequent creditors.—*Plunkett v. Plunkett*, 114 Ind. 484, 16 N. E. 612, 17 N. E. 562.

## [e] (Sup. 1893)

In an action to set aside a deed of land by plaintiff's husband as made with intent to defeat the collection of a judgment for alimony, the complaint is demurrable if it fails to allege that the grantees participated in the husband's fraudulent design.—*Huffman v. Ogden*, 135 Ind. 661, 35 N. E. 512.

The complaint is also defective if it fails to allege that the husband has no other property from which the judgment can be satisfied.—Id.

## [f] (App. 1901)

Defendant in an action for divorce testified that, after a conveyance of his real estate to his daughter, his property did not exceed \$600, and was of an uncertain value. Later he stated that his remaining property aggregated over \$5,000, and consisted of an interest in machinery worth \$250, some building and loan stock, and household goods. Over \$4,000 of this sum consisted of credits due from paving contracts and from an estate. *Held*, that the evidence authorized a finding that defendant did not have property remaining sufficient to

satisfy a claim of \$4,000 for alimony.—*De Ruiter v. De Ruiter*, 62 N. E. 100, 28 Ind. App. 9, 91 Am. St. Rep. 107.

A complaint in an action by a wife for divorce alleged that, on the date of the husband's conveyance of his property to his daughter, he was insolvent, and had not then, nor at the time of the suit, sufficient other property subject to execution to pay any judgment for alimony that might be rendered against him. It also alleged that the plaintiff was informed that the defendant was possessed of a large sum of money and bonds, which he secreted. *Held*, that the latter allegation was too indefinite and uncertain to be regarded as contradictory to the preceding averments, and that the complaint was sufficient to justify setting aside the conveyance to his daughter.—Id.

Where a conveyance by the husband was set aside as fraudulent in an action for divorce, and a judgment for alimony was rendered in favor of the wife, an order directing the sale of the land for the satisfaction of the judgment was proper.—Id.

A judgment for alimony for the wife in an action by her for divorce is not a necessary prerequisite to entitle her to attack a conveyance by the husband of his property as fraudulent and void.—Id.

A wife is a present and continuing creditor of her husband, and is entitled, in an action for divorce, to attack a conveyance by him to his daughter as fraudulent and void.—Id.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 740-753.

See, also, 14 Cyc. pp. 798, 799.

## § 277. Right to and collection of arrears.

## [a] (Sup. 1864)

Arrears of alimony decreed by the court in favor of a divorced wife under the statutes of this state may be collected after her death by her administrator.—*Miller v. Clark*, 23 Ind. 370.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 733-734½.

## § 278. Appeal.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 565, 764-771.

See, also, 14 Cyc. pp. 802, 803.

## § 279. — Appellate jurisdiction.

Appellate jurisdiction as between particular courts, see COURTS, § 220 (11).

Appellate jurisdiction as dependent on whether title to real property is involved, see COURTS, § 220 (13).

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 764.

**§ 280. — Decisions reviewable.**

[a] (App. 1891)

The court's granting or refusing an allowance to attorneys of the wife in an action for divorce may be reviewed in an appeal on the final judgment on the merits, but an appeal will lie directly from an order making such an allowance without awaiting the final judgment.—*Traylor v. Richardson*, 28 N. E. 205, 2 Ind. App. 452.

[b] (App. 1902)

The granting of an allowance under authority of Rev. St. 1881, § 1042, is not a trial, since it does not involve any examination of the issues of the case.—*Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378.

An order of the court in a divorce suit making an allowance for the wife's expenses, as authorized by Rev. St. 1881, § 1042, making provision for such allowance to the wife as will insure her efficient preparation and trial of her case, is not a cause for a new trial, and hence cannot be reviewed upon an assignment of error to the action of the court in refusing a new trial, though it may be the subject of an independent assignment of error upon an appeal taken either directly from such order, or from the final judgment in the case.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 764.

**§ 281. — Right of review.**

[a] (App. 1904)

It being within the power of the Appellate Court, on appeal from a judgment for alimony, to reverse the decree of divorce as well as the judgment for alimony, where the appellant has placed it beyond the court's power to do this by remarriage his appeal from that portion of the judgment awarding alimony will be dismissed.—*Rariden v. Rariden*, 70 N. E. 398, 33 Ind. App. 284, 104 Am. St. Rep. 252.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 765.

**§ 282. — Presentation and reservation in lower court of grounds of review.**

[a] (Sup. 1857)

Where there is no motion for a new trial, and no objection or exception taken, the supreme court cannot consider an alleged erroneous ruling of the trial court in giving alimony after the bill for divorce was dismissed.—*Stafford v. Stafford*, 9 Ind. 162.

[b] (Sup. 1873)

Assigning as a reason for a new trial in a divorce suit that the jury erred in its finding as to the value of the husband's property is not a sufficient calling of the attention of the court to the fact that the alimony is excessive to authorize a review of the decree on the ground of excessive alimony.—*Bradley v. Bradley*, 45 Ind. 67.

[c] (Sup. 1881)

The objection to a verdict on account of excessive alimony will not be considered on appeal, unless such objection was made in the trial court, either as a cause for a new trial or by motion to reduce the amount.—*Smith v. Smith*, 77 Ind. 80.

[d] (Sup. 1887)

A party against whom alimony has been awarded in a divorce suit will not be heard to claim for the first time, on appeal, that the allowance was illegal and unreasonable in amount, where the record fails to show any objection thereto of any kind.—*Henderson v. Henderson*, 110 Ind. 316, 11 N. E. 432.

[e] (App. 1910)

A husband, against whom a decree for divorce is granted, cannot complain of the form of the judgment as to alimony where he makes no objection thereto and no motion to modify it, and saves no exception thereto in the court below.—*Boggs v. Boggs*, 90 N. E. 1040.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 565.

**§ 285. — Record.**

[a] (Sup. 1868)

This court will not disturb a decree for alimony as excessive, if the record does not show the amount of the husband's estate, his conduct towards the wife, etc.—*Ifert v. Ifert*, 29 Ind. 473.

[b] (Sup. 1898)

Where the bill of exceptions states that defendant's attorneys in a divorce case requested the court to make them an allowance for fees, an assignment of error in overruling a motion by defendant for an allowance of her attorney's fees is unavailing, the bill not showing a motion by her.—*Garrison v. Garrison*, 50 N. E. 383, 150 Ind. 417.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 768.

See, also, 14 Cyc. p. 803.

**§ 286. — Review.**

[a] (Sup. 1813)

Under Act 1813, authorizing the court, on pronouncing a divorce decree, to regulate the division of the property in such a way as shall seem right to it, it has a discretionary power to divide the property; and an exercise of such discretion will not be set aside, unless it is abused to the manifest injury of a party.—*Kinney v. Kinney*, 1 Blackf. 481.

In divorce, where it does not appear that the husband possessed any property, it will be presumed that the court decreed the wife not only her just proportion of the estate, but made as equitable a division as the nature of the estate required, not only the extent, but the nature of the estate being a proper subject for consideration.—*Id.*

[b] (Sup. 1872)

On an appeal from an interlocutory order directing the husband to pay into the clerk's office \$100, for his wife's use, to enable her to prepare her case for trial, no question will be considered involving the sufficiency of the complaint for the divorce.—*Harrell v. Harrell*, 39 Ind. 185.

[c] The appellate court will not interfere with the discretion of the lower court in fixing the amount of temporary or permanent alimony in a divorce suit, unless such discretion has been abused.—(Sup. 1876) *Powell v. Powell*, 53 Ind. 513; (1877) *Conn v. Conn*, 57 Ind. 323; (1881) *Buckles v. Buckles*, 81 Ind. 159; (1886) *Simons v. Simons*, 107 Ind. 197, 8 N. E. 37; (1895) *Gussman v. Gussman*, 140 Ind. 433, 39 N. E. 918.

(Sup. 1882)

A woman of 30 married a man of 80, who gave her a sum beyond that named in an antenuptial contract. She obtained a divorce because of his cruelty. *Held*, that an order of the court refusing alimony would not be disturbed.—*Corey v. Corey*, 81 Ind. 469.

[d] An order granting alimony and counsel fees will not be disturbed on appeal unless it clearly shows that the court abused its discretion.—(Sup. 1883) *Logan v. Logan*, 90 Ind. 107; (1888) *Peck v. Peck*, 113 Ind. 168, 15 N. E. 12.

[e] (Sup. 1887)

The allowance of alimony for attorney's fees, and the costs and expenses of a wife's suit for divorce, are of necessity largely within the discretion of the trial court, and the abuse of that discretion must be very clear to justify the Supreme Court in interfering with its exercise.—*Henderson v. Henderson*, 11 N. E. 432, 110 Ind. 316.

[f] (Sup. 1888)

The Supreme Court will not interfere with an allowance of alimony where it is not made to appear that the trial court abused its discretion.—*Mercer v. Mercer*, 17 N. E. 182, 114 Ind. 558.

[g] (Sup. 1892)

When a husband worth \$15,000 is granted a divorce from his wife because of her adultery, the allowance of counsel fees and the taxation of costs to plaintiff is not such an abuse of discretion as justifies the interference of the supreme court.—*Spaulding v. Spaulding*, 133 Ind. 122, 32 N. E. 224, 36 Am. St. Rep. 534.

[h] (Sup. 1895)

The discretion of the trial court in making an allowance for alimony pendente lite will not be disturbed by the Supreme Court, unless abuse of discretion is very clear.—*Sellers v. Sellers*, 40 N. E. 699, 141 Ind. 305.

[i] (Sup. 1895)

If the trial court abuses or unduly exercises the powers granted it by the statute providing for "suit money" for the wife in an action for divorce, the Supreme Court on appeal will correct the wrong or injury done.—*Davis v. Davis*, 40 N. E. 803, 141 Ind. 367.

Before the Supreme Court will interfere with the action of the trial court in awarding suit money in a divorce, the complaining party must show affirmatively that there was an abuse of the discretion, and that the same was prejudicial to appellant.—*Id.*

[j] (Sup. 1895)

The question as to what amount shall be decreed for suit money to a wife in divorce depends upon the facts and circumstances and the Supreme Court will only interfere where it is apparent that the discretion of the lower court has been abused.—*Yost v. Yost*, 41 N. E. 11, 141 Ind. 584.

[k] (Sup. 1898)

Orders allowing the wife a sum for her use and support during pendency of the action are within the discretion of the court, and will not be reversed unless there has been a clear abuse of such discretion.—*McCue v. McCue*, 49 N. E. 382, 149 Ind. 466.

[l] (App. 1901)

Where there is no abuse of discretion by the trial court, its award of alimony on granting a divorce should not be disturbed.—*Breedlove v. Breedlove*, 61 N. E. 797, 27 Ind. App. 560.

[m] (App. 1902)

To warrant the reversal of a judgment because of the abuse of the trial court's discretion in making an allowance to the wife pending a divorce, the abuse of discretion must clearly appear.—*Stewart v. Stewart*, 62 N. E. 1023, 28 Ind. App. 378.

[n] (App. 1903)

Under Burns' Rev. St. 1901, § 1057, providing that in awarding alimony the court shall make such decree as the circumstances shall render just, the amount of alimony is largely within the discretion of the trial court, but the abuse of such discretion as to the amount of alimony will be corrected on appeal.—*Stutsman v. Stutsman*, 66 N. E. 908, 30 Ind. App. 645.

[o] (App. 1906)

An Appellate Court will interfere in the allowance of alimony only where it plainly appears that the trial court has abused its discretion.—*Watson v. Watson*, 77 N. E. 355, 37 Ind. App. 548.

[p] (App. 1910)

The amount of alimony to be awarded in a divorce case is dependent on the circumstances, and is in the discretion of the trial court, and the appellate tribunal will not review that

decision unless an abuse of such discretion has been shown.—*Boggs v. Boggs*, 90 N. E. 1040.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 769, 770;  
2 CENT. DIG. App. & E. § 598.

See, also, 14 Cyc. p. 803.

**VI. CUSTODY AND SUPPORT OF CHILDREN.**

Custody and support not provided for by judgment or decree, see post, § 323.

Effect of award of custody or allowance for support on further liability for support, see post, § 324.

Foreign divorces, see post, § 332.

**§ 289. Power to control or award in general.**

[a] In divorce cases, the court has power to make provision for the custody and support of the children.—(Sup. 1871) *Bush v. Bush*, 37 Ind. 164; (1883) *Logan v. Logan*, 90 Ind. 107.

[b] (Sup. 1873)

The court in decreeing a divorce should make provision for the guardianship, custody, support, and education of minor children.—*Musselman v. Musselman*, 44 Ind. 106.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 773.

See, also, 14 Cyc. p. 804.

**§ 290. Jurisdiction of person of child.**

[a] (Sup. 1870)

Where the court has acquired jurisdiction of the parties in a divorce suit, and an order is made granting the custody of the children to one of the parties until further orders, that court retains jurisdiction, without reference to any change of residence and of the subject-matter.—*Baily v. Schrader*, 34 Ind. 260.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 774.

See, also, 14 Cyc. p. 804.

**§ 291. Sufficiency of allegations and prayers in pleadings.**

\* [a] (Sup. 1883)

Under Rev. St. 1881, § 1046, explicitly providing that the court in decreeing a divorce shall make provision for the custody and support of minor children, provision for a minor child could be made without prayer therefor in the complaint.—*Logan v. Logan*, 90 Ind. 107.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 775.

See, also, 14 Cyc. p. 804.

**§ 296. Discretion of court.**

[a] (Sup. 1876)

In an action for divorce, the question of the temporary custody of the infant children is in the discretion of the court.—*Powell v. Powell*, 53 Ind. 513.

[b] (Sup. 1884)

Under Rev. St. 1881, § 1046, providing that the court in decreeing a divorce shall make provision for the custody of the minor children, the court has the right, if necessary, to commit the children to the custody of either party to the exclusion of the other or to commit them to the custody of strangers, and, where the court in a proceeding for divorce heard the evidence and made an order in relation to the custody of the children, such order must be regarded as a final adjudication on the subject of the fitness or unfitness of the parent for such custody at that time.—*Dubois v. Johnson*, 96 Ind. 6.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, § 779.

See, also, 14 Cyc. p. 808.

**§ 298. Grounds for award of custody.**

[a] (Sup. 1877)

The claim of the father to the custody of the children will be preferred, unless sufficient reason be shown against it.—*Conn v. Conn*, 57 Ind. 323.

[b] (Sup. 1881)

A divorced wife should be given the custody of a five year old son who weighs but little over 30 pounds, and is not a healthy boy, where she is not an unfit person to have custody of the child.—*Reeves v. Reeves*, 75 Ind. 342.

On an application to obtain the custody of a child, the wife will be given the custody of the child, where the latter is a delicate boy five years of age, and the mother is not shown to be an unfit person.—*Id.*

[c] (Sup. 1885)

Under Rev. St. 1881, § 2518, the father if a suitable person, is first entitled to the custody of his minor children; but the future welfare of the children should determine the matter, even as between the father and a guardian who has been appointed without notice to him.—*Bryan v. Lyon*, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; *Same v. Ferguson*, *Id.*

[d] (App. 1908)

In divorce actions, the welfare of the child is paramount to the claims of either parent for its custody, and the order of the court, awarding its custody should be made with sole regard to the child's best interests.—*Keesling v. Keesling*, 42 Ind. App. 361, 85 N. E. 837.

Upon petition by a parent to have modified an order in a divorce action relating to the custody of a child, if it appears to the court that the best interests of the child require that neither of the parents should have control of it, its custody may be awarded to a third person, as the child's grandfather.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Divorce, §§ 781-787.

See, also, 14 Cyc. pp. 805-808.

### § 300. Removal of child from jurisdiction.

[a] (Sup. 1884)

The divorce court gave to a wife the custody of a child, and forbade its removal from the jurisdiction. *Held*, that a violation of the order forbidding removal did not, without a further order of court, give to the father the right to take the child.—*Joab v. Sheets*, 99 Ind. 328.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 789.

See, also, 14 Cyc. p. 809; note, 58 L. R. A. 939.

### § 302. Order, judgment, or decree as to custody.

[a] (Sup. 1874)

Where a divorce is granted, and the care, custody, and education of a minor child is given to one of the parties, without limitation as to time, or reservation of power to change it, the decree is conclusive, even in a direct proceeding to modify it, as well as in all collateral proceedings.—*Sullivan v. Learned*, 49 Ind. 252.

[b] (Sup. 1884)

Where the court has, incidental to the proceedings for divorce, fixed the status of the child as between the parties prescribing definite directions as to the details of such custody, the order is binding until modified or set aside for cause shown by some subsequent or supplemental proceedings in the same cause.—*Joab v. Sheets*, 99 Ind. 328.

[c] (Sup. 1885)

A decree of divorce obtained by the mother, awarding her the custody of the children, is not conclusive as against the father in a habeas corpus proceeding by him, after the mother's death, against one who was not a party to the divorce proceedings.—*Bryan v. Lyon*, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; *Same v. Ferguson*, Id.

[d] (Sup. 1891)

A decree of divorce, awarding the custody of a child to the husband, is conclusive on the parties, unless modified or set aside, and the wife cannot, to justify her taking the child, show that it is for the child's interest.—*Leming v. Sale*, 128 Ind. 317, 27 N. E. 619.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 791, 792.

See, also, 14 Cyc. pp. 810, 811.

### § 303. Modification of order, judgment, or decree as to custody.

[a] (Sup. 1859)

A decree as to the custody of the children, rendered when the divorce was granted, cannot be changed or modified.—*Williams v. Williams*, 13 Ind. 523.

[b] (Sup. 1865)

An order as to alimony and custody of children, which is only an incident of the de-

cree for divorce, can be modified or set aside by a proceeding under 2 Gav. & H. St. p. 349, § 7, providing that parties against whom a judgment of divorce has been or shall be rendered, without other notice than publication, may have it opened at any time so far as relates to the custody of children, the allowance of alimony, and the disposition of property.—*Ewing v. Ewing*, 24 Ind. 468; Id., 25 Ind. 155.

[c] (Sup. 1874)

In decreeing a divorce, a court may reserve the power to open, alter, and modify the decree, in reference to the care and custody of minor children, by expressly reserving the power, or by providing that the custody shall continue until the further order of the court.—*Sullivan v. Learned*, 49 Ind. 252.

[d] (Sup. 1875)

In decreeing a divorce, the court gave the custody and guardianship of a minor child to the mother until the further order of the court, ordering, among other things that she should not, without the consent of the court, permanently remove the child beyond its jurisdiction. Afterwards the mother filed a motion to modify the decree so as to give her the custody of the child without condition or restriction as to her place of residence. The father filed an answer, or "cross motion," asking the court to revoke said order. The mother then withdrew her motion. *Held*, that there was no error in refusing to dismiss the motion of the father upon the withdrawal of that of the mother.—*Ryce v. Ryce*, 52 Ind. 64.

[e] (Sup. 1884)

On an application to have a decree giving the wife the custody of the children modified on the ground that at the time of the application she was living in fornication with B., evidence of her adultery or indecent acts with B. before the divorce was inadmissible.—*Dubois v. Johnson*, 96 Ind. 6.

On such application evidence of the character of one with whom the wife was living under a marriage contract not then consummated was admissible.—Id.

[f] (Sup. 1885)

Where children have once been taken from the custody of their father because of his misconduct, a judgment in a habeas corpus proceeding, instituted by him, denying him their custody, will not be reversed, where it appears that they are pleasantly and advantageously situated, and the father fails to explain his past conduct, or to show that he can give them a good home for the future, although there may be some evidence of his present good character.—*Bryan v. Lyon*, 104 Ind. 227, 3 N. E. 880, 54 Am. Rep. 309; *Same v. Ferguson*, Id.

[g] (App. 1901)

Where, in an action for divorce, the custody of the only child is awarded to the mother, and no provision made for permitting the father to visit the child, the decree should be



modified so as to grant such permission.—*Breedlove v. Breedlove*, 61 N. E. 797, 27 Ind. App. 560.

[h] (Sup. 1902)

Under Burns' Rev. St. 1901, § 1058, imposing on the court decreeing a divorce the duty to provide for the guardianship, custody, and education of minor children, the court has continuing jurisdiction during the minority of the children to make from time to time such orders and modifications thereof as are expedient, without a reservation of such power in the judgment.—*Stone v. Stone*, 64 N. E. 86, 158 Ind. 628.

[i] (App. 1908)

Where persons have been divorced, their child becomes in a sense a ward of the court, and upon petition by one of the parties to modify a previous order as to the child's custody the case is reopened, and the court may go fully into the question, and consider the claims of the different parties, as well as their ability and fitness to give the child the attention and rearing conducive to its best interests.—*Keesling v. Keesling*, 42 Ind. App. 361, 85 N. E. 837.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 793-795.

See, also, 14 Cyc. p. 810.

### § 305. Enforcement of order, judgment, or decree as to custody.

[a] (Sup. 1859)

A decree as to the custody of the children, rendered when the divorce was granted, may be enforced by a court other than the one in which it was rendered, upon an application by habeas corpus to obtain possession of the children.—*Williams v. Williams*, 13 Ind. 523.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 797.

### § 307. Application for allowance or support and proceedings thereon.

[a] (Sup. 1883)

In a divorce case, on the question of the amount of alimony to be allowed for the support of a minor child, it is not error to admit evidence of the amount of the husband's earnings per year, and his accumulations at the time of the separation, and evidence of such facts need not be limited to the time the action was brought.—*Logan v. Logan*, 90 Ind. 107.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 800; 34 CENT. DIG. Marriage, § 29.

### § 308. Order, judgment, or decree as to support.

[a] (Sup. 1818)

A decree requiring a divorced husband to pay a certain sum to his wife for their children's support is not vitiated by the fact that

such sum is called alimony.—*Kinney v. Kinney*, 1 Blackf. 481.

[b] (Sup. 1883)

In fixing the amount of alimony, in a divorce case, for the support of a minor child, the court may not only consider the amount of the husband's property, but also his ability to earn money.—*Logan v. Logan*, 90 Ind. 107.

[c] (App. 1903)

Burns' Rev. St. 1901, § 617, provides that all final judgments for money shall be a lien on real estate liable to execution in the county for 10 years. Section 1058 provides that in decreeing a divorce the court shall make provision for the guardianship, custody, support, and education of the minor children. Section 588 provides that judgments must specify clearly the relief granted. *Held*, that a decree in a divorce suit adjudging that "the support, maintenance, and education" of a minor child "is now here decreed a lien on the real estate" of the defendant husband, "the same to be paid out to the mother, or other proper person, on petition to the court, if he fails or refuses to pay the same in such annual or semiannual sums as to the court may appear just and proper," did not become a lien on the husband's realty, it being neither a final judgment under section 617, nor such a definite provision as is contemplated by section 1058.—*Matthews v. Wilson*, 67 N. E. 280, 31 Ind. App. 90.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 801, 802.

See, also, 14 Cyc. pp. 813, 814; note, 114 Am. St. Rep. 700.

### § 309. Modification of order, judgment, or decree as to support.

[a] (Sup. 1865)

The amount allowed in a judgment for divorce, for the support of children, is subject to subsequent modification.—*Cox v. Cox*, 25 Ind. 303.

[b] (App. 1902)

A decree of divorce awarding alimony, and giving the care of a minor child to the wife, but making no direct provision for the child, may be modified, on a showing that the mother cannot properly care for it, by requiring the husband to provide for the child, but not for the mother, although there was no reservation in the original decree of the power to modify it.—*Tobin v. Tobin*, 64 N. E. 24, 29 Ind. App. 382.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 803.

See, also, 14 Cyc. p. 813.

### § 311. Enforcement of order, judgment, or decree as to support.

[a] (Sup. 1896)

Rev. St. 1894, § 1058 (Rev. St. 1881, § 1046), provides that the court, in decreeing a divorce, shall provide for the custody and support

of the minor children. A decree provided for custody of a minor child by the wife, and for a fixed payment per week, for his support. *Held* that, on failure of defendant to obey such order as to the payments, plaintiff in the decree was entitled to a rule to show cause why he should not be adjudged for contempt.—*Stonehill v. Stonehill*, 146 Ind. 445, 45 N. E. 600.

[b] (App. 1903)

Under Burns' Rev. St. 1901, § 617, making judgments a lien on the defendant's realty for 10 years, and no longer, the provision in a decree of divorce for the support by the defendant husband of a minor child cannot be enforced as a lien on his realty after 10 years.—*Matthews v. Wilson*, 67 N. E. 280, 31 Ind. App. 90.

A wife secured a divorce in September, 1882, in which the support of a minor child was adjudged against her husband. The husband mortgaged his realty, and the mortgage was foreclosed, and the property sold to a third person. The husband died, and his estate was settled. In December, 1900, the wife began proceedings to enforce the lien of the divorce decree against the realty. *Held*, that the proceedings were barred by laches.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 799, 805.  
See, also, 14 Cyc. p. 814.

§ 312. Appeal.

[a] (Sup. 1818)

Under Act 1813, § 7, regulating divorce, and requiring the court to divide the estate with due regard to the children, if any, where the decree makes provision for but one of two children, and it is not shown what provision, if any, should have been made for the other, the want of such provision, when the necessity of it is not apparent, will not authorize reversal.—*Kinney v. Kinney*, 1 Blackf. 481.

[b] (Sup. 1856)

On passing a decree of divorce, the court awarded the custody of an infant son to the mother. She afterwards married, and being with her second husband about to remove from the state, the father petitioned to have the custody of the child awarded to him, to which the mother objected. From the testimony heard, it appeared that both parties were equally able to take care of the child, and equally fit in regard to morals. The court below decided in favor of the mother, and this court, seeing no reason to doubt that it had exercised due discretion in the matter, refused to reverse its decision.—*Darnall v. Mullikin*, 8 Ind. 152.

[c] (Sup. 1876)

On appeal from an order providing for the temporary custody of infant children, the abuse of discretion of the trial court must be very clear to justify the appellate court in interfering with its exercise.—*Powell v. Powell*, 53 Ind. 513.

[d] (Sup. 1883)

In proceedings for divorce, the court, in making allowance for the support of minor children, should consider all the facts and circumstances and exercise a judicial discretion, and the Supreme Court will not interfere therewith save for the abuse of such discretion.—*Logan v. Logan*, 90 Ind. 107.

[e] (Sup. 1891)

The Supreme Court will not on appeal disturb an order made by the trial court awarding the custody of children to one of the parties in a divorce proceeding, unless it appears that there has been an abuse of discretion.—*Hedrick v. Hedrick*, 26 N. E. 768, 128 Ind. 522.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 806.  
See, also, 14 Cyc. p. 814.

**VII. OPERATION AND EFFECT OF  
DIVORCE, AND RIGHTS OF  
DIVORCED PERSONS.**

Bar to dower, see DOWER, § 52.

Defense to action for criminal conversation, see HUSBAND AND WIFE, § 342.

Defense to prosecution for lewdness, see LEWDNESS, § 2.

Effect on admissibility of evidence of communications between parties, see WITNESSES, § 185.

Effect on capacity of married woman to convey, see HUSBAND AND WIFE, § 67.

Effect on competency of husband or wife as witness for or against the other, see WITNESSES, § 64.

Right of wife to dower in general, see DOWER, § 36.

**§ 313. Personal status and mutual rights and liabilities.**

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 807-816.  
See, also, 14 Cyc. pp. 727, 729, 730.

**§ 316. — Absolute divorce in general.**

[a] (Sup. 1865)

The legal effect of a divorce is determined by the law in force when it was granted.—*Whitsell v. Mills*, 6 Ind. 220.

[b] (Sup. 1876)

The statutory disability of a married woman to alienate real estate held by her in virtue of a previous marriage is removed by divorce.—*Piper v. May*, 51 Ind. 283.

[c] (Sup. 1877)

Where an estate is conveyed to husband and wife as joint tenants, and this relation is suspended by a rule of law which makes them tenants by entireties, a decree of divorce between them will restore the relation of joint tenants.—*Lash v. Lash*, 58 Ind. 526.

## [d] (App. 1908)

Though at common law a husband and wife could not contract with each other, a contract between divorced parties, while not enforceable at law, was upheld in equity.—Townsend v. Huntzinger, 41 Ind. App. 223, 83 N. E. 619.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 807, 808, 812-816.

See, also, 14 Cyc. pp. 727-729.

## § 319. Right to marry.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 818-820, 844.

See, also, 14 Cyc. p. 729; notes, 24 L. R. A. 831, 55 L. R. A. 169.

## § 320. — In general.

## [a] (Sup. 1855)

By Rev. Laws 1831, p. 214, all divorces were a vinculo matrimonii, and either party, after the divorce was granted, could lawfully marry.—Whitsell v. Mills, 6 Ind. 229.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 818, 819, 844; 34 CENT. DIG. Marriage, § 29.

See, also, 14 Cyc. p. 729.

## § 321½. Rights and liabilities as to property in general.

Effect on estate by entirety, see HUSBAND AND WIFE, § 14.

## [a] (App. 1891)

A divorce ends all rights dependent on marriage, and not actually vested. It divests each party of executory property rights which have no other basis than the marriage. Whatever rests on the marriage falls with it.—State ex rel. Haines v. Parrish, 27 N. E. 652, 1 Ind. App. 441.

## [b] (Sup. 1898)

A decree of divorce adjudicates all property rights or questions growing out of or connected with the marriage.—Walker v. Walker, 50 N. E. 68, 150 Ind. 317.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 49.

See, also, 14 Cyc. p. 728.

## § 322. Property not disposed of by judgment or decree of divorce.

## [a] (Sup. 1840)

The dower interest of a widow, which on her remarriage vests in her second husband, is restored to her by her subsequently procuring a divorce a vinculo matrimonii from him.—Doe ex dem. Cull v. Brown, 5 Blackf. 309.

## [b] (Sup. 1864)

A divorced wife has no interest in the realty of her husband.—Billan v. Hercklebrath, 23 Ind. 71.

## [c] (Sup. 1868)

A sale by the husband of crops growing on the wife's land, which is otherwise legal, is not affected by a subsequent divorce obtained by the wife.—Cunningham v. Mitchell, 30 Ind. 362.

## [d] (Sup. 1896)

Rev. St. 1894, § 1055 (Rev. St. 1881, § 1043), providing that a divorce granted for misconduct of the husband shall entitle the wife to the same rights, "as far as her real estate" is concerned, that she would have been entitled to by his death, refers only to the separate estate of the wife, and not to her husband's real estate.—Fletcher v. Monroe, 145 Ind. 56, 43 N. E. 1053.

## [e] (Sup. 1898)

Property conveyed by a husband to his wife, the conveyance to be void if she abandons or refuses to take care of him, cannot be recovered because of a breach of such conditions after a decree of divorce has been granted.—Walker v. Walker, 50 N. E. 68, 150 Ind. 317.

## [f] (App. 1908)

A decree of divorce by a court having jurisdiction of the subject-matter and the parties adjudicates all property rights between the parties growing out of and connected with their marriage, leaving other questions or rights between the divorced parties to be settled as though the marriage relation had never existed.—Townsend v. Huntzinger, 41 Ind. App. 223, 83 N. E. 619.

Where a divorce decree provided "that certain personal property heretofore used by the parties in common be divided," and specifically described it, and it appeared that notes executed by the wife to the husband for a loan were not mentioned or taken into account in the settlement of their property rights in the divorce proceeding, her liability on the notes may be subsequently adjudicated.—Id.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 822-825.

See, also, note, 50 L. R. A. 552.

## § 323. Custody and support of children not awarded by judgment or decree of divorce.

## [a] (Sup. 1877)

If the care and custody of a child of divorced parents has been given to the mother by the decree of divorce, the father is nevertheless liable for its support, though there is no agreement or provision in the decree requiring him to furnish such support.—Conn v. Conn, 57 Ind. 323.

## [b] (Sup. 1879)

If the care and custody of a child of divorced parents has been given to the mother by the decree of divorce, the father is not liable for its support, in the absence of an agreement or provision in the decree requiring him to fur-

nish such support.—*Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107.

[c] (Sup. 1889)

A divorced wife cannot maintain an action against her former husband for the past support of their child, born after the divorce, where it appears that the custody and support of the child were voluntarily assumed by the mother, and there was no intent on the part of the father to neglect or abandon it.—*Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 60, 6 L. R. A. 682.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 826.

**§ 324. Effect of award of custody or allowance for support of children, on further liability for support.**

[a] (App. 1909)

It is the statutory as well as the common-law duty of a father, if able to labor, to support his dependent child, though he has been deprived of the care and custody thereof under a divorce decree.—*Spade v. State*, 89 N. E. 604.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 826.

**§ 325. Foreign divorces.**

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 827-843.

See, also, 14 Cyc. pp. 814-822; notes, 7 Am. Dec. 206, 21 Am. Dec. 747.

**§ 326. — Conclusiveness in general.**

[a] (Sup. 1877)

Const. U. S. art. 4, § 1, requiring full faith and credit to be given in each state to the judicial proceedings of every other state, does not require credit to be given to a decree of divorce rendered by a court having no jurisdiction of the parties to such action.—*Hood v. State*, 56 Ind. 263, 28 Am. Rep. 21.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 827-830, 840.

See, also, 14 Cyc. p. 814; notes, 19 L. R. A. 515, 2 L. R. A. (N. S.) 325.

**§ 327. — Objections to jurisdiction.**

[a] (Sup. 1877)

A statute of Utah territory authorizes the granting of divorce to nonresidents who merely desire to become residents of the territory. *Held*, that a divorce so granted will be regarded in this state as void.—*Hood v. State*, 56 Ind. 263, 28 Am. Rep. 21.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 831-834.

See, also, 14 Cyc. pp. 816-821.

**§ 331. — Alimony and disposition of property.**

[a] (Sup. 1875)

A judgment for alimony rendered in another state, on notice by publication without defendant's appearance, is without force in this state, the record not showing that he was a resident of the state in which the judgment was rendered.—*Middleworth v. McDowell*, 49 Ind. 386.

[b] (Sup. 1896)

Under Rev. St. 1894, §§ 1060, 1061 (Rev. St. 1881, §§ 1048, 1049), declaring that the divorce of one party shall fully dissolve the marriage contract as to both, and that a divorce decreed in another state by a court having jurisdiction thereof shall have full effect in this state, a decree of divorce granted to a man in another state, on constructive notice to the wife, and not attempting any adjudication of the wife's property rights in this state, will have the same effect, as to her rights in his property in Indiana, as if rendered there.—*Milbush v. Hattle*, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783.

[c] (App. 1909)

As a general rule, a judgment is final for the purpose of basing an action thereon when it is a definite and personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement; and an Ohio judgment allowing a wife alimony payable in installments, which judgment is appealable under the express provisions of Rev. St. Ohio 1908, § 5706, and collectible by execution, is not interlocutory.—*Rogers v. Rogers*, 89 N. E. 901.

Under Const. U. S. art. 4, § 1, providing that full faith and credit shall be given in each state to the judicial proceedings of every other state, judgments of courts having jurisdiction of the subject-matter and of the parties are conclusive on the merits in all other states so long as they are unreversed and unappealed from or set aside by a court having power to do so; and a decree for divorce and alimony obtained in one state by a court having jurisdiction of the subject-matter and parties is res judicata in an action on the judgment so rendered in another state, whether upon a gross sum or installments past due.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, §§ 841, 842.

See, also, note, 59 L. R. A. 178.

**§ 332. — Custody and support of children.**

[a] (Sup. 1907)

A foreign divorce decree settling the care and custody of children of the parties, rendered by a court of a sister state having jurisdiction of the subject-matter and the parties thereto, in the absence of fraud affecting the jurisdiction, is entitled to full faith and credit

in the courts of Indiana, under the express provisions of Burns' Ann. St. 1901, § 1061.—Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Divorce, § 843.

## DOCKET FEES.

See—

CLERKS OF COURTS, § 19.

DISTRICT AND PROSECUTING ATTORNEYS, § 5.

Prosecutions for violations of municipal ordinances. MUNICIPAL CORPORATIONS, § 644.

Settlement between county and state. COUNTIES, § 156.

## DOCKETS.

See—

Civil causes for trial. TRIAL, §§ 9-17.

On appeal—

APPEAL AND ERROR, §§ 809-811.

JUSTICES OF THE PEACE, § 161.

Criminal causes for trial. CRIMINAL LAW, § 632.

JUSTICES OF THE PEACE, § 138.

## DOCKS.

See—

City docks, injuries from condition or use. MUNICIPAL CORPORATIONS, § 849.

Power of municipality to make improvements. MUNICIPAL CORPORATIONS, § 274.

Use and regulation. MUNICIPAL CORPORATIONS, § 719.

NAVIGABLE WATERS, § 43.

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## DOCTORS.

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## DOCUMENTS.

See—

Best and secondary evidence—

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Evidence—

CRIMINAL LAW, §§ 429-447.

EVIDENCE, §§ 325-383.

Record for purpose of review. APPEAL AND ERROR, § 524.

Incorporation into bill of exceptions. EXCEPTIONS, BILL OF, §§ 21-23.

Office, summary proceedings for recovery. OFFICERS, § 85.

Production and inspection before trial. DISCOVERY, §§ 80-107.

At trial—

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Testimony from memoranda or other writings. WITNESSES, § 258.

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Use to refresh memory. WITNESSES, §§ 253-257.

## DOGS.

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ANIMALS.

Larceny of. LARCENY, § 5.

Muzzling, delegation of power of city council to require. MUNICIPAL CORPORATIONS, § 591.

Power of municipality to require. MUNICIPAL CORPORATIONS, § 604.

Taxation. TAXATION, §§ 49, 70, 79, 327, 908.

Apportionment and distribution of school revenues arising from. SCHOOLS AND SCHOOL DISTRICTS, § 110.

## DOING BUSINESS.

See—

Foreign corporation—

CORPORATIONS, § 642.

INSURANCE, § 16.

## DOMESTIC ANIMALS.

See ANIMALS.

## DOMESTICATION.

Foreign corporations, see RAILROADS, § 33.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

# DOMICILE.

## Scope-Note.

[INCLUDES places of fixed habitation of individuals; nature, acquisition, and change thereof in general.

[EXCLUDES domicile of corporations (see *Corporations*); what constitutes domicile for particular purposes, and application of the law of the domicile to particular subjects (see specific heads). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature and elements.
- § 4. Domicile of choice and change of domicile.
- § 5. Domicile by operation of law.
- § 7. Evidence.
- § 8. — Presumptions and burden of proof.
- § 9. — Admissibility.
- § 10. — Weight and sufficiency.

## Cross-References.

See—

CORPORATIONS, § 52.

County commissioners, eligibility to hold office. COUNTIES, § 42.

Decedent, ground of jurisdiction of administration of estate. EXECUTORS AND ADMINISTRATORS, § 10.

Executor, removal from state as ground for removal. EXECUTORS AND ADMINISTRATORS, § 35.

Exemptions, right to. EXEMPTIONS, §§ 26-29.

Fraudulent grantor, right of creditor to have conveyance set aside before judgment on claim. FRAUDULENT CONVEYANCES, § 241.

Law of, as controlling course of descent. DESCENT AND DISTRIBUTION, § 5.

License to practice medicine in county of. PHYSICIANS AND SURGEONS, § 5.

Officers, eligibility to office. OFFICERS, § 22.

Parties as determining jurisdiction—

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JUSTICES OF THE PEACE, § 40.

REMOVAL OF CAUSES, §§ 27-61.

Determining venue. VENUE, §§ 20-32.

Person for purpose of taxation. TAXATION, § 254.

Right to sue for causing death. DEATH, § 31.

Sureties on county contractors' bonds, qualifications. COUNTIES, § 123.

Voters, qualifications. ELECTIONS, §§ 71-76.

### § 1. Nature and elements.

[a] (Sup. 1876)

A person cannot have more than one domicile at a time.—Culbertson v. Board of Com'rs of Floyd County, 52 Ind. 361.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Domicile, § 1.

See, also, 14 Cyc. pp. 833, 834, 837.

### § 4. Domicile of choice, and change of domicile.

Change as affecting right to exemptions, see EXEMPTIONS, §§ 27, 29.

[a] (Sup. 1850)

One whose boyhood was spent in B. went when a young man to C. to learn a trade. Afterwards he went to N., where he engaged in business with a brother and remained several years. He then returned to B., and stated he

designed to make it his permanent abode, owned real estate there, purchased and collected materials for building, voted at elections, and interested himself in politics and the affairs of the town as a citizen. He was never married. He became insane, and was sent to a hospital in C., where he died. *Held*, that his domicile was at B.—McClerry v. Matson, 2 Ind. 79.

[b] (Sup. 1866)

It requires an intention in order to change the domicile, and therefore if a person leave his place of residence temporarily, on business or otherwise, but with the intention of returning, he does not thereby lose his domicile.—Yonkey v. State ex rel. Cornelison, 27 Ind. 236.

[c] (Sup. 1869)

A minor apprentice, a resident of Indiana, left to go to another county, but, meeting one going to Iowa, engaged himself to go with him

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in consideration of having his expenses paid. He wrote his master, saying he was going to see the country, and intended to return as soon as he accomplished that purpose. He remained in Iowa about three years, working in different places, and then returned to Indiana, to the residence of his master, to whom he had written, soon after coming of age, that he would return when he could get money to pay his expenses. After his return he stated that he did not expect to remain. *Held*, that he had not lost his residence in Indiana.—*Maddox v. State*, 32 Ind. 111.

[d] (*Sup.* 1876)

A domicile, once existing, continues until another is acquired.—*Culbertson v. Board of Com'rs of Floyd County*, 52 Ind. 361.

[e] (*Sup.* 1833)

A residence is not lost by a mere intention of changing ultimately or at some future time.—*Astley v. Capron*, 89 Ind. 167.

[f] (*App.* 1897)

A man can have but one place of residence, and, to lose his residence in one place he must acquire residence in another place. Personal presence alone at another place does not determine the matter. He must remove without the intention of returning to his home as such. He must remove to another place with the intent to make it his home.—*Green v. Simon*, 46 N. E. 693, 17 Ind. App. 360.

[g] (*App.* 1897)

A man may acquire a domicile if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another.—*Brittenham v. Robinson*, 48 N. E. 616, 18 Ind. App. 502.

[h] (*App.* 1907)

A domicile, once established, continues until both residence in a new locality and intent to make it a home concur.—*Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805.

[i] (*Sup.* 1908)

While residence is largely a matter of intention, mere intention to change from one place to another, and making a trip of investigation, is not enough; but one must determine on some definite place to which to remove, and take some affirmative step toward transferring his personal effects, or toward settling himself in the new place.—*State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409.

[j] (*App.* 1908)

There can be no change of residence without the conjunction of intention to change and actual removal.—*Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Domicile, §§ 5-23; 27 CENT. DIG. Ins. Per. § 76.

See, also, 14 Cyc. pp. 837-843, 851-856; note, 10 C. C. A. 251; note, 32 Am. Dec. 427.

§ 5. Domicile by operation of law.

[a] The domicile of a minor is determined by the domicile of his parents.—(*Sup.* 1847) *Hiestand v. Kuns*, 8 Blackf. 345, 46 Am. Dec. 481; (1859) *Warren v. Hofer*, 13 Ind. 167.

[b] (*Sup.* 1847)

A., a female about 9 years of age, who was domiciled in Ohio, and whose parents were dead, was, against the will of her guardian there, brought into Indiana by B., who procured himself here to be appointed her guardian; the age of majority of a female being 18 in Ohio and 21 in Indiana. A. continued in Indiana until she was 18, and then made choice of it as her permanent home. *Held*, that A.'s domicile was thus changed from Ohio to Indiana, and that her age of majority then depended on the law of Indiana.—*Hiestand v. Kuns*, 8 Blackf. 345, 46 Am. Dec. 481.

[c] (*Sup.* 1859)

The domicile of an infant orphan is the same as that of his deceased parents, and he cannot, of his own volition, change that domicile.—*Warren v. Hofer*, 13 Ind. 167.

[d] (*Sup.* 1862)

The domicile of a minor not emancipated is determined by the domicile of his parents.—*Wheeler v. Burrow*, 18 Ind. 14.

[e] The domicile of the husband is the domicile of the wife.—(*Sup.* 1864) *McCollem v. White*, 23 Ind. 43; (1865) *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; (1893) *Parrett v. Palmer*, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

[f] (*Sup.* 1864)

The domicile of the father is the domicile of his minor child.—*McCollem v. White*, 23 Ind. 43.

[g] (*Sup.* 1869)

The residence of the master is the residence of his apprentice, and such apprentice cannot, while a minor, change that residence by leaving his master and going to another state.—*Maddox v. State*, 32 Ind. 111.

[h] (*App.* 1908)

A guardian may control the legal residence of his ward.—*Brookover v. Kase*, 41 Ind. App. 102, 83 N. E. 524.

The residence of the parents, or surviving parent, is the residence of the infant.—*Id.*

## [1] (App. 1908)

The domicile of the husband is the domicile of the wife until after separation.—*Petty v. Petty*, 42 Ind. App. 443, 85 N. E. 995.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Domicile, §§ 24-35; 27 CENT. DIG. Ins. Per. § 76.

See, also, 14 Cyc. pp. 838, 843-850; note, 84 Am. St. Rep. 27.

## § 7. Evidence.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Domicile, §§ 36-39.

See, also, 14 Cyc. pp. 856-864.

## § 8. — Presumptions and burden of proof.

## [a] (Sup. 1866)

As a general rule, where a man is the head of a family and is a housekeeper, the domicile of the family is presumed to be his legal place of residence.—*Yonkey v. State ex rel. Cornelison*, 27 Ind. 236.

## [b] (Sup. 1883)

A residence, shown to have existed in the state for a number of years, will be presumed to continue, in the absence of any contrary showing.—*Astley v. Capron*, 89 Ind. 167.

## [c] (App. 1905)

In the absence of a showing to the contrary, the domicile of the wife is that of the husband, and the law presumes that they are living together and cohabiting.—*Smith v. Smith*, 74 N. E. 1008, 35 Ind. App. 610.

## [d] (Sup. 1906)

The presumptions that a man is domiciled where he is found unless he is shown to be there for a temporary purpose, and that on the return of an alien to his domicile of origin, his original domicile reverts, and that in doubtful cases the original domicile is considered the true one, are not presumptions of law, but presumptions of fact only.—*Donaldson v. State ex rel. Taylor*, 78 N. E. 182, 167 Ind. 533.

Where, in an action to recover as escheated property land of which an alien died seized, the court found that the alien, a native of Scotland, emigrated to the United States in 1861 and became and remained a bona fide resident thereof until 1896, when he returned to Scotland, where he remained until his death two years later, and that it was not known whether he intended to return to the United States on his returning to Scotland, the court could not presume as a fact that he was a resident of Scotland at the time of his death, so as to deprive his alien heirs from claiming interest in the land.—*Id.*

## [e] (Sup. 1908)

A residence once shown is presumed to continue at the same place till it is clearly shown to have changed.—*State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Domicile, §§ 36; 37.

See, also, 14 Cyc. pp. 858-862.

## § 9. — Admissibility.

*Res gestæ*, see EVIDENCE, § 121.

## [a] (App. 1897)

A person's declarations as to his residence are admissible to show his intention.—*Brittenham v. Robinson*, 48 N. E. 616, 18 Ind. App. 502.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Domicile, § 38.

See, also, 14 Cyc. pp. 856-858.

## § 10. — Weight and sufficiency.

## [a] (App. 1907)

Intent to acquire a domicile may be determined by general acts and conduct and expressions of intention, but such expressions alone will not control where inconsistent with the acts and conduct of the person making them.—*Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 805.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Domicile, § 39.

See, also, 14 Cyc. pp. 862-864.

## DOMINANT ESTATES.

See EASEMENTS.

## DONATIONS.

See—

## GIFTS.

Land for seat of justice. COUNTIES, §§ 32, 33. Limitation on power of municipality to make to individuals. MUNICIPAL CORPORATIONS, § 871.

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To particular classes of persons or corporations.

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COLLEGES AND UNIVERSITIES, §§ 4, 6.

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COUNTIES, § 154.

RAILROADS, §§ 34-43.

## DOORS.

Obstruction of view of liquor bar, see INTOXICATING LIQUORS, § 115.

## DORMANT JUDGMENTS.

See—

Execution on. EXECUTION, § 7.

JUSTICES OF THE PEACE, § 133.

## DORMANT PARTNERS.

See PARTNERSHIP, § 162.



**DOUBLE APPEAL.**

See APPEAL AND ERROR, § 15.

**DOUBLE PLEADING.**

See—

EQUITY, § 145.

INDICTMENT AND INFORMATION, § 125.

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**DOUBLE TAXATION.**

See—

LICENSES, § 7.

TAXATION, § 47.

**DOUBTFUL TITLE.**

Duty of vendee to accept, see VENDOR AND PURCHASER, § 128.

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**DOWER.***Scope-Note.*

[INCLUDES nature and incidents of the interest in the real property of a deceased husband to which his widow is entitled for her life or absolutely, at common law or by statute; abolition of dower and its effect; rights, powers, and liabilities of married women and widows in respect of their dower; releasing, barring, or defeating rights of dower; and remedies relating thereto.

[EXCLUDES rights of widow in respect of community property (see *Husband and Wife*), or of homestead (see *Homestead*); rights of quarantine and under statutory provisions for allowances out of the husband's estate (see *Executors and Administrators*); rights of inheritance from husband, or in distribution of husband's personal estate (see *Descent and Distribution*); and rights under will of husband, and election between dower and testamentary provisions (see *Wills*). For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Nature and Requisites.**

- § 1. Nature and existence of estate.
- § 2. What law governs.
- § 3. Statutory modification or abolition.
- § 4. Nature of statutory estate instead of dower.
- § 5. Requisites.
- § 7. — Title or seisin of husband.
- § 8. — Instantaneous or transitory seisin.
- § 9. — Death of husband.
- § 10. Property subject to dower.
- § 11. Estates and interests subject to dower.
- § 12. — In general.
- § 14. — Equitable estates in general.
- § 15. — Mortgaged property.
- § 16. — Joint tenancy and tenancy in common.
- § 17. — Partnership property.
- § 20. Conveyances before marriage in fraud of wife.
- § 22. Extent of right.
- § 23. Priorities.
- § 24. — In general.
- § 25. — Liens existing before marriage.
- § 26. — Property acquired subject to incumbrances.
- § 27. — Liens created after marriage.
- § 28. Rights of creditors of husband.

**II. Inchoate Interest.****(A) RIGHTS AND REMEDIES OF WIFE.**

- § 29. Nature of inchoate interest.
- § 30. Modification by statute.

**II. Inchoate Interest—Continued.****(A) RIGHTS AND REMEDIES OF WIFE—Continued.**

- § 31. Accrual of right.
- § 32. Value of right.
- § 33. Assignability of inchoate interest.
- § 34. Sales and conveyances subject to dower.
- § 35. Remedies for protection of interest of wife.
- § 36. Right vesting during life of husband.

**(B) BAR, RELEASE, OR FORFEITURE.**

- § 37. Statutory provisions.
- § 38. Power of husband in general.
- § 39. Power of wife in general.
- § 40. Jointures.
- § 41. Antenuptial settlements and agreements.
- § 42. Postnuptial settlements and agreements.
- § 44. Conveyance by husband after marriage.
- § 45. Assignment by husband for benefit of creditors or in insolvency.
- § 46. Judicial sale of property.
- § 47. Dedication or appropriation of property to public use.
- § 49. Conveyance or release by wife.
- § 50. Estoppel.
- § 51. Elopement, adultery, or other misconduct of wife.
- § 52. Divorce.
- § 53. Restoration of right.

**III. Rights and Remedies of Widow.**

- § 54. Dower consummate before assignment.
- § 55. — Nature of interest.
- § 56. — Rights of widow in general.
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- § 91. — Distinct parcels.
- § 93. Division of rents and profits.
- § 97. Return or report as to admeasurement or assignment.
- § 112. Conclusiveness and effect of assignment.
- § 114. Rights and liabilities of tenant in dower.
- § 116. Liens and enforcement thereof.

### Cross-References.

See—

Abatement of price of land sold for refusal of wife to relinquish. **VENDOR AND PURCHASER**, § 175.

Allowance to surviving wife from estate of husband. **EXECUTORS AND ADMINISTRATORS**, §§ 173-194.

**CURTESY**.

Election between dower and devise or bequest. **WILLS**, § 803.

And right of inheritance. **DESCENT AND DISTRIBUTION**, §§ 64, 65.

Existence of right of, as affecting validity of will. **WILLS**, § 6.

In property sold as defect in title of vendor defeating contract of sale. **VENDOR AND PURCHASER**, § 134.

In property sold as defense to action for price. **VENDOR AND PURCHASER**, § 308.

Extinguishment of right of, by purchaser of property sold as set-off in action for price. **VENDOR AND PURCHASER**, § 310.

Impairing obligation of contracts. **CONSTITUTIONAL LAW**, § 156.

Inheritance of surviving wife. **DESCENT AND DISTRIBUTION**, §§ 52-65.

Judgment lien on land, as affecting widow's interest. **JUDGMENT**, §§ 772, 776.

Possession by husband of dower estate of wife acquired by previous marriage. **HUSBAND AND WIFE**, § 9.

Priority of mechanic's lien over claim for. **MECHANICS' LIENS**, § 198.

Quarantine. **EXECUTORS AND ADMINISTRATORS**, § 175.

Release of consideration for contract to convey. **VENDOR AND PURCHASER**, § 13.

Transfer of, as consideration of deed. **DEEDS**, § 17.

Vested rights in. **CONSTITUTIONAL LAW**, § 95.

### I. NATURE AND REQUISITES.

#### § 1. Nature and existence of estate.

[a] (**Sup.** 1855)

Dower, by Rev. St. 1838, p. 238, was substantially as at common law.—*Whitsell v. Mills*, 6 Ind. 229.

[b] Where a husband dies, leaving a second wife by whom he has no children, and several children by a former wife, surviving him, the second wife is entitled to one-third of the deceased husband's estate for life only, as against his children by a former wife, under 1 Rev. St. p. 251, § 24, providing that if a man marry a second or other subsequent wife, and has by her no children, but has children by a previous wife, the land left by him at his death shall go to his children, subject to the life estate in one-third of it of such second or subsequent wife.—(**Sup.** 1858) *Martindale v. Martindale*, 10 Ind. 566; (1858) *Ogle v. Stoops*, 11 Ind. 380; (1865) *Rockhill v. Nelson*, 24 Ind. 422.

[c] Under the statute of descents the widow takes her interest in the lands of her deceased husband, as heir, and by descent from her husband, and not as dowress.—(**Sup.** 1863) *State ex rel. Lockhart v. Mason*, 21 Ind. 171; (1870) *Fletcher v. Holmes*, 32 Ind. 497.

[d] (**Sup.** 1865)

Under section 17 of the statute of descents, providing that if a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors, and section 27, providing that a surviving wife is entitled to one-third of all the real estate of which her husband shall have been seised in fee simple at any time during the marriage, any conveyance to which she may not have joined in due form

of law, the wife takes a fee-simple interest in the land of her deceased husband.—*Barnes v. Allen*, 25 Ind. 222.

[e] (**Sup.** 1869)

The common-law right of dower no longer exists in Indiana. The rights of a surviving wife in the real estate of her husband are those created by statute alone, and the question upon them must be determined solely by reference to the provisions of the statute.—*Gaylord v. Dodge*, 31 Ind. 41.

[f] (**Sup.** 1870)

Under the provision of the statute of descents (1 Gav. & H. St. p. 296), that "if a husband or wife die, intestate, leaving no child, and no father or mother, the whole of his or her property, real and personal, shall go to the survivor," where in such case the wife is the survivor, she is entitled to the entire interest of the husband in the land.—*Sullivan v. McGowen*, 33 Ind. 139.

[g] (**Sup.** 1884)

A widow is entitled to a third of her husband's realty, free from all demands of creditors.—*Matthews v. Pate*, 93 Ind. 443.

[h] (**Sup.** 1898)

Marriage is a valuable consideration, and the wife is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of her marital rights or by virtue of any valid antenuptial contract.—*Bookout v. Bookout*, 49 N. E. 824, 150 Ind. 63, 65 Am. St. Rep. 350.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 1, 2, 8; 48

CENT. DIG. Ven. & Pur. § 254.

See, also, 14 Cyc. pp. 880-887.

## § 2. What law governs.

[a] (Sup. 1881)

A law in force at the death of her husband is the measure of the widow's rights.—*Derry v. Derry*, 74 Ind. 560.

### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 4, 5.

See, also, 14 Cyc. pp. 887, 888; note, 2 L. R. A. (N. S.) 459.

## § 3. Statutory modification or abolition.

Modification of inchoate interest, see post, § 10.

Right to redeem from mortgage sale, see MORTGAGES, § 594.

Violation of vested rights, see CONSTITUTIONAL LAW, § 95.

[a] (Sup. 1855)

Under Act May 14, 1852 (1 Rev. St. p. 248, c. 27), providing that if a husband die, leaving a widow, a third of his realty shall descend to her in fee simple, the widow of a husband who died in December, 1852, is entitled only to dower in his lands, since the act did not take effect until May 6, 1853.—*Hendrickson v. Hendrickson*, 7 Ind. 13.

[b] (Sup. 1857)

1 Rev. St. p. 250, §§ 16, 17, abolishing tenancies by curtesy and in dower, and providing that the widow shall receive one-third of the husband's real estate in fee simple, free from all demands of creditors, in lieu of dower, operated on marriages existing at the time of the passage of the act, where the death of the husband occurred after such passage.—*Noel v. Ewing*, 9 Ind. 37.

1 Rev. St. p. 250, §§ 16, 17, abolishing tenancies by curtesy and in dower, and providing that if the husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free of all demands of creditors, are not retrospective, but simply determine the legal effect of death as a future event on the rights of the survivor.—*Id.*

The Legislature is competent to increase or diminish dower, or to substitute a larger estate for it, or even to abolish dower inchoate altogether.—*Id.*

[c] (Sup. 1859)

So far as the statute of 1853, abolishing dower and substituting a fee simple, provides that one-third in fee of the land conveyed prior to its passage and vested in the purchaser shall be vested out of him, and vested in the widow of the deceased grantor, it is unconstitutional and void.—*Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

[d] (Sup. 1872)

Code 1852, abolishing dower, is within the power of the Legislature, where the right to

dower has not become consummate by the husband's death.—*May v. Fletcher*, 40 Ind. 575.

[e] (Sup. 1874)

Under Rev. St. 1852, abolishing dower, and giving a widow one-third in fee of land of which her husband was seised during coverture, and to the alienation of which she had not consented, a widow whose husband died subsequent to the passage of the act of 1852 has no interest in land of which her husband was disseised, where the statute of limitations had run in favor of the disseisor before the passage of the act of 1852.—*Bowen v. Preston*, 48 Ind. 307.

[f] (Sup. 1876)

A husband conveyed land which he owned in fee simple, his wife not joining in the conveyance, before the taking effect of the statute of 1852, which abolished dower and gave a surviving wife an interest in fee in real estate so owned and conveyed; and the husband died after the taking effect of said statute, leaving his said wife surviving him. *Held*, that she was not entitled to any interest in the land.—*Colman v. De Wolf*, 53 Ind. 428.

[g] (Sup. 1890)

While one having an equitable title to land by virtue of a contract to convey was in possession, and entitled to enforce a conveyance of the legal title, the statute abolishing dower (1 Rev. St. 1852, p. 248), and giving to married women, instead, an inchoate estate in fee simple in one-third of the husband's real estate, took effect. *Held* that, though the vender's wife lost her dower by the repeal of the old law, the vendee's vested interest was not charged with the inchoate fee-simple estate substituted therefor.—*Joseph v. Fisher*, 122 Ind. 399, 23 N. E. 856.

[h] (Sup. 1895)

Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), providing that the surviving wife shall, upon the husband's death, be entitled to one-third of all the real estate of which he may have been seised at any time during the marriage, is not affected by Rev. St. 1894, § 2644 (Rev. St. 1881, § 2487), as amended by Acts 1889, p. 430, which provides that if a man marry a second wife, and by her has no children, but has living children by a former wife, such second wife shall have only a life estate in his lands after his death, and the fee shall vest in said children.—*Graves v. Fligor*, 140 Ind. 25, 38 N. E. 853.

[i] (App. 1909)

Burns' Ann. St. 1908, § 3029, provides that a surviving wife is entitled, with certain exceptions, to one-third of all the real estate of which her husband may have been seised in fee during marriage, and in the conveyance of which she may not have joined, and also to all lands in which her husband had an equitable interest at the time of his death. *Held*, that a widow does not take as heir of her husband, but by virtue

of her marital rights.—*Keener v. Grubb*, 89 N. E. 896.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. DOWER, §§ 6, 7, 93.

See, also, 14 Cyc. pp. 883, 884; note, 19 L. R. A. 256; note, 84 Am. St. Rep. 446.

### § 4. Nature of statutory estate instead of dower.

[a] (Sup. 1854)

Rev. St. 1843, p. 428, § 80, declares that a widow shall be endowed of all lands the legal title to which was in her husband or in any person to or for his use and benefit during coverture, and of any lands in which her husband had an equitable interest at the time of his death, unless her right to dower has been legally barred; and section 84 provides that a widow shall not be endowed of any estate or interest which the husband may have in trust estate, unless the husband shall have a beneficial interest therein, in which case she shall be endowed in proportion to the interest which might go to his heirs. *Held* that, while such sections enlarge the estate in which a widow was endowed at common law, they were otherwise merely declaratory, and not in conflict with the common law.—*Matlock v. Matlock*, 5 Ind. 403.

[b] (Sup. 1857)

Act May 14, 1852, § 16, providing that tenancy by curtesy and in dower are hereby abolished, leaves dower consummate untouched, and substitutes a third in fee for dower inchoate, when consistent with the rights of third parties.—*Noel v. Ewing*, 9 Ind. 37.

[c] (Sup. 1859)

Statute of 1853, abolishing dower and substituting fee simple to one-third of the land, takes away the inchoate right of dower existing at the time.—*Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

[d] (Sup. 1874)

The widow of a husband dying seised of real estate takes it as his heir, but, under section 27 of the statute of descents, she takes by virtue of her marital rights where the husband, although seised in fee during the marriage, died disseised, and she did not join in a conveyance of such real estate.—*Bowen v. Preston*, 48 Ind. 367.

[e] (Sup. 1886)

The interest of the wife in lands of her husband is not an incumbrance thereof, but an estate in the land itself.—*Bever v. North*, 8 N. E. 576, 107 Ind. 544.

[f] (Sup. 1893)

Rev. St. 1881, § 2487, provided that if a man married a second or other subsequent wife, and had by her no children, but had children alive by a previous wife, the land which at his death descended to such wife should at her death descend to his children. Said section, as

amended by Act March 11, 1889, provides that in such case the interest of such wife in the lands of decedent shall be only a life estate, and the fee shall at the husband's death vest in such children, subject only to said life estate. Section 2483 provides that one-third of a husband's realty shall descend to his widow in fee simple. *Held*, that the amendment to section 2487 does not override section 2483, so as to give the widow an estate in the whole of the realty, but she still takes only a third.—*Pearson v. Pearson*, 135 Ind. 377, 35 N. E. 288.

[g] (Sup. 1898)

Under Burns' Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), providing that a surviving wife is entitled to one-third of all the real estate of which her husband may have been seised in fee simple at any time during marriage, and in the conveyance of which she may not have joined, and also of all lands in which he had an equitable interest at the time of his death, the wife's interest attaches at the time of the husband's seisin, and is not an incumbrance, but an interest in the land itself.—*Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55.

[h] (Sup. 1907)

The right of a widow in the real estate of her deceased husband, being an extension of common-law dower, is highly favored.—*Staser v. Gaar, Scott & Co.*, 168 Ind. 131, 79 N. E. 404.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. DOWER, §§ 6, 7.

See, also, 14 Cyc. pp. 883-885.

### § 5. Requisites.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. DOWER, §§ 9-14, 16, 19.

See, also, 14 Cyc. pp. 888-896.

### § 7. — Title or seisin of husband.

[a] (Sup. 1888)

A widow has no marital rights in lands formerly owned by her husband, but to which before their marriage, he had executed voluntary deeds, and given them to a third party, with instructions to deliver them to the grantees therein named on the grantor's death, which was done; she having had notice, before her marriage, as to what lands her husband owned.—*Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585.

[b] (Sup. 1895)

In order that a wife's inchoate dower can attach, the husband must be seised of an estate of inheritance during coverture, but for this purpose it is not necessary that the husband should have had the actual corporeal seisin; seisin in law with a present right to actual seisin being sufficient.—*Stroup v. Stroup*, 39 N. E. 864, 140 Ind. 179, 27 L. R. A. 523.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. DOWER, §§ 10, 11, 14, 16, 19.

See, also, 14 Cyc. pp. 891-895.

### § 8. — Instantaneous or transitory seisin.

[a] (Sup. 1881)

A., in order to obtain a loan from the state sinking fund, conveyed land to B., who executed a mortgage, without his wife joining, obtained the money, and, on the same day that the mortgage was given, reconveyed to A. *Held*, that B.'s seisin was instantaneous, and his wife was not entitled to dower.—*Johnson v. Plume*, 77 Ind. 166.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 12, 13.

See, also, 14 Cyc. p. 894.

### § 9. — Death of husband.

[a] (Sup. 1881)

A woman acquires by marriage no complete right in her husband's property, but under 1 Rev. St. 1876, p. 408, §§ 17, 24, she takes a fee simple only on the husband's death leaving her surviving and issue born of the marriage.—*Derry v. Derry*, 74 Ind. 560.

FOR CASES FROM OTHER STATES,

See, also, 14 Cyc. p. 896.

### § 10. Property subject to dower.

[a] (App. 1893)

Though timber, while standing on land of an insane husband, is part of the realty, when severed by his guardian it at once becomes personalty, and the wife cannot recover from him one-third of the proceeds of a sale thereof.—*Hallett v. Hallett*, 8 Ind. App. 305, 34 N. E. 740.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 20-35.

See, also, 14 Cyc. pp. 896-901.

### § 11. Estates and interests subject to dower.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 18, 36-65.

See, also, 14 Cyc. pp. 901-915; note, 3 C.

C. A. 316; notes, 16 L. R. A. 247, 56 L.

R. A. 67.

### § 12. — In general.

[a] (Sup. 1837)

The term "messuage," as used in the statutes regulating dower, may include a few acres adjoining a dwelling house, but not a whole farm.—*Grimes v. Wilson*, 4 Blackf. 331.

[b] (Sup. 1881)

Section 30 of the statute of descents, providing that if a husband shall have made a contract for real estate, and shall have paid only part of the consideration, and the real estate shall be sold after his death under any decree, or by virtue of any power or devise in the husband's will, the widow shall be entitled to her

third of the real estate in proportion to the amount paid under the contract by her deceased husband, is inapplicable to a case where it does not appear that the administrator acted under any power in disposing of the real estate, nor that the husband left any will, nor that there was any order of court for the disposal of the same.—*Keith v. Hudson*, 74 Ind. 333.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 36-43, 48.

### § 14. — Equitable estates in general.

[a] (Sup. 1832)

The wife of a cestui que trust is not dowerable, by the English law, of an estate to which her husband had only an equitable title during the coverture; nor an estate mortgaged in fee by her husband before marriage and which was unredeemed at his death.—*McMahan v. Kimball*, 3 Blackf. 1.

[b] (Sup. 1840)

If a testator die without having paid any part of the purchase money of land for which he has a title bond, his widow is not entitled to dower in such land, although the executor sell the same under a power in the will, and with the proceeds pay the amount agreed to be paid by the testator, and apply the residue to the payment of debts of the estate.—*Smith v. Addleman*, 5 Blackf. 406.

[c] (Sup. 1833)

The vendee of land, who had not paid all the purchase money nor received a deed, died in 1829, leaving a widow surviving him. *Held*, that the widow had only an equitable right, under the statute, to be endowed of the interest during her life of one-third of the amount the land would sell for over the unpaid purchase money, interest, and costs.—*Malin v. Coult*, 4 Ind. 535.

[d] (Sup. 1876)

Rev. St. 1876, p. 413, § 27, provides that a wife shall be entitled to one-third in fee of land of which her husband shall have been seised during coverture, and in the conveyance of which she may not have joined, and also of all lands in which her husband had an equitable interest at the time of his death. A purchaser at execution sale received a certificate of purchase, and occupied the premises purchased for several years. He never received a sheriff's deed, but, because of the loss of a certificate, executed to another a title bond, in which his wife did not join, conditioned to execute a proper conveyance to the obligee on the payment of the purchase money. The latter paid the same, and took possession thereof. Subsequently the purchaser died. *Held*, that the widow of the execution purchaser had no interest, as he was never seised of the land, and had no equitable title at the time of his death.—*Butler v. Holtzman*, 55 Ind. 125.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

## [e] (Sup. 1879)

A husband purchased land, paying only one-third of the purchase money, and died. His administrator sold the land to pay off the residue of the purchase money, without making the widow a party to the proceedings. *Held*, that the widow was entitled to one-ninth of the land, under Rev. St. 1876, p. 413, § 30, providing that if the husband shall have made a contract, subsisting at the time of his death, for real estate, and paid only part of the consideration, and said real estate shall be sold after his death under a decree, or by virtue of any power or devise in the will of the husband, the widow shall be entitled to her third of such real estate in proportion to the amount paid under said contract by said husband.—*Carver v. Grove*, 68 Ind. 371.

## [f] (Sup. 1889)

By Rev. St. 1881, § 2491, the widow is entitled to one-third of lands in which the husband had an equitable interest, and section 2493 provides that if the husband had a contract for lands, the price of which wholly or partly is paid after his death out of his estate, the widow shall have a third, as if the legal estate had vested during coverture. *Held*, that where a part of the land held by the husband under contract was set off to the widow, and the residue was sufficient to pay the balance of the price, though the same had not been paid, the widow had an interest in the land, and that her interest was not one in the money remaining after sale to pay the vendor's lien.—*Bowen v. Lingle*, 119 Ind. 560, 20 N. E. 534.

## [g] (Sup. 1895)

Where a husband purchases land, and causes it to be conveyed in trust for himself to another, reserving a life estate in it and the power of disposition over it to his own use, he has an equitable interest, to which dower may attach.—*Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 45-47, 49-56.

See, also, 14 Cyc. pp. 909-915.

## § 15. — Mortgaged property.

## [a] (Sup. 1832)

Rev. Code 1824, p. 157, providing that a widow is entitled to dower in "all the lands, tenements, and hereditaments, either legal or equitable, whereof her husband or any other person to his use, was seised at any time during the coverture," changed the common law, and she has consequently a right of dower in an equity of redemption on a mortgage in fee.—*McMahan v. Kimball*, 3 Blackf. 1.

## [b] (Sup. 1861)

Where a wife joins her husband in a mortgage, relinquishing dower, she is not entitled to dower in the excess arising from the sale under foreclosure of the mortgage.—*Dean v. Phillips*, 17 Ind. 406.

## [c] (Sup. 1864)

Prior to May 6, 1853, A. executed a mortgage upon certain real estate to B., his wife not joining, to secure the payment of certain sums of money then due from A. to B., and of all sums that might hereafter become due. A. died in 1858, leaving a widow. One-third of the mortgaged land was afterwards set off to the widow. B. then foreclosed his mortgage, and had a decree for the sale of the other two-thirds, to pay the indebtedness which existed at the date of the mortgage, and which accrued after May 6, 1853, and it was sold, and the proceeds were only sufficient to pay that part of the debt which existed at the date of the mortgage. B. claimed a right to subject the widow's third to the payment of the subsequent indebtedness on the ground that her dower estate in the land was abolished by the Legislature, and her contingent fee therein never attached by reason of the mortgage. *Held* that, under the circumstances, B. had no claim under the mortgage upon the third set off to the widow.—*Morton v. Noble*, 22 Ind. 160.

## [d] (Sup. 1865)

A. died intestate and insolvent, his entire assets consisting of two parcels of real estate, upon each of which there was a separate mortgage, in the execution of which the wife had joined. The administrator filed his petition to sell the real estate, and the wife appeared and consented to the sale, reserving her interest in the proceeds. The administrator first sold one parcel of the land, and, after paying off the mortgage upon it, paid to the widow one-third of the residue. He then sold the other parcel, and, after paying off the mortgage upon it, out of the proceeds, paid to the widow one-third of what remained. *Held*, that the right of the widow, under the statute, to one-third of the real estate of her deceased husband, is absolute against creditors, unless by joining with her husband in a mortgage she has waived her right; and even then the waiver operates only in favor of the mortgagee.—*Perry v. Borton*, 25 Ind. 274.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 18, 32, 57-60.

See, also, 14 Cyc. pp. 914, 915; note, 5 Am. Dec. 233.

## § 16. — Joint tenancy and tenancy in common.

## [a] (Sup. 1852)

Dower lies against a tenant in common before partition.—*Davis v. Bartholomew*, 3 Ind. 485.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 61.

See, also, 14 Cyc. p. 902.

## § 17. — Partnership property.

## [a] (Sup. 1855)

The real estate of a partnership may be so held for partnership purposes as to exclude a

widow's right of dower; but where the partners have not impressed upon it the character of personal property, and it is not necessary to pay the partnership debts, or for other exigencies of the partnership, a partner's widow has her dower in it.—*Hale v. Plummer*, 6 Ind. 121.

[b] (Sup. 1873)

A widow of a deceased member of a firm is not entitled to dower in land owned by the firm as against firm creditors; the interest of a member of a firm in such land being merely the surplus remaining after payment of firm debts and a final accounting.—*Huston v. Neil*, 41 Ind. 504.

[c] (Sup. 1875)

A surviving partner has the right to control real estate held by the partners until the partnership debts are paid and the affairs of the firm finally settled; and until such time the widow of a deceased partner has no separate share in the partnership property.—*Coble v. Tomlinson*, 50 Ind. 530.

[d] (Sup. 1886)

Where the firm in which the husband is a partner makes improvements on the real estate of which he is owner in fee simple, out of firm means, and for partnership purposes, the right of the wife does not attach to the improvements on the real estate on the death of her husband, but only to the surplus remaining after the partnership is wound up.—*Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 62, 76.

See, also, 14 Cyc. pp. 903, 904; note, 27 L. R. A. 340.

§ 20. Conveyances before marriage in fraud of wife.

Conveyance before marriage in fraud of spouse's right to alimony, see DIVORCE, § 275.

[a] (Sup. 1895)

Where one, intending to defeat his wife's dower, has land purchased by him conveyed to another, but secures to himself the full use and disposition thereof, the conveyance being in fraud of the wife, she may, before or after the husband's death, recover that part of the land which would have fallen to her as dower had the husband been actually seised.—*Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523.

[b] (Sup. 1898)

A complaint was sufficient, on demurrer, which alleged that plaintiff's deceased husband, a short time prior to his marriage to plaintiff, for the purpose of defrauding her in her marital rights, secretly conveyed all his real estate to defendants, without consideration; that he was in actual possession of the land in question at the time of such marriage, and occupied it as

his homestead until his death; that during such period he was in fact the owner thereof; that he represented to plaintiff, as an inducement to such marriage, that he was the owner of such property, which fact was at the time disclosed by the public records; that plaintiff relied on such representations in contracting such marriage; and that defendants accepted such deeds with full knowledge of such fraudulent purpose of their grantor.—*Bookout v. Bookout*, 49 N. E. 824, 150 Ind. 63, 65 Am. St. Rep. 350.

A secret voluntary conveyance by a man of his lands on the eve of his marriage operates as a fraud upon his wife, and cannot serve to defeat her upon his death of her dower or interest in such lands allowed to her under the law as his widow. She may successfully assert her rights thereto as though such conveyance had not been made.—Id.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 15.

See, also, note, 39 Am. Dec. 218.

§ 22. Extent of right.

[a] (Sup. 1887)

Under Rev. St. § 2508, which provides that, by reason of a judicial sale of the husband's land, the wife's interest vests as on the death of the husband, and section 2483, providing that a widow shall take one-third of her husband's real estate, in fee-simple, free from demands of creditors,—provided, where it exceeds in value \$10,000, she shall take one-fourth, and, where it exceeds \$20,000, one-fifth, as against creditors,—the wife primarily takes one-third in the whole estate; but creditors may, by proper proceeding in court, have such interest reduced to one-fourth or one-fifth, according to the value of the estate.—*Elliott v. Cale*, 113 Ind. 383, 14 N. E. 708.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 1.

See, also, 14 Cyc. p. 886.

§ 23. Priorities.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 66-80; 48

CENT. DIG. Ven. & Pur. § 672.

See, also, 14 Cyc. pp. 915-925.

§ 24. — In general.

[a] (Sup. 1881)

Where a title bond was assigned to indemnify a surety, with agreement to reassign, and on the death of the vendee the surety assumed payment of the price, as well as of the debt for which he was surety, and the vendee's administrator surrendered the agreement to reassign, the widow's remedy was to have an accounting, and to redeem the premises on the amount due, the surety being ascertained.—*Keith v. Hudson*, 74 Ind. 333.

[b] (Sup. 1881)

A wife's inchoate right to dower in her husband's lands is not a mere lien, but is an



estate in the land, and hence liens of others are not entitled to priority over the wife's interest on foreclosure of a mortgage thereon.—*Mark v. Murphy*, 76 Ind. 534.

[c] (Sup. 1882)

After the wife's inchoate interest in one-third of her husband's land has become absolute, under Rev. St. 1881, § 2508, by sale of the land under execution, she may insist that the other two-thirds of the land shall be exhausted in the satisfaction of a decree foreclosing a mortgage in which she joined with her husband before resort is had to her share.—*Grave v. Bunch*, 83 Ind. 4.

[d] (Sup. 1883)

A wife whose inchoate interest in her husband's land, incumbered by a mortgage in which she joined, becomes absolute, under Rev. St. 1881, § 2508, by a judicial sale, is entitled to insist that her husband's interest shall be first sold on foreclosure of the mortgage.—*Hardy v. Miller*, 89 Ind. 440.

[e] (Sup. 1883)

Where a wife has joined with her husband in a mortgage to secure his debt, and her inchoate interest has become absolute by a sheriff's sale, she is entitled, on foreclosure, to have the two-thirds in which she has no interest first exhausted, and if that be insufficient, and her husband has no other property, and is insolvent, is also entitled to have a receiver appointed, pending suit, to take charge of the rents and profits of the two-thirds, so that, if necessary, they may be applied on the debt.—*Main v. Ginthert*, 92 Ind. 180.

[f] (Sup. 1884)

A widow may have personal property of her husband applied to payment of her share in his real estate conveyed by mortgages in which she has joined. Such right is prior to claims of his general creditors.—*McCord v. Wright*, 97 Ind. 34.

[g] (Sup. 1889)

The widow had joined with her husband in a mortgage of lands included in a contract to convey to her husband, but not included in the lands set off to her. *Held*, that the mortgagee could not compel the vendor to resort first to lands not included in the mortgage for the satisfaction of his lien, but that, the lands not set off to the widow being sufficient to pay the vendor, the widow was entitled to hold her portion free from the liens of both vendor and mortgagee.—*Bowen v. Lingle*, 119 Ind. 560, 20 N. E. 534.

[h] (App. 1896)

Under Rev. St. 1894, § 2640 (Rev. St. 1881, § 2483), providing that, if a husband dies intestate, one-third of his real estate shall descend to his widow free from all demands of creditors, etc., the widow's interest is subject only to liens for taxes, purchase money, and mortgages in which she has joined; and, to preserve such interest, she is entitled to have all

the personal estate, and the remaining two-thirds of the real estate, marshaled and applied to the discharge of such liens.—*Kemph v. Belknap*, 15 Ind. App. 77, 43 N. E. 891.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 66-76, 80.

See, also, 14 Cyc. p. 915.

§ 25. — Liens existing before marriage.

[a] (Sup. 1832)

A person having executed a mortgage in fee on his estate married, and afterwards died without having redeemed the mortgage. Two of the three payments to secure which the mortgage was given were due and unpaid at the time of the mortgagor's death. The widow caused her dower in the estate to be assigned to her by a commissioner under the statute. The mortgagee filed a bill in chancery against the heir and personal representative of the mortgagor for a foreclosure and sale of the mortgaged premises; and a decree was rendered for the complainant by an agreement of the parties. This decree required that the premises should be exposed to sale by a commissioner according to law, and that, if they would not sell for a sufficient sum to pay the mortgage money and costs, they should be delivered to the mortgagee in full satisfaction of the debt. The commissioner afterwards, not being able to sell the premises for a sufficient sum to pay the mortgage money, conveyed them to the mortgagee, according to the direction of the decree. *Held*, that the widow of the mortgagor was not, under these circumstances, entitled to dower in the premises.—*McMahan v. Kimball*, 3 Blackf. 1.

[b] (Sup. 1846)

The widow of a man against whom judgment existed at the time of the marriage is entitled to dower in the land of which he was seised during coverture, subject to the judgments.—*Robbins v. Robbins*, 8 Blackf. 174.

[c] (Sup. 1850)

A., the owner of real estate, which was incumbered by judgments against him, married. Afterwards, other judgments were rendered against him, which, also, constituted liens upon the same estate. Upon these latter judgments, executions were issued, and A. then died. After his death, by virtue of the executions on the previous judgments, the real estate was sold, the purchaser bidding and paying the full value of the property, with an understanding by all the parties in interest that the purchase money should be applied—First, to the payment of the older judgment; and, second, of the junior judgments. *Held*, that the widow is entitled to dower in the whole estate only upon contribution to the payment of the older judgments.—*Whitehead v. Cummins*, 2 Ind. 58.

[d] (Sup. 1878)

1 Rev. St. 1876, p. 554, vesting the inchoate interest of married women in the lands of their husbands, where the husband's title has

been divested by judicial sale, has no application to a foreclosure sale of property in which the wife has acquired no inchoate interest as against the mortgagee and those claiming under him.—*Kissel v. Eaton*, 64 Ind. 248.

[e] (Sup. 1881)

Judgments recovered against a husband before marriage constituted a prior lien to the widow's dower interest therein.—*Eiceman v. Finch*, 79 Ind. 511.

[f] (Sup. 1882)

The inchoate interest of a wife in her husband's real estate is subordinate to incumbrances existing upon such real estate at the time of the marriage, even though they were not recorded, and she had no notice of them.—*Godfrey v. Craycraft*, 81 Ind. 476.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DOWER, § 77.

See, also, 14 Cyc. pp. 923, 924.

§ 26. — Property acquired subject to incumbrances.

[a] (Sup. 1846)

If a person sell real estate, receive part of the purchase money, give the purchaser a bond conditioned for a deed on payment of all the purchase money, and put him into possession, and the purchaser die, the widow's claim to dower, under the act of 1838, must yield to the vendor's equitable lien for the unpaid purchase money.—*Crane v. Palmer*, 8 Blackf. 120.

[b] (Sup. 1854)

The lien of the vendor for the purchase money of land sold is paramount to the claim of the widow of the purchaser for dower.—*Fisher v. Johnson*, 5 Ind. 492.

[c] (Sup. 1860)

The grantor's lien is superior to the right of dower and therefore a surrender of the deed before record thereof, and the possession of the land in satisfaction of that lien bars dower as against bona fide purchasers from the grantor after the surrender.—*Talbott v. Armstrong*, 14 Ind. 254.

[d] (Sup. 1873)

The wife of the grantee of lands incumbered by a mortgage has no inchoate right in the land as against the mortgagee.—*Kissel v. Eaton*, 64 Ind. 248.

[e] (Sup. 1882)

The widow's dower is subject to a mortgage executed to the grantor to secure the purchase money.—*Baker v. McCune*, 82 Ind. 339.

[f] (Sup. 1882)

A widow's right of dower in lands of which her husband died seised is subject to the right of the vendor, who reserved the vendor's lien thereon to secure payment of the purchase price.—*Nutter v. Fouch*, 86 Ind. 451.

[g] (Sup. 1895)

Though a wife had no knowledge of a vendor's lien, she could not be protected in her inchoate interest against the vendor, nor did the fact that she married the grantee after the conveyance was made add any strength to her claim.—*Grimes v. Grimes*, 40 N. E. 912, 141 Ind. 480.

[h] (Sup. 1908)

A widow is not entitled to one-third of her husband's land as against the holder of a purchase-money mortgage thereon, but has the right to have two-thirds thereof sold and the proceeds applied thereon, and if that is insufficient she is entitled to the remaining one-third after satisfaction of the mortgage.—*Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DOWER, §§ 67, 68, 71;  
48 CENT. DIG. VEN. & PUR. § 672.

§ 27. — Liens created after marriage.

[a] (Sup. 1846)

If a mechanic's lien accrue after the employer's marriage, and the employer die, after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien.—*Pifer v. Ward*, 8 Blackf. 252.

[b] (Sup. 1849)

A. received a deed of land from B., and the same day mortgaged it back to secure an unpaid balance of the purchase money. A. died in possession, and the mortgage was foreclosed by an assignee thereof. Held that, under the statute of 1838, the widow of A. was entitled to dower in the equity of redemption, but that if, upon foreclosure, the land was sold for less than the mortgage debt, her dower was barred.—*Nottingham v. Calvert*, 1 Ind. 527, Smith, 300.

Where a husband purchases land, and at the same time gives a mortgage on the premises to secure the payment of the purchase money, no right of dower attaches as against the mortgagee.—Id.

[c] (Sup. 1854)

Rev. St. 1843, p. 428, § 80, declares that a widow shall be endowed of all lands the legal title to which was in her husband, or in any person to or for his use and benefit, during coverture, and of any lands in which her husband had an equitable interest at the time of his death, unless her right to dower has been legally barred; and section 84 provides that a widow shall not be endowed of any estate or interest which the husband may have in trust estate, unless the husband shall have a beneficial interest therein, in which case she shall be endowed in proportion to the interest which might go to his heirs. Held that, where real estate was purchased with the funds of a firm for firm purposes, the widow of a deceased partner was not entitled to dower therein until all the debts of the partnership were satisfied.—*Matlock v. Matlock*, 5 Ind. 403.

## [d] (Sup. 1857)

A house was erected upon an unimproved lot by the husband. A mechanic's lien was perfected upon it, execution obtained against the husband, and a sale made in pursuance thereof. *Held*, that the widow was entitled to dower in both house and lot; a dower claim being superior to that of mechanic's lien.—*Bishop v. Boyle*, 9 Ind. 169, 68 Am. Dec. 615.

## [e] (Sup. 1863)

August 28, 1840, A. sold to B. the equity of redemption of a lot of land, executing his title bond in six months from date. B. paid for the equity, and an agreement was made for the removal of a mortgage existing upon the lot. May, 1, 1841, B. mortgaged to C. with full covenant and warranty, but he did not assign the title bond, nor did his wife join in the mortgage. May 24, 1841, A. executed to B. a deed in fee. B. did not discharge C.'s mortgage, which must be presumed to have been foreclosed by suit against B. alone. The property was sold on the judgment of foreclosure, and C. purchased it. B. was married prior to 1841, and died in 1849. *Held*, that his widow was entitled to recover dower against the vendees of C.—*Hamilton v. Johnson*, 20 Ind. 392.

## [f] (Sup. 1869)

A husband, during the marriage, purchased certain land, which he entered upon and improved, and of which he received from his vendor a deed of conveyance in fee. This deed was lost or destroyed by the grantee, without having been recorded, and with his consent another deed was made to his son by the vendor. Afterwards the father and son executed a mortgage of the land, in which the wife of the father did not join. The father, son, and wife resided as one family upon the land, and cultivated it, from the time of the purchase till the father and son died, at which time the wife was surviving, and the mortgage unpaid. *Held*, that the wife was entitled to one-third of the land in fee as against the mortgagee seeking to foreclose his mortgage. Her husband was seised in fee simple of the land during the marriage, and the wife had united in no conveyance of the title.—*Sutton v. Jervis*, 31 Ind. 265, 99 Am. Dec. 631.

## [g] (Sup. 1884)

The dower right of a woman in land bought by her husband is unaffected by the question whether she signed the purchase-price mortgage given therefor.—*Bowman v. Mitchell*, 97 Ind. 155.

## [h] (Sup. 1892)

Defendant, in common with several others, owned a tract of land incumbered by mortgages which he and they had executed in excess of its real value, and in one of which the wife had joined to the extent of the defendant's interest. Afterwards defendant acquired the interest of the others upon the understanding that he was to assume and pay the mortgages. The holder of one of the mortgages furnished

an amount sufficient to pay off all the mortgages but his own, and took a new mortgage for the amount so paid and the amount of his own mortgage. The wife refused to join in the new mortgage. It was contended, however, that she had no interest, under Rev. St. 1881, § 2495, declaring that, although she do not join in a mortgage given to secure the whole or any part of the purchase money, she is not entitled to any interest as against the mortgagee. *Held*, that the mortgage, in so far as it represented the money paid as purchase money, was superior to any interest of the wife, but not as to the amount paid in extinguishing the mortgages executed by the husband upon his own interest.—*Butler v. Thornburg*, 131 Ind. 237, 30 N. E. 1073.

*Held*, further, that the one who furnished the money and took a new mortgage was as much entitled to the protection of Rev. St. 1881, § 2495, as he would have been if he himself had been the vendor.—*Id*.

## [i] (Sup. 1895)

Where the owners of land incumbered by liens in excess of its value convey the land in consideration that the grantee pay the liens, and the grantee borrows from one of such lien holders money to pay all the liens but his own, and such lien holder takes a mortgage on the land from the grantee for the amount so advanced and the amount of his own lien, the mortgage is a purchase-money mortgage, so that under Rev. St. 1894, § 2656 (Rev. St. 1881, § 2495), the rights of the mortgagee are superior to those of the wife of the mortgagor, though she does not join in the mortgage.—*Butler v. Thornburgh*, 141 Ind. 152, 40 N. E. 514.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 57, 59, 69, 71, 75, 76, 78.

See, also, 14 Cyc. pp. 917-922.

## § 28. Rights of creditors of husband.

## [a] (Sup. 1857)

Under 1 Rev. St. pp. 250, 251, § 17, providing that if a husband died testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors, and, where the real estate exceeds in value \$10,000, the widow shall have only one-fourth, and, where the real estate exceeds \$20,000, only one-fifth, as against creditors; and section 27, providing that a surviving wife is entitled, except as in section 17, to one-third of all the real estate of which the husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, and also of all lands in which her husband had an equitable interest at the time of his death,—the claim of a widow to one-third of the real estate of the deceased husband is reduced only in favor of creditors.—*Johnson v. Johnson*, 9 Ind. 28.

## [b] (Sup. 1885)

In a suit against the widow, heirs, and personal representatives of a deceased grantor upon a covenant of warranty contained in a deed, the complaint averred that the decedent left an estate worth \$5,000, after the payment of debts, of which the widow received dower, and the heirs took the remainder equally. *Held*, that no cause of action was shown against the widow, as her dower was not liable for the debts of the husband.—*Barnard's Adm'r v. Cox*, 25 Ind. 251.

## [c] (Sup. 1885)

Where an owner of realty dies, leaving a widow, such widow, as provided by Rev. St. 1881, § 2483, will take a portion of the deceased husband's realty in fee, free from all demands of his creditors.—*Bryan v. Uland*, 101 Ind. 477, 1 N. E. 52.

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 17, 79.

See, also, 14 Cyc. p. 925.

## II. INCHOATE INTEREST.

As breach of covenant of right to convey, see COVENANTS, § 95.

As breach of covenant of seisin, see COVENANTS, § 94.

Consideration paid for release of dower as constituting separate property of married woman, see HUSBAND AND WIFE, § 110.

Effect of statutes abolishing dower, see ante, § 4. Laws relating to, as denial of due process of law, see CONSTITUTIONAL LAW, § 278.

## (A) RIGHTS AND REMEDIES OF WIFE.

## § 29. Nature of inchoate interest.

## [a] (App. 1897)

The estate owned by a wife in lands conveyed by a husband by a conveyance in which she did not join is an estate in the land itself and not a mere incumbrance resting upon it, but, until the death of the husband, the wife has no claim, legal or equitable, upon the real estate so conveyed, and, if she does not survive her husband, her estate therein is determined.—*Ohio Farmers' Ins. Co. v. Bevis*, 46 N. E. 928, 18 Ind. App. 17.

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, § 81.

See, also, 14 Cyc. p. 925.

## § 30. Modification by statute.

## [a] (Sup. 1882)

Rev. St. §§ 2508, 2509, in so far as they attempt to convert a wife's inchoate right into a vested one upon a sale under a mortgage executed before its passage, are unconstitutional, as impairing the creditor's contract right to all the land, subject only to the wife's inchoate interest.—*Helphenstine v. Meredith*, 84 Ind. 1.

## [b] (Sup. 1883)

The right of dower in a married woman before it is consummated by the death of her husband is a mere inchoate expectancy, which does not rise to the dignity of a vested right, and may be changed by the legislature at any time before the death of the husband.—*Wiseman v. Beckwith*, 90 Ind. 185.

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, § 82.

See, also, 14 Cyc. p. 923.

## § 31. Accrual of right.

## [a] (Sup. 1883)

A contract for the sale of land gave the prospective vendee a vested right which could not be divested by the subsequent taking effect of the law of 1852, giving the widow one-third in fee of the lands of which her husband was seised during coverture and in the conveyance of which she had not joined.—*Wiseman v. Beckwith*, 90 Ind. 185.

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, § 83.

See, also, 14 Cyc. p. 926.

## § 32. Value of right.

## [a] (Sup. 1883)

Evidence showing the age, health, and habits of both husband and wife is competent on an issue as to the value of the wife's inchoate dower interest in her husband's estate.—*Sedgwick v. Tucker*, 90 Ind. 271.

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, § 84.

See, also, 14 Cyc. p. 926.

## § 33. Assignability of inchoate interest.

## [a] (Sup. 1881)

During the life of her husband, the wife having no right of possession by reason of her dower interest, she could not convey it to another.—*McGlothlin v. Pollard*, 81 Ind. 228.

## [b] (Sup. 1892)

A deed of husband and wife which attempts to convey the inchoate right of a wife in the land of her husband, and no more, leaving the husband's title in him, is void.—*Davenport v. Gwilliams*, 31 N. E. 790, 133 Ind. 142, 22 L. R. A. 244.

## [c] (App. 1892)

During coverture the wife has no interest in her husband's real estate which she by her separate deed can convey, but she does have an interest which she may release by joining with her husband in the conveyance.—*Howlett v. Dilts*, 30 N. E. 313, 4 Ind. App. 23.

## FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 155, 156.

### § 34. Sales and conveyances subject to dower.

[a] (Sup. 1908)

Where a wife did not join her husband in a deed of his lands, she was not entitled to possession of any part of the land until after his death.—*Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531.

### § 35. Remedies for protection of interest of wife.

[a] (Sup. 1884)

A wife's inchoate interest in her husband's lands cannot be the subject of a suit by her to quiet title.—*Paulus v. Latta*, 93 Ind. 34.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 85, 86.

See, also, 14 Cyc. pp. 926, 927.

### § 36. Right vesting during life of husband.

[a] (Sup.)

Rev. St. 1843, c. 35, § 57, declares that whenever a divorce shall be decreed on account of the misconduct of the husband, the wife shall be entitled to dower in his lands in like manner as if he were dead. *Held*, that such statute was not retroactive, and hence a wife obtaining a divorce for her husband's misconduct is not entitled to dower in lands conveyed by him before the passage of the act.—(Sup. 1846) *McCafferty v. McCafferty*, 8 Blackf. 218; (1848) *Comly v. Strader*, 1 Ind. 134, Smith, 75.

[b] (Sup. 1850)

Where a divorce is granted for misconduct of both parties, the wife cannot claim dower in the husband's lands, under Rev. St. 1843, § 57, providing that when a divorce is granted for misconduct of the husband the wife shall be entitled to dower in his lands as if he were dead.—*Cunningham v. Cunningham*, 2 Ind. 233.

[bb] (Sup. 1879)

Under 1 Rev. St. 1876, p. 554, § 1, the one-third in which the debtor's wife has an inchoate interest cannot be sold on an execution issued on a judgment rendered subsequent to the taking effect of the act of 1875; and on the sale of the remaining two-thirds, on such execution, and vesting of title in the purchaser, her interest becomes consummate, and she is entitled to immediate possession, and to have her third set off to her by partition.—*Taylor v. Stockwell*, 66 Ind. 505.

[c] (Sup. 1879)

The conveyance of a bankrupt's property by the judge or register to the assignee is a judicial sale within the meaning of Act March 11, 1875, § 1 (Acts 1875, p. 178), providing that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, when the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and

to the same extent as such inchoate interest of married women become absolute upon the death of the husband.—*Roberts v. Shroyer*, 68 Ind. 64.

[cc] (Sup. 1879)

Under Act March 11, 1875, § 1, "vesting the inchoate interests of married women in the lands of their husbands when the title of the husband therein has been divested by certain judicial sales," etc., the wife takes precisely the same interest in such lands, upon the execution of a sheriff's deed to a purchaser at such sale, that she would have taken therein without the statute, upon the death of the husband leaving her surviving him, under the provisions of section 27 of the statute of descents. She takes such interest in said lands free from all the demands of the general creditors of her husband, but not free from prior conveyances thereof, by way of mortgages, executed by her and her husband, in due form of law. Therefore, in making partition of her interest, such mortgages should be taken into consideration.—*Jackman v. Nowling*, 69 Ind. 188.

[d] (Sup. 1880)

The title of a mortgagor's wife, who did not join in the mortgage, and was not made a party to a suit to foreclose it, becomes absolute, under 1 Rev. St. p. 554, § 1, at the date of the foreclosure sale, and a conveyance made by her, during the year allowed for redeeming the mortgaged property, is good, as to one-third of said property, against the purchaser at said sale, who at the expiration of the year of redemption receives a sheriff's deed of the whole property.—*Hollenback v. Blackmore*, 70 Ind. 234.

[dd] (Sup. 1880)

A conveyance by a register in bankruptcy of the land of an adjudged bankrupt to his assignee is a judicial sale, within Act March 11, 1875, vesting the inchoate interest of a wife in the lands of her husband absolutely in her when such lands are conveyed away from him under judicial proceedings, to the same extent as in case of his death.—*Ketchum v. Schickentanz*, 73 Ind. 137.

[e] (Sup. 1880)

A conveyance from the register in bankruptcy to the assignee of the bankrupt is a judicial sale within the meaning of Act March 11, 1875, vesting the inchoate title of a married woman in lands of her husband in case of a sale of such lands in judicial proceedings instituted against the husband.—*McCracken v. Kuhn*, 73 Ind. 149.

[ee] (Sup. 1881)

Under 1 Rev. St. 1876, p. 554, providing that, in all cases of judicial sales of real property in which a married woman has an inchoate interest by virtue of her marriage, such interest shall become absolute and vest in the wife in the same manner and to the same extent as it would upon death of the husband, the trans-

fer to a husband's assignee in bankruptcy of land which had been previously mortgaged by both husband and wife did not satisfy the mortgage as to the wife, but she took her interest in the land absolutely, but subject to the mortgage.—*Haggerty v. Byrne*, 75 Ind. 499.

[f] (Sup. 1881)

A sale of a debtor's real estate by his assignee in insolvency, as authorized by Rev. St. 1876, p. 142, is a judicial sale, within 1 Rev. St. 1876, p. 554, declaring that a widow's inchoate right of dower in her husband's lands vests when her husband's title is vested in another, and hence the wife, on the execution of a deed to the purchaser by the assignee, is entitled to immediate possession of her dower interest.—*Lawson v. De Bolt*, 78 Ind. 563.

[ff] (Sup. 1881)

The inchoate right of a wife in lands of her husband is transformed into a vested one by his conveyance thereof to an assignee in bankruptcy.—*Leary v. Shaffer*, 79 Ind. 567.

[g] (Sup. 1881)

Where land of a judgment debtor, in which his wife has an inchoate interest by virtue of her marriage, is sold on execution, her interest becomes vested and absolute on the day of the sale.—*Elliott v. Cale*, 80 Ind. 285.

[gg] (Sup. 1881)

Acts 1875, p. 178, declaring that a wife's inchoate dower interest in her husband's lands shall vest on the vesting of title in the purchaser at a judicial sale of the land during marriage, is not retroactive, and hence a purchaser under foreclosure of a mortgage made by the husband before the passage of the act, in which his wife did not join, took title freed from the wife's dower right therein.—*McGlothlin v. Pollard*, 81 Ind. 228.

[h] (Sup. 1882)

A husband and wife conveyed the husband's land, subject to the lien of a judgment against the husband, under which judgment execution was levied and sale made. *Held*, that the wife had no interest in the land, under Act March 11, 1875, § 1, providing that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold, or barred by virtue of such sale, such interest shall become absolute, and vested in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute, and vest in the purchaser thereof.—*Hudson v. Evans*, 81 Ind. 596.

[hh] (Sup. 1882)

1 Rev. St. 1876, p. 413, provides that where, during marriage, a husband purchases lands and gives a mortgage for the purchase

money, the wife shall not be entitled to a third of such lands, as against the mortgagee or persons claiming under him. Act 1875 provided that, in a certain contingency, such inchoate interests as the law might at the time recognize as inchoate interests should vest and become absolute in the wife as if she had survived her husband and become his widow. *Held*, that a foreclosure of the husband's land, under a purchase-money mortgage, does not vest any interest in the wife, under the latter statute.—*Baker v. McCune*, 82 Ind. 339.

[i] (Sup. 1882)

Rev. St. 1881, §§ 2508, 2509, declaring that a married woman's inchoate dower interest in her husband's land shall become vested on a judicial sale thereof, are not retroactive, and hence her interest did not vest by judicial sale of her husband's lands, on a judgment rendered against him prior to the passage of the act.—*Westerfield v. Kimmer*, 82 Ind. 365.

[ii] (Sup. 1882)

Under Rev. St. 1881, §§ 2508, 2509, vesting a wife's inchoate dower interest on a judicial sale of the land, are not retroactive, and hence do not apply to a husband's land sold under foreclosure of a mortgage executed by the husband alone before the passage of the act, though the judgment was recovered subsequent thereto.—*Parkham v. Vandeventer*, 82 Ind. 544.

[j] (Sup. 1882)

Where, under Rev. St. § 2508, a wife's inchoate interest in one-third of land of her husband vests by reason of an execution sale, her title relates back to the time of the sale, and she is entitled to rents and profits accruing between the time of the sale and the expiration of the year allowed for redemption.—*Riley v. Davis*, 83 Ind. 1.

[jj] (Sup. 1882)

Rev. St. 1881, § 2508, declaring that a married woman's dower interest shall vest on a judicial sale of the land, is not retroactive, and hence her interest in lands sold to satisfy a mortgage given by her husband prior to the enactment of said statute did not vest on the execution of the sheriff's deed to the purchaser under foreclosure.—*Lease v. Owen Lodge No. 140, I. O. O. F.*, 83 Ind. 498.

[k] (Sup. 1882)

Under Rev. St. 1881, § 2508, declaring that a married woman's dower interest in her husband's lands shall vest on a judicial sale thereof, a married woman was entitled to dower in her husband's lands sold under a judgment against him alone, though she had no children by such husband, and he had children by a previous wife.—*Caywood v. Medsker*, 84 Ind. 520.

[kk] (Sup. 1882)

The sale of a debtor's land by the assignee under a statutory assignment for the benefit of creditors is a judicial sale, and therefore, under the act of 1875, the inchoate right of dower

of the debtor's wife becomes absolute.—*Wright v. Gelvin*, 85 Ind. 128.

[l] (*Sup.* 1882)

Act March 11, 1875 (Rev. St. 1881, § 2508), providing that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold, such interest shall become absolute, and vest in the wife in the same manner and to the same extent as such inchoate interest now becomes absolute on the death of the husband, does not apply to a sale under a judgment rendered on a mortgage executed prior to the taking effect of such act.—*Voltz v. Rawles*, 85 Ind. 198.

[ll] (*Sup.* 1882)

Act March 11, 1875, provides that a wife's inchoate right to dower in her husband's land becomes absolute on the transfer of the husband's title by judicial sale, and that such act applies to equitable as well as legal estates of the husband. *Held*, that where part of a bankrupt's assets consisted of a certificate of purchase of school lands, and the assignee in bankruptcy paid the remainder of the purchase money, and took a conveyance to himself as assignee, the bankrupt's wife was entitled to dower in the land, as against a purchaser at a judicial sale thereof by such assignee.—*Keck v. Noble*, 86 Ind. 1.

[m] (*Sup.* 1882)

Act March 11, 1875, vesting in a wife her inchoate interest in lands sold at judicial sales does not apply to a sale under a mortgage executed before that act.—*Ferris v. Reed*, 87 Ind. 123; *Vermillion v. Nelson*, Id. 194.

[mm] (*Sup.* 1882)

Where, by virtue of a judicial sale of a husband's land, the wife became seised with one-third of the same in fee, as provided by Act 1875, and the husband at the purchaser's request procured a deed of his wife's interest, nothing being said as to the price to be paid, and the condition for such conveyance was not any new credit given to the husband, there was an implied promise by the purchaser to pay the wife the value of her interest, in the absence of evidence that the husband had any authority to deliver the deed in consideration of his previous indebtedness.—*Kocher v. Christian*, 88 Ind. 81.

Under Act 1875, providing that, on conveyance of land in which a married woman has a dower interest, such interest immediately vests in her, on a creditor purchasing a husband's land under execution, the wife became seised of the fee of one-third thereof, under the statute.—*Id.*

[n] (*Sup.* 1882)

Rev. St. § 2491, provides that the surviving wife is entitled to one-third of the real estate to which her husband may have been entitled in fee simple, and in the conveyance of

which she may not have joined, except that if a man marry a second or subsequent wife, and has by her no children, but has children living by a previous wife, the land which at his death descends to such wife shall at her death descend to his children. Section 2508 provides that, in case of judicial sales of real property in which any married woman has an interest by virtue of her marriage, such interest shall become absolute, and vest in the wife in the same manner and to the same extent as it would on the death of her husband, when the legal title of the husband becomes absolute in the purchaser. *Held*, that where a husband's land is sold on execution against him, and the title matures in the purchaser, the husband having children by the first wife, but none by his second, the latter takes a fee in one-third of the land.—*McClamrock v. Ferguson*, 88 Ind. 208.

[nn] (*Sup.* 1882)

Under Rev. St. 1881, §§ 2508, 2511, vesting a wife's inchoate interest in her husband's land sold under judicial sale as soon as the purchaser acquires title, a wife acquired a vested estate in one-third of her husband's mortgaged land sold under foreclosure of the mortgage in which she did not join, on the execution of the sheriff's deed to the purchaser, which title related back to the date of the sale, and hence on the wife's death her interest descended to her husband.—*Summit v. Ellett*, 88 Ind. 227.

[o] (*Sup.* 1882)

Specific performance of a husband's contract for the sale of land enforced by the execution of a deed by a commissioner appointed for that purpose, not being a judicial sale, under Rev. St. 1881, §§ 2508–2511, providing that, where land in which a married woman has an inchoate interest by reason of her marriage shall be sold at judicial sale, such interest shall become absolute in the wife when the husband's title vests in the purchaser, does not convert the wife's inchoate interest into a vested estate.—*Straughan v. White*, 88 Ind. 242.

[oo] (*Sup.* 1884)

A voluntary assignment by a husband of his land for the benefit of his creditors, under Rev. St. 1881, § 2662, is not a judicial sale of the land, within Rev. St. 1881, § 2508, providing that in case of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, such interest shall become absolute, and vest in the wife in the same manner as it would on the death of her husband, whenever, by virtue of the sale, the legal title of the husband shall become absolute in the purchaser, and the assignment will not therefore vest in the wife a right to recover from the assignee one-third of the rents accruing from the property from the date of the assignment to the sale of the land.—*Hall v. Harrell*, 92 Ind. 408.

[p] (*Sup.* 1884)

Rev. St. 1881, § 2491, gives a widow dower in lands of which her husband had an equita-

ble interest at the time of his death, and section 2508 provides that, when the legal title becomes absolute in the purchaser, the inchoate interest of the wife becomes vested in her, and that she shall have the right to immediate possession. *Held* that, where lands in which a husband had an equitable interest were conveyed by a sheriff's deed under judicial sale, the wife's interest therein vested on the execution of the deed.—*Shelton v. Shelton*, 94 Ind. 113.

[pp] (Sup. 1884)

Rev. St. 1881, §§ 2483, 2508, provide that, "if a husband die \* \* \* leaving a widow, one-third of his real estate shall descend to her in fee simple, free from all demands of creditors: provided, however, that where the real estate exceeds in value \$10,000 the widow shall have one-fourth only \* \* \* as against creditors," and "in all cases of judicial sales of real property in which any married woman has an inchoate interest, \* \* \* where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute on the death of the husband." *Held*, that where a creditor had obtained a sheriff's deed on execution, and his two heirs brought suit against the debtor's wife for partition, the evidence showing that two-thirds of the land sold was worth much more than the amount of the debt, and that the debtor's entire land was worth more than \$10,000, the wife was entitled to one-third, notwithstanding the proviso.—*Mansur v. Hinkson*, 94 Ind. 395.

[q] (Sup. 1884)

Under Rev. St. § 2508, a wife's inchoate interest in her husband's land becomes absolute on a sale of the land under an execution. Her relation to her interest is equivalent to that of a purchaser for value without notice, and her right, therefore, is paramount to that of one claiming under a secret trust.—*Richardson v. Schultz*, 98 Ind. 429.

[qq] (Sup. 1885)

Ordinarily, under Act March 11, 1875, which took effect August 24, 1875, upon foreclosure of husband's mortgage, a wife becomes seised of an undivided one-third of the incumbered land, and is entitled to a decree whereby such one-third is saved from foreclosure sale, unless that of the other two-thirds fails to satisfy the debt.—*Pouder v. Ritzinger*, 1 N. E. 44, 102 Ind. 571.

[r] (Sup. 1885)

Where the husband has an estate in fee simple, though not to be enjoyed until after the death of a life tenant, the wife, under Rev. St. § 2508, takes an absolute estate in one-third thereof on sheriff's sale.—*Foltz v. Wert*, 2 N. E. 950, 103 Ind. 404.

[rr] (Sup. 1886)

Under Rev. St. 1881, § 2508, a judicial sale of real property in which a married woman has

an inchoate interest, which is not by the judgment directed to be sold or barred, vests an absolute undivided one-third of said property in the wife in fee. She becomes a tenant in common with the purchaser, with no other interest in the undivided two-thirds, and she is not entitled to redeem the undivided two-thirds.—*Buser v. Shepard*, 8 N. E. 280, 107 Ind. 417.

[s] (Sup. 1887)

Where, subsequent to the sale on execution of certain property, subject to the lien of two prior mortgages executed by the owner and his wife, the wife has her one-third interest in the property set off to her under act March 11, 1875, and thereafter the title of the purchaser at the execution sale has matured and he purchases and has assigned to him one of the prior mortgages, foreclosing the same, and taking the decree in his own name, and also purchasing and taking an assignment of the decree and judgment under foreclosure of the other mortgage, both decrees adjudging that such assignee's interest in the land, which exceeded in value the amount of the judgment, be first sold for the payment of the debts, the mortgage debts were extinguished as to the wife by such purchase, and ceased to be liens on her interest.—*Bunch v. Grave*, 12 N. E. 514, 111 Ind. 351.

Where, under the act of March 11, 1875, a married woman has had set off to her her one-third interest in her husband's real estate which has been sold on execution, she occupies a relation analogous to that of surety as to prior mortgages in which she has joined, and the two-thirds of the property bought at the sheriff's sale is, as to her, charged with the payment of the whole debt, provided it is of sufficient value.—*Id.*

[ss] (Sup. 1887)

Rev. St. 1881, § 2508, provides that, in all cases of judicial sales of real estate in which a married woman has an inchoate interest which is not directed to be barred by the sale, such interest shall vest the same as on the husband's death, whenever the legal title of the husband in the estate sold shall vest in the purchaser. Section 2491 gives a surviving wife one-third of the real estate held by the husband in fee simple, in a conveyance of which she has not joined, and land in which he had an equitable interest at his death. Section 2499 provides that no act or conveyance of the husband in which the wife does not join shall extinguish her right. *Held*, that where a husband assigned for benefit of creditors, but before the assignment was recorded, land was sold under execution on a judgment obtained against him, the assignment did not prevent his wife's interest from vesting by virtue of the sale.—*Elliott v. Cale*, 113 Ind. 383, 14 N. E. 708.

[t] (Sup. 1889)

Rev. St. § 2508, provides that when land in which a married woman has an inchoate interest is sold at judicial sale, under a judgment which does not direct that her interest shall be



barred, her inchoate interest shall become absolute, with right of possession. Section 2497 provides that a husband who has deserted his wife, and is living in adultery at her death, shall take none of her estate. The husband of plaintiffs' ancestor gave a mortgage in which she did not join, and the land was sold to defendant under a foreclosure suit to which she was not a party. The husband deserted her, and was living in adultery at her death. *Held*, that plaintiffs could recover her interest in the land.—*Bradley v. Thixton*, 117 Ind. 255, 19 N. E. 335.

[tt] (Sup. 1890)

Rev. St. 1881, § 2508, provides that, when land in which a married woman has an inchoate interest shall be sold at judicial sale, her interest shall become absolute, as if her husband was dead. A married man conveyed to his assignee two tracts of land, each subject to a mortgage. The assignee sold one tract for more than the mortgage, and paid the wife her share of the entire purchase money. The other tract he sold for less than the mortgage. *Held*, that the wife had no claim against the assignee for any part of the price of the second tract, her inchoate right therein being subject to the mortgage.—*Miller v. Robbins*, 122 Ind. 203, 23 N. E. 713.

[u] (Sup. 1891)

Where a husband was adjudged a bankrupt and property was sold under an order made in the proceedings in 1878, the wife became the owner of an absolute estate in the land in that year.—*Powers v. Nesbit*, 27 N. E. 501, 127 Ind. 497.

[uu] (Sup. 1891)

A mortgage executed by plaintiff and her husband on the husband's land was foreclosed after the husband had conveyed the land to a third person, in which conveyance plaintiff did not join. *Held*, that the fact that the husband had no title at the time of the foreclosure did not prevent plaintiff's inchoate interest from vesting absolutely on the foreclosure sale; Rev. St. 1881, § 2508, providing that in all judicial sales of real property a married woman's inchoate interest, where it is not directed by the judgment to be sold or barred by the sale, shall become absolute, and vest in the wife in the same manner as on the husband's death, whenever the legal title of the husband shall become absolute and vested in the purchaser.—*Kelley v. Canary*, 129 Ind. 400, 29 N. E. 11.

[v] (Sup. 1892)

Where the wife of an assignor for the benefit of creditors does not join in the deed of an assignment, her inchoate interest in the real estate assigned does not become perfect until a sale by the assignee, who is entitled to actual possession until such sale.—*Taylor v. Bruner*, 130 Ind. 482, 30 N. E. 635.

[vv] (Sup. 1893)

Under Rev. St. 1881, § 2508, providing that in all cases of judicial sale of land in

which a married woman has an inchoate interest by virtue of her marriage, where such interest is not directed by the judgment to be sold, it shall become absolute in the wife, in the same manner as it becomes absolute on the death of the husband, "whenever by virtue of the sale the legal title of the husband \* \* \* shall become absolute and vested in the purchaser," a wife's inchoate interest in land of her husband, who is still living, does not become absolute on a judicial sale thereof from which redemption has been made by grantees of the husband.—*Huffmaster v. Ogden*, 135 Ind. 661, 35 N. E. 512.

[w] (Sup. 1894)

Upon subjecting to sale, to satisfy creditors, land purchased by the husband, but fraudulently taken in the name of the wife, her inchoate one-third interest becomes absolute, under Rev. St. 1894, § 2669 (Rev. St. 1881, § 2508).—*Whitney v. Marshall*, 138 Ind. 472, 37 N. E. 964.

[ww] (Sup. 1899)

Where the owner of real estate sold and conveyed the same, his wife not joining therein, the deed never being recorded, and the land was sold for taxes thereafter accrued, and the purchaser at the tax sale quieted the title as against the grantor, the legal title of the grantee vested in the purchaser at the tax sale, and not that of the grantor, and the inchoate interest of the grantor's wife, does not vest until the death of her husband.—*Pattison v. Wert*, 55 N. E. 227, 153 Ind. 453.

Acts 1875, p. 178 (Burns' Rev. St. 1894, § 2669; Horner's Rev. St. 1897, § 2508), making a married woman's inchoate right of dower vest absolutely where the husband's title to the land is sold at judicial sale without an order directing a sale of the inchoate interest, does not apply to land which a husband had conveyed prior to the judicial sale.—*Id.*

Acts 1875, p. 178 (Burns' Rev. St. 1894, § 2669; Horner's Rev. St. 1897, § 2508), making a married woman's inchoate right of dower to vest absolutely where the husband's title to land is sold at judicial sale without an order directing a sale of the inchoate interest, does not apply to land sold under a foreclosure of a tax lien which attached before the act was passed.—*Id.*

[x] (Sup. 1901)

Rev. St. 1881, § 2508 (Horner's Rev. St. 1897, § 2508; Burns' Rev. St. 1894, § 2669), declares that an undivided third in real estate of her husband is cast on the wife during the husband's life whenever, as the result of a sale based on judicial proceedings in which her inchoate interest is not barred, the legal title of the husband in his real estate shall become absolute and vested in the purchaser thereof, and "not otherwise." *Held*, that as the statute means the wife's inchoate interest cannot become a vested interest during the husband's life by operation of law under any other circumstances than specified, and does not prevent a mar-

ried woman divesting her interest during his life in consideration of receiving the equivalent of its value, if the transaction does not prejudice her husband's creditors, where it was agreed that if the husband should deed certain land the grantee, in consideration of the wife's surrender of her interest in the same, would convey to her a portion of the land, the portion so conveyed to her was not subject to execution against the husband; it appearing that all his land had not been of greater value than the amount of incumbrances, and was exempt.—*Higgins v. Ormsby*, 59 N. E. 321, 156 Ind. 82.

[xx] (Sup. 1901)

Action was brought by a vendor to enforce his lien for the unpaid purchase money. The wife of the defendant was not made a party. In pursuance of a judgment, the lands were sold, and purchased by the plaintiff. *Held*, that the contention that by the sale to the plaintiff the wife's inchoate dower interest became vested cannot be sustained, since her inchoate dower interest was subject to the superior equity of the vendor.—*Sarver v. Clarkson*, 59 N. E. 933, 156 Ind. 316.

[y] (App. 1903)

A conveyance under order of the court by an assignee for creditors to the assignor's wife of certain realty in consideration of the relinquishment of her inchoate interest in all other realty, and the release of a mortgage held by her on certain other lands, did not operate to merely vest her inchoate interest, so that under *Horner's Rev. St. 1901*, § 2510, such realty would descend to her husband on her death, but she was a purchaser for value, and could dispose of it by will.—*Willson v. Miller*, 66 N. E. 757, 30 Ind. App. 586.

[yy] (App. 1906)

*Burns' Ann. St. 1901*, § 2632, provides that a surviving widow shall be entitled to one-third of the real estate of which her husband, was seised during marriage and in the conveyance of which she may not have joined. *Burns' Ann. St. 1901*, § 2669, provides that in case of judicial sales of realty in which any married woman has an inchoate interest by virtue of her marriage, and such interest was not sold by the judgment, it shall vest in the wife as such inchoate interest becomes absolute on the death of the husband, and that when so vested the wife shall have the right to the immediate possession thereof and may have partition. A husband brought partition, and the land was sold, and certain creditors claimed the interest of the husband under a judgment against him. *Held*, that the judgment creditors could not as against the wife hold the entire fund realized from the partition proceedings of the husband's real estate, in the conveyance of which she had not joined, and in which proceedings she was not a party.—*Staser v. Gaar, Scott & Co.*, 38 Ind. App. 696, 78 N. E. 987.

[z] (Sup. 1907)

Such section vests the wife's interest, against her husband as well as against credi-

tors, notwithstanding section 2640, *Burns' Ann. St. 1901*, providing that the widow's one-third of real estate shall descend to her in fee simple "free from all claims of creditors."—*Green v. Estabrook*, 168 Ind. 123, 79 N. E. 373, 120 Am. St. Rep. 349.

*Burns' Ann. St. 1901*, § 2669 (Act March 11, 1875, p. 178, c. 123, § 1), provides that, where, at the judicial sale of realty, a wife's inchoate interest is not directed by the judgment to be sold or barred, such interest shall become absolute as upon the death of the husband, when, by virtue of the sale, the legal title of the husband vests in the purchaser. For the protection of the wife, the decree of foreclosure of a mortgage in which she had joined ordered sold only two-thirds of the property. *Held*, that her title became absolute with that of the purchaser of the two-thirds share, though the decree did not specifically provide that the whole of the husband's estate should be sold, leaving her inchoate interest to become vested.—*Id.*

*Burns' Ann. St. 1901*, § 2669, providing that the wife's inchoate interest in her husband's land shall become vested when such land is sold at a judicial sale, must be liberally construed in favor of the wife.—*Id.*

*Burns' Ann. St. 1901*, § 2669, providing that on a judicial sale of a husband's land the wife's interest therein shall vest, is a substitute for her common-law dower, which constitutes a legal, equitable, and moral right.—*Id.*

[zz] (Sup. 1907)

On the foreclosure of a mortgage on the husband's land, a court will protect the wife's rights therein as given by *Burns' Ann. St. 1901*, § 2669, vesting in the wife her rights in her husband's land sold at judicial sale for the payment of his debts.—*Staser v. Gaar, Scott & Co.*, 168 Ind. 131, 79 N. E. 404.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 87, 88.

See, also, 14 Cyc. pp. 927, 928.

(B) BAR, RELEASE, OR FORFEITURE.

Application of statute of frauds, see FRAUDS, STATUTE OF, § 63.

Release of dower as consideration for contract to convey, see VENDOR AND PURCHASER, § 13.

§ 37. Statutory provisions.

[a] Where a husband made a conveyance of land in which his wife did not join, prior to the statute abolishing dower and substituting one-third in fee simple, and died after such statute took effect, the widow is not entitled to dower in the land so conveyed.—(Sup. 1859) *Strong v. Clem*, 12 Ind. 37; (1872) *May v. Fletcher*, 40 Ind. 575; (1874) *Bowen v. Preston*, 48 Ind. 367; (1875) *Taylor v. Sample*, 51 Ind. 423; (1876) *Colman v. De Wolf*, 53 Ind. 428; (1883) *Wiseman v. Beckwith*, 90 Ind. 185.

## [b] (Sup. 1859)

In estates aliened by the husband before the Revised Code of 1852 took effect, the wife has no right of dower or other interest in the land, unless the right was consummate by the death of the husband before the taking effect of the Code.—*Giles v. Gullion*, 13 Ind. 487.

## [c] (Sup. 1863)

Where a husband owning real estate conveys the same, his wife not joining in the conveyance, and he dies before the taking effect of the Code of 1852, abolishing dower, and substituting one-third in fee simple, the widow's right of dower in such real estate became vested, and she is entitled to have the same assigned to her after the taking effect of such Code.—*Galbreath v. Gray*, 20 Ind. 200.

[d] Where a mortgage is made prior to the passage of a statute which provides for the vesting, upon foreclosure, of the inchoate interest of the mortgagor's wife, her rights are fixed, upon foreclosure, by the law in force when the mortgage was made.—(Sup. 1881) *McGlothlin v. Pollard*, 81 Ind. 228; (1882) *Lease v. Owen Lodge*, No. 146, I. O. O. F., 83 Ind. 498.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 131, 146;  
35 CENT. DIG. Mtg. § 209.

See, also, note, 4 C. C. A. 205.

## § 38. Power of husband in general.

## [a] (Sup. 1854)

When a husband conveys land in which the wife has an inchoate right of dower, no act done by him subsequent to the conveyance can affect the right of the wife.—*Rank v. Hanna*, 6 Ind. 20.

## [b] (Sup. 1871)

None of the disabilities imposed upon married women attach to the condition of a married man. He is as free to receive the title to property, and dispose of it, after marriage as before, except that he cannot by his conveyance affect the inchoate right of his wife to his real estate.—*Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679.

## [c] (Sup. 1873)

A widow claiming under an unrecorded deed of land, executed to her husband, will hold one-third of the land against subsequent purchasers for value, with notice that the deed was not recorded.—*Brannon v. May*, 42 Ind. 92.

## [d] (Sup. 1874)

The fact that the deed to real estate conveyed to a husband has, after the conveyance, been destroyed by the husband's consent, without having been recorded, does not estop the widow from setting up her claim to one-third of the property, as she cannot be deprived of her statutory right to one-third of the lands of which her husband was seised during coverture by any act of the husband alone. She does

not take such interest as heir to her husband, but by virtue of her marital rights.—*Johnson v. Miller*, 47 Ind. 376, 17 Am. Rep. 699.

## [e] (Sup. 1886)

Where a husband, during marriage, becomes seised of real estate in fee simple, the right of the wife therein cannot be defeated by him by any agreement short of a conveyance in which she joins.—*Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 89, 94, 95, 132.

See, also, 14 Cyc. pp. 929, 943-945; note, 18 L. R. A. 75.

## § 39. Power of wife in general.

## [a] (App. 1908)

A wife may waive her right to her inchoate interest in her husband's real estate.—*Druckmiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 155, 156.

## § 40. Jointures.

Election between jointure and dower, see post, § 58.

## [a] (Sup. 1889)

During coverture a husband caused to be conveyed to his wife a tract of land, reciting that it was in lieu of her interest in the lands owned by him and of which he might die possessed "as her jointure in her said husband's land forever." Held, that the deed was intended by the parties thereto as a jointure.—*Glass v. Davis*, 21 N. E. 319, 118 Ind. 593.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 111-113.

See, also, 14 Cyc. pp. 936-938.

## § 41. Antenuptial settlements and agreements.

Election between settlement and dower, see post, § 58.

## [a] (Sup. 1893)

An antenuptial agreement by which the husband obligated himself to provide a suitable home during the marriage, and, in case the wife should survive him, certain described lands should be set apart for her use and benefit until she died or remarried, and also to set aside a certain sum of money to be kept at annual interest for her benefit, the wife to have no more or greater share of or in the estate of the husband than so provided, duly signed and sealed by the parties to the marriage, was a deed creating a jointure within the meaning of Rev. St. 1881, § 2500, providing that whenever, for the purpose of creating a jointure for an intended wife, a pecuniary provision shall be made for the benefit of the intended wife, the lands conveyed to or in trust for her the same shall be a bar to the claim of such wife in the lands of

the husband, provided the wife at the time of the creation of such jointure signified in writing indorsed on or attached to the deed her assent to receive the same in lieu of such right.—*Craig v. Craig*, 90 Ind. 215.

[b] (Sup. 1883)

Where an antenuptial contract limits the interest of the wife in case she survives her husband to one-third of his land for life, she cannot on his death claim also one-third in fee.—*Shaffer v. Shaffer*, 90 Ind. 472.

[c] (Sup. 1898)

An adult woman before her marriage may bar her legal rights in her husband's estate by her agreement to accept any other provisions in lieu thereof, and such an agreement will be upheld and enforced by the courts, in the absence of fraud or imposition upon her, and where it may be said under the particular circumstances that it is not unconscionable.—*Kennedy v. Kennedy*, 50 N. E. 756, 150 Ind. 636.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 114-122.

See, also, 14 Cyc. pp. 939-941.

§ 42. Postnuptial settlements and agreements.

[a] (Sup. 1878)

Under Rev. St. p. 414, §§ 36, 40, a postnuptial agreement, making a pecuniary provision in lieu of the dower right in the real estate, must be in writing, with an acknowledgment attached or indorsed that the wife has assented to such substitution.—*Randles v. Randles*, 63 Ind. 93.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 123-128.

See, also, 14 Cyc. pp. 941-943.

§ 44. Conveyance by husband after marriage.

Conveyance by wife, see post, § 49.

[a] (Sup. 1854)

Where the husband was seised in fee of an undivided interest in land, which he sold, and the purchaser during the husband's lifetime had his share set off to him in severalty, the widow may have her dower assigned out of the whole undivided estate, as if partition had not been made.—*Rank v. Hanna*, 6 Ind. 20.

[b] (Sup. 1872)

Where the husband conveys without the wife, and the wife survives her husband, she is entitled to dower.—*May v. Fletcher*, 40 Ind. 575.

[c] (Sup. 1877)

The right of a wife in unincumbered land held by the husband under an unrecorded deed is extinguished by his surrender of such deed to the grantor, and his causing the latter to convey the land to an innocent third person.—*Alexander v. Herbert*, 60 Ind. 184.

[d] (Sup. 1892)

Rev. St. 1881, § 2491, provides that a surviving wife shall be "entitled to one-third of all the real estate of which her husband may have been seised in fee during marriage, in the conveyance of which she did not join," but "if a man marry a second wife, and has no children by her, but has children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children." Held, that where a husband conveyed his property to a child of the first marriage, the second wife not joining in the deed, she was entitled to one-third in fee; the proviso of the act being applicable only where the husband was the owner of land at his death.—*Slack v. Thacker*, 84 Ind. 418.

[e] (Sup. 1891)

The rights of a widow in land conveyed by her husband in fee to a creditor to secure him, but to defraud other creditors, are not affected by such fraudulent intent, unless she was aware of and participated in the same; and, if she be innocent in the premises, the absolute conveyance will, as to her rights, be declared a mortgage.—*Kitts v. Willson*, 130 Ind. 492, 20 N. E. 401.

[f] (Sup. 1895)

Where one deeds land to his daughter, without the joinder of his wife, the wife is entitled, after his death, to a one-third interest in said land in fee, under Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), giving a surviving wife one-third of all the real estate of which her husband may have been seised during the marriage.—*Graves v. Fligor*, 140 Ind. 25, 38 N. E. 853.

[g] (Sup. 1906)

Under Burns' Rev. St. 1901, § 2652 (Rev. St. 1881, § 2491), a wife who does not join her husband in conveying land owned by him at any time during their marriage is entitled, on surviving him, to one-third thereof at his death.—*Fry v. Hare*, 166 Ind. 415, 77 N. E. 803.

[h] (App. 1906)

The legal widow takes her statutory rights in all of her deceased husband's property, in whose transfer she did not join, though the grantee was ignorant of her marriage to such husband and believed him married to the woman who lived with him and who joined in execution of the deed.—*Stevens v. Wooderson*, 38 Ind. App. 617, 78 N. E. 681.

[i] (App. 1909)

Under Burns' Ann. St. 1908, § 3029, providing that, with certain exceptions, a surviving wife is entitled to one-third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she did not join, together with all lands in which he owed an equitable interest at the time of his death, a wife's interest attaches to the real estate by virtue of her husband's seisin during

marriage, which cannot be divested by his conveyance, in which she did not join.—*Keener v. Grubb*, 89 N. E. 896.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 3, 130-143.  
See, also, 14 Cyc. pp. 945-947.

**§ 45. Assignment by husband for benefit of creditors or in insolvency.**

[a] (Sup. 1833)

A wife is not precluded from asserting title to one-third of the lands, under Rev. St. 1881, § 2508, by the fact that she joined with her husband in a conveyance made to defraud his creditors, where, upon his subsequently becoming bankrupt, the grantee reconveyed to the assignee in bankruptcy in compromise of a suit brought by him, and the assignee conveyed the land as part of the husband's estate in bankruptcy.—*Mattill v. Baas*, 89 Ind. 220.

[b] (Sup. 1884)

The judicial sale of lands of a bankrupt by order of the bankruptcy court to satisfy liens thereon, the wife not being a party to the order of sale, does not divest the rights of the wife in such lands.—*Ragsdale v. Mitchell*, 97 Ind. 458.

[c] (Sup. 1895)

Where a husband executes alone a deed of assignment for the benefit of his creditors of all his property, including land previously mortgaged by himself and wife, title to one-third of such land remains in the wife, subject to said mortgage.—*Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 144.

**§ 46. Judicial sale of property.**

As vesting of interest, see ante, § 36.

Sale under order of court in administration of deceased husband's estate, see EXECUTORS AND ADMINISTRATORS, § 387.

[a] (Sup. 1832)

Rev. Code 1824, p. 157, providing the clause in the statute which says that the widow's dower shall not be considered as sold or extinguished by a sale of her husband's property by virtue of any decree, execution, or mortgage to which she is not a party, has no relation to a decree, etc., existing previous to the marriage.—*McMahan v. Kimball*, 3 Blackf. 1.

[b] (Sup. 1851)

A. having sold a tract of land to B., the latter paid a portion of the purchase money, gave his note for the balance, and took a bond conditioned that a deed should be made when all the purchase money was paid. B. took possession, and died, leaving heirs. The purchase money being unpaid, A. filed his bill to enforce payment by a sale of the land. A decree was rendered, and the land sold to C. A. married prior to the said sale to C., and died. *Held*,

that his widow was not entitled to dower in said land.—*Kintner v. McRae*, 2 Ind. 453.

[c] (Sup. 1865)

A husband executed a mortgage in which his wife did not join, on his interest in land held by him as tenant in common with others. The mortgage was afterwards foreclosed, and the land bought in by the mortgagee. The mortgagee afterwards sued for partition against the trustee in common with A., and on a report that the land was not susceptible of partition an order of sale was made, and said mortgagee became the purchaser. Thereafter the husband died, and his widow sued for partition against the mortgagee, claiming to have one-third of the endowable interest of her husband set apart to her. *Held*, that the sale under the proceedings for partition did not divest the contingent interest of the widow.—*Verry v. Robinson*, 25 Ind. 14, 87 Am. Dec. 346.

[d] (Sup. 1870)

A husband and wife executed a mortgage without warranty on certain land to which neither had title, but afterwards the husband acquired title thereto in fee simple. Subsequently the mortgage was foreclosed, neither of the mortgagors appearing in the suit, and the land was sold to one not a party. The husband died. *Held*, that the widow was entitled, as such, to one-third of the land.—*Curren v. Driver*, 33 Ind. 480.

[e] (Sup. 1871)

The act abolishing tenancies in dower and by curtesy did not except inchoate rights. Hence, where a husband mortgaged lands before the date of the act, his wife not joining, and the mortgage was foreclosed, the widow took no interest in the land. She was not entitled to dower in consequence of the act, and she could not take her third in fee simple, as the interest of the mortgage could not be diminished without incurring the charge of having impaired the obligation of the contract.—*Hoskins v. Hutchings*, 37 Ind. 324.

[f] (Sup.)

A sale on execution does not divest the wife's title to dower.—(Sup. 1872) *May v. Fletcher*, 40 Ind. 575; (1882) *Nutter v. Fouch*, 86 Ind. 451.

[g] (Sup. 1875)

The widow of a judgment defendant, who married him after the lien of the judgment attached, has no claim, by virtue of her marriage, to real estate sold to satisfy the judgment, even though the original judgment was revived by the administrator of the deceased judgment creditor after the marriage, and the real estate sold after such judgment was revived; 10 years not having elapsed after the original judgment was obtained and before it was revived.—*Armstrong v. McLaughlin*, 49 Ind. 370.

[h] (Sup. 1875)

Under the statute of descent of 1852, which abolished dower and provided that the wife of

one who had been seised in fee of land during coverture should be entitled to one-third in fee of all land to the alienation of which she had not consented, a widow of one whose land was attempted to be sold under execution before such act went into effect, such attempted sale being void, is entitled to a one-third interest in such land, where her husband died after it took effect.—*Thacher v. De Vol*, 50 Ind. 30.

[l] (Sup. 1875)

Under the statute of descent of 1852, which abolished dower and gave a surviving wife a one-third estate in fee of land of which the husband had been seised during coverture, and to the alienation of which she had not consented, a widow has no interest in land owned by her husband in fee simple, sold on execution before such act took effect, subject to her inchoate right of dower, where her husband did not die until subsequent to the time such act took effect.—*Taylor v. Sample*, 51 Ind. 423.

[j] (Sup. 1878)

1 Rev. St. 1876, p. 411, § 6, "regulating descents," etc., abolished tenancies by the curtesy and in dower; and where land of the husband, who died after the passage of said act, was sold on execution against him prior to the date when such act took effect, the widow had no right of dower therein.—*Carr v. Brady*, 64 Ind. 28.

[k] (Sup. 1880)

Where a man marries a second time, and acquires land which is sold on execution against him, and dies leaving children by his first marriage only, his wife is entitled merely to a life estate in one-third of the land sold on execution, under 1 Rev. St. 1876, p. 412, § 24, providing that if a man marry a second or subsequent wife, and has by her no children, but has children living by a previous wife, the land which at his death descends to such wife shall at her death descend to his children.—*Hendrix v. Sampson*, 70 Ind. 350.

[l] (Sup. 1882)

The act of March 11, 1875, in relation to dower, does not apply to judicial sales in which the wife's inchoate interest is directed to be sold by the judgment or decree upon which the sale takes place.—*Gough v. Clift*, 81 Ind. 371.

[m] (Sup. 1882)

A wife is not entitled to dower in one-third of land sold under foreclosure of a purchase-money mortgage given by her husband alone.—*Baker v. McCune*, 82 Ind. 585.

[n] (Sup. 1882)

The fact that a purchaser of land against whom the vendor had obtained a personal judgment for the purchase money consented that a general execution issued on the judgment might be levied on the land without a previous exhaustion of personalty did not amount to a consent that the vendor might forego his equi-

table remedy for the enforcement of his lien so as to deprive the wife of the purchaser of any right to which she might be entitled under 1 Rev. St. 1876, pp. 413, 414, §§ 27, 35, providing that a wife shall be entitled to one-third interest in any land in which her husband has a fee-simple estate and which shall be sold under an execution issued on a judgment against the husband.—*Nutter v. Fouch*, 86 Ind. 451.

[o] (Sup. 1887)

Under Act March 11, 1875 (Rev. St. 1881, § 2508), providing that a judicial sale of land in which a married woman has an inchoate interest, which is not by the judgment directed to be sold or barred, shall vest an absolute undivided third of the property in her in fee, a purchaser from the wife of her interest in land previously mortgaged by her husband alone, in 1874, and subsequently sold under execution against the husband in 1879, takes the fee in an undivided third of the land, which, under the state practice, cannot be cut off by a strict foreclosure.—*Jefferson v. Coleman*, 110 Ind. 515, 11 N. E. 465.

[p] (Sup. 1887)

Under Rev. St. 1881, § 2508, providing that a wife's inchoate interest in her husband's real estate shall vest as on his death, on a judicial sale of such real estate vesting an absolute title in the purchaser, such interest was not barred by the husband's assignment of the land for the benefit of creditors, postponed to the judgments on which the land was sold, because not recorded; and, on her death after the sale, her husband inherited her interest and became a tenant in common with the purchasers.—*Elliott v. Cale*, 113 Ind. 383, 14 N. E. 708.

[q] (Sup. 1889)

When land in which the wife of the mortgagor has an inchoate marital interest is sold under a foreclosure, directing that such interest shall be barred by the sale, and the land is afterwards redeemed by a judgment creditor, and sold under his judgment by virtue of Rev. St. § 773, which provides that such sale shall be by execution on the judgment, reciting the amount paid for redemption, etc., and that all the title of the owner shall pass to the purchaser, and the lien of the original foreclosure judgment be discharged by such sale, the wife is barred thereby, and acquires no interest under section 2508, providing that, when a judicial sale of land in which the wife of the debtor has such an interest is made under a judgment which does not direct that her interest shall be barred, she shall be vested absolutely with a share of the land equal to her inchoate interest.—*Patterson v. Rosenthal*, 117 Ind. 83, 19 N. E. 618.

[r] (Sup. 1891)

Under Rev. St. Ind. 1881, § 2508, making the inchoate interest of a married woman in her husband's land become absolute on a judi-

cial sale, as on his death, where the inchoate interest is not directed to be sold, she is entitled, on a sale under a mortgage in the execution of which she joined, to an order that the husband's two thirds be first sold, and if the whole is sold the husband's general creditors have no claim to her third of the proceeds.—*Purviance v. Emley*, 126 Ind. 419, 26 N. E. 107.

[s] (Sup. 1891)

A sale by the husband's guardians by order of court to pay the balance of the unpaid purchase price and other debts will not bar the wife's dower, where she was not a party to the proceeding had to procure the order of sale.—*Davis v. Hutton*, 127 Ind. 481, 26 N. E. 187, 1006.

[t] (Sup. 1892)

Rev. St. 1881, § 2491, provides that a surviving wife is entitled to one third of all the real estate of which her husband was seised during coverture, in a conveyance of which she had not joined. *Held*, that a judgment against a husband and wife quieting title to land which had been owned by the former, but which prior to the action he alone conveyed, is binding on the wife after the husband's decease. *Curren v. Driver*, 33 Ind. 480, overruled.—*Tanguay v. O'Connell*, 132 Ind. 62, 31 N. E. 469.

[u] (Sup. 1893)

A married man conveyed land by deed in which his wife did not join. The land was then sold for taxes. *Held*, that the purchaser at tax sale took it subject to the inchoate right of the wife of the grantor, and that, on the death of her husband, she was entitled to a third interest in the land, free from any liability to refund to the purchaser any part of the taxes paid by him on the land prior to the death of the husband.—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

[v] (Sup. 1897)

The inchoate right of a wife to one-third of her husband's real estate, given by Rev. St. 1894, § 2652 (Rev. St. 1881, § 2491), subsists by virtue of the seisin of the husband, and is subject to all incidents which the law attaches to such seisin, one of which, in case of a tenancy in common, is a liability to be divested by a partition sale.—*Haggerty v. Wagner*, 48 N. E. 366, 148 Ind. 625, 39 L. R. A. 384.

The clause of Rev. St. 1894, § 2660 (Rev. St. 1881, § 2490), substantially providing that the right of the wife to one-third of her husband's real estate shall not be affected by any judicial proceeding to which she was not a party, must be construed with those sections of the Code of Civil Procedure (2 Gav. & H. St. pp. 45, 46, §§ 17, 18) relating to the subject of necessary parties to civil actions, as they are in pari materia; and to give effect to each is possible by construing the requirement of the former as to parties to relate to such parties only as are necessary parties.—*Id.*

Under 2 Gav. & H. St. p. 365, § 23, providing that the moneys arising from a partition sale "shall be paid \* \* \* to the persons entitled thereto according to their respective shares," no money can be paid to the wife of a cotenant on such sale, even though made a party, as she has no share in the lands of her husband while he lives; and therefore Rev. St. 1894, § 2660 (Rev. St. 1881, § 2490), providing that no "sale \* \* \* of the husband's property, by virtue of any decree \* \* \* to which she shall not be a party, \* \* \* shall prejudice or extinguish the right of the wife to her third of his lands," etc., does not apply to such sales, as she could effect nothing by being made a party.—*Id.*

[w] (Sup. 1898)

By virtue of Burns' Rev. St. 1894, § 2660 (Rev. St. 1881, § 2490), providing that no conveyance by the husband without the consent of the wife, evidenced by her acknowledgment, nor sale under any decree, execution, or mortgage to which the wife is not a party, shall extinguish the wife's right to one-third interest in her husband's estate, a conveyance of real estate, either directly by the husband alone, or by an officer, to satisfy a lien given by the husband individually, passes to the purchaser only the husband's interest.—*Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55.

[x] (App. 1901)

Where a wife is not a party to a proceeding for partition of realty in which her husband has an interest, and she survives him, and the interest of the husband is divested by judicial sale in such proceedings, she retains no interest or title in the property.—*Wagner v. Carskadon*, 28 Ind. App. 573, 60 N. E. 731, 61 N. E. 976.

[y] (Sup. 1903)

Burns' Rev. St. 1901, § 2652, provides that a surviving wife is entitled, except as otherwise provided, to a third of the real estate of which her husband may have been seised in fee simple during marriage. A husband held possession of land under an executory contract for a conveyance on his payment of the price. He was sued on his default, and answered. The judgment directed a lien on the land for the balance due under the contract, and ordered the sale of his equity for payment of the judgment. A sale was made, and he surrendered possession to the purchaser. *Held*, that his surviving wife had no interest in the land.—*Schaefer v. Purviance*, 66 N. E. 154, 160 Ind. 63.

[z] (Sup. 1907)

Under Burns' Ann. St. 1901, § 2669, providing that, on judicial sale of real property in which a married woman has an inchoate right that is not directed to be barred or sold, her right shall become absolute when the title of the husband shall become vested in the purchaser, where land is sold in partition proceedings, the wife of a cotenant is entitled as against his judgment creditors to the protec-

tion of her share of the proceeds by virtue of her dower right.—*Staser v. Gaar, Scott & Co.*, 168 Ind. 131, 79 N. E. 404.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 92, 145–153.

See, also, 5 Cyc. p. 384, 14 Cyc. pp. 947–952; note, 16 L. R. A. 776.

### § 47. Dedication or appropriation of property to public use.

[a] (Sup. 1882)

Under Act 1852 (1 Rev. St. 1876, p. 897), providing that every donation or grant to the public or to any individual, religious society, corporation or body politic, noted as such on the plat of the town wherein such donation or grant may have been made shall be considered a general guaranty to said donee or grantee for the purposes intended by the donor or grantor, a donation or grant to the public noted as such on the plat of an addition to a town, made in accordance with the statute, and accepted by the town, bars the dower of the donor's wife.—*Duncan v. City of Terre Haute*, 85 Ind. 104.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 96.

See, also, 14 Cyc. pp. 930, 931.

### § 49. Conveyance or release by wife.

Liability of married woman joining in deed for purpose of relinquishing dower on covenants therein, see HUSBAND AND WIFE, § 81. Release of dower consummate before assignment, see post, § 57.

[a] (Sup. 1843)

Where a wife joins with her husband in a mortgage of land, she will have no right to claim dower in the premises, without redeeming the mortgage.—*Watson v. Clendenin*, 6 Blackf. 477.

[b] (Sup. 1845)

A conveyance executed by husband and wife, but in the body of which the wife's name is not inserted, does not convey the interest of the wife to the premises.—*Cox v. Wells*, 7 Blackf. 410, 43 Am. Dec. 98.

[c] (Sup. 1847)

Where a husband and wife convey property on condition that they be permitted to occupy a house on the premises, and that the grantees furnish them with support during their lives, the wife is entitled to dower in the premises if the grantees fail to comply with the conditions.—*Hefner v. Yount*, 8 Blackf. 455.

[d] (Sup. 1862)

A deed executed while the statute of 1824, providing that a married woman may, by joining in a deed with her husband, release or convey her dower, was in force, contained the following in relation to the dower of the wife: "In witness whereof the said I. B., and R., his wife, who hereby relinquishes her right of dower

in the above premises, have hereunto set their hands, the date above written." *Held*, that under the statute the words amount to a release.—*Davis v. Bartholomew*, 3 Ind. 485.

A deed in which a wife joins with her husband, to be sufficient to bar dower, must itself contain words necessary to constitute a conveyance or release, and cannot be aided by the certificate of acknowledgment.—*Id.*

The signature and seal of a married woman to a deed executed by her husband are not sufficient of themselves to release her dower.—*Id.*

[e] (Sup. 1857)

A release can only operate as a conclusion between parties and privies, and cannot inure to bind an estate, or transfer by estoppel an interest, not possessed at the time.—*Matlock v. Lee*, 9 Ind. 298.

[f] (Sup. 1870)

1 Gav. & H. St. p. 260, provides that, if a mortgagor uses the words "mortgages and warrants," he shall be held to have warranted a perfect title, but, if he omits the words "and warrants," the mortgage shall be good, but without warranty. A husband and wife executed a mortgage without warranty on real estate to which they had no title, but afterwards the husband required title thereto in fee simple. The mortgage was subsequently foreclosed on default, neither of the mortgagors appearing to the suit, and the land was sold under the decree to one not a party. Afterwards the husband died, leaving his wife surviving. *Held*, that the widow was entitled to one-third of such real estate.—*Curren v. Driver*, 33 Ind. 480.

[g] (Sup. 1872)

1 Gav. & H. St. p. 291, § 17, entitling a widow to a fee simple of one-third of her deceased husband's land free from all demands of creditors, does not include the claim of a mortgagee under a mortgage that had been executed by both husband and wife.—*May v. Fletcher*, 40 Ind. 575.

[h] (Sup. 1874)

A widow who joined with her husband in his lifetime in a mortgage of his lands has a right to have the personal estate, and the residue of the decedent's real estate, applied, as far as applicable, to the payment of the mortgage debt before her interest as widow in such lands is subjected to sale.—*Hunsucker v. Smith*, 49 Ind. 114.

[i] (Sup. 1875)

Under 1 Gav. & H. St. p. 296, § 27, providing that the surviving wife shall be entitled to one-third of all the real estate of which her husband may have been seised in fee simple at any time during coverture and in the conveyance of which she may not have joined, the wife has no interest in her husband's real estate which, during his life, can be separately conveyed.—*McCormick v. Hunter*, 50 Ind. 186.



## [j] (Sup. 1878)

Joinder of the wife of a judgment debtor in a duly-recorded mortgage of lands conveys her inchoate interest therein.—*Graves v. Braden*, 62 Ind. 93.

## [k] (Sup. 1881)

A wife's inchoate dower right in her husband's land may be properly mortgaged by her to secure his debt, and the mortgagee takes a superior interest thereunder to the rights of subsequent lienors.—*Mark v. Murphy*, 76 Ind. 534.

## [l] (Sup. 1881)

Where the lands of a husband have been sold on execution, the wife may sell and convey her inchoate interest in such land, where her husband joins with her.—*Dunn v. Tousey*, 80 Ind. 288.

## [m] (Sup. 1882)

The release by a wife of her inchoate interest in her husband's real estate may be a valuable consideration.—*Jarboe v. Severin*, 85 Ind. 496.

## [n] (Sup. 1883)

A husband's lands were sold on execution to satisfy a personal judgment against him, and, not being redeemed, the purchaser took a sheriff's deed. During the year for redemption the husband and wife conveyed the land. Held, that such conveyance passed the wife's inchoate interest.—*Youst v. Hayes*, 90 Ind. 413.

## [o] (Sup. 1884)

Where a wife joined with her husband in the execution of certain mortgages on his real estate, none of his creditors, on the death of such husband, other than those secured by such mortgages, could assert or enforce their demands against her share of his real estate.—*McCord v. Wright*, 97 Ind. 34.

## [p] (Sup. 1884)

A deed by husband and wife, made after dower was abolished, containing only his name in the granting clause, but in the testatum clause the words, "said A. and B. his wife, who hereby relinquishes her dower in said premises," does not bar the wife's inchoate estate.—*Travellers' Ins. Co. v. Noland*, 97 Ind. 217.

## [q] (Sup. 1888)

Where the husband's deed of his own real estate, wherein his wife has joined, has been avoided and rendered inoperative or ineffectual to convey his real estate, such deed is not valid and effective to bar his wife's inchoate interest in such real estate, or as a release of her inchoate interest therein. If the deed is void and ineffectual to convey the husband's real estate, it is also void and ineffectual to convey, bar, or release the wife's inchoate interest in such real estate, in the event she survives her husband, or in the event that such real estate is sold and conveyed as the husband's property, under a judicial sale thereof, and his title thereto be-

comes absolute and vested in the purchaser thereof at such sale.—*Rupe v. Hadley*, 16 N. E. 391, 113 Ind. 416.

## [r] (Sup. 1888)

Where a husband makes a contract to convey land, in which the wife does not join, and pending a suit for specific performance both join in a conveyance to a third person, who, before a decree ordering a conveyance under the contract, reconveys to the husband, the wife has no interest in the property as against the vendee, her right of dower having been released by her deed and she having acquired no interest in the title obtained by her husband on the reconveyance as against the vendee.—*Sharts v. Holloway*, 50 N. E. 386, 150 Ind. 403.

## [s] (Sup. 1906)

Where a husband in 1867 by a contract in writing, without the joinder of his wife, agreed to transfer certain realty giving the purchaser possession which he and his heirs maintained, the consideration being subsequently paid, a quitclaim deed by the wife in 1891 perfects the purchaser's title, the husband having died in 1868, leaving children by a former marriage but none by her, and as to such children such adverse possession is shown as would defeat their cause of action.—*Fry v. Hare*, 106 Ind. 415, 77 N. E. 803.

## [t] (App. 1908)

Where a judgment creditor of a husband redeemed land from a mortgage foreclosure sale and procured the land to be resold under a venditioni exponas, the land sold on such redemption sale was the land of the husband in which the wife had an inchoate interest; and hence the wife was entitled to intervene and claim one-third of the purchase price of the land, less the amount necessary to satisfy the decree out of the surplus as against junior lienors.—*Luken v. Fickle*, 42 Ind. App. 445, 84 N. E. 561.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 154-175.

See, also, 14 Cyc. pp. 952-958; note, 16 L. R. A. 209; note, 49 Am. Rep. 87.

## § 50. Estoppel.

## [a] (App. 1906)

Where a wife separated from her husband, but they were not divorced, and subsequently he and a woman with whom he lived deeded his land, the wife not having known that her husband was the owner of the land and that he was attempting to transfer, and the grantee not having relied on anything said or done by the wife, she was not estopped from asserting her dower right.—*Stevens v. Wooderson*, 38 Ind. App. 617, 78 N. E. 681.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 99.

See, also, 14 Cyc. pp. 931, 932; notes, 25 L. R. A. 564, 3 L. R. A. (N. S.) 971.

### § 51. Elopement, adultery, or other misconduct of wife.

[a] (Sup. 1880)

A wife's right of dower is not defeated by her desertion of her husband without adultery.—*Wiseman v. Wiseman*, 73 Ind. 112, 38 Am. Rep. 115.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 100, 101.

See, also, 14 Cyc. pp. 932, 933; note, 19 Am. Dec. 688.

### § 52. Divorce.

[a] (Sup. 1855)

A husband obtained a divorce while Rev. Laws 1831, p. 214, was in force, providing that a decree of divorce should release plaintiff from the marriage contract to all intents and purposes, as though the same had never been solemnized. *Held*, that the right of the wife in respect to dower was fixed by such statute, and was not affected by Rev. St. 1838, p. 238, providing that in certain cases a divorce should not bar dower.—*Whitsell v. Mills*, 6 Ind. 220.

Where husband and wife are divorced a vinculo, the wife, after the husband's death, is not a widow, and the widow alone at common law is entitled to dower.—*Id.*

[b] (Sup. 1859)

A divorce deprives a wife of any right of dower.—*Chenowith v. Chenowith*, 14 Ind. 2.

[c] (Sup. 1877)

Under 2 Rev. St. 1876, p. 324, § 18, regulating the granting of divorces, a wife from whom her husband has obtained a divorce takes no interest in his real property at his death.—*Lash v. Lash*, 58 Ind. 526.

[d] (Sup. 1896)

A wife who had been divorced for the fault of the husband is, on the death of the husband, neither the "widow" (Rev. St. 1894, § 2640; Rev. St. 1881, § 2483) nor "the surviving wife" (Rev. St. 1894, § 2652; Rev. St. 1881, § 2491) of the husband, who died without remarrying, and therefore is not entitled to a one-third interest in his estate.—*Fletcher v. Monroe*, 145 Ind. 56, 43 N. E. 1053.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 102-107.

See, also, 14 Cyc. pp. 934-936; note, 15 L. R. A. 542.

### § 53. Restoration of right.

[a] (Sup. 1881)

The taking of a new note and mortgage, by the mortgagee, for the same debt, on the same land, will not discharge the lien of the first mortgage, so as to let in the right of a wife to dower.—*Walters v. Walters*, 73 Ind. 425.

[b] (Sup. 1889)

If a mortgagee, without the consent of a married woman who united with her husband

in a mortgage conveying his real estate to indemnify an indorser of his note, take a new note, not signed by one of the makers of the original note, the inchoate interest of the wife in the land is thereby released, and cannot be sold under a foreclosure of the mortgage.—*Crawford v. Hazelrigg*, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139.

Where a wife unites with her husband in a mortgage conveying his real estate to indemnify an indorser of his note, the mere extension of time, to which the mortgagee is a party, to the makers of such note for a definite period upon a valuable consideration, without the wife's consent, does not release her inchoate interest in the mortgaged land from the lien of the mortgage.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 108-110.

## III. RIGHTS AND REMEDIES OF WIDOW.

Election between dower and devise or bequest, see WILLS, §§ 778-803.

Election between dower and right of inheritance, see DESCENT AND DISTRIBUTION, §§ 64, 65.

Right becoming absolute during life of husband, see ante, § 36.

Right to have debts of decedent paid out of general assets in exoneration of her interest in realty, see EXECUTORS AND ADMINISTRATORS, § 271.

Right to statutory allowance in addition to dower, see EXECUTORS AND ADMINISTRATORS, § 179.

Sale to pay debts of deceased husband, see EXECUTORS AND ADMINISTRATORS, § 329.

### § 54. Dower consummate before assignment.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 91, 129, 176, 178-219, 264, 265.

See, also, 14 Cyc. pp. 960-972.

### § 55. — Nature of interest.

[a] (Sup. 1868)

A widow entitled to dower is not a tenant in common with the children of the deceased owner of the land until the assignment of dower.—*Grossman v. Lauber*, 29 Ind. 618.

[b] (Sup. 1899)

The right of a widow to dower, before assignment, does not constitute a life estate, so as to make the widow a tenant in common with the heirs and devisees.—*Grubbs v. Leyendecker*, 53 N. E. 940, 153 Ind. 348.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 176.

See, also, 14 Cyc. pp. 960, 961.

**§ 56. — Rights of widow in general.**

Restraining sale on execution under judgment against deceased husband, see EXECUTION, § 171.

[a] (Sup. 1837)

Where a widow enters on the land of her deceased husband, other than "the mansion house and messuage thereunto belonging," and appropriates the proceeds to her own use, she is a wrongdoer, and amenable to the owner of the land for rents and profits.—*Grimes v. Wilson*, 4 Blackf. 331.

Where a widow enters upon the lands of her deceased husband, other than the mansion house and messuage thereunto belonging, and appropriates the proceeds to her own use, she is a wrongdoer, and answerable for the rents and profits thereof.—*Id.*

[b] (Sup. 1840)

It is not error in a decree for dower that it gives no damages for the use of the land, where it does not appear that the use was of any value.—*Smith v. Addleman*, 5 Blackf. 406.

[c] (Sup. 1854)

Though no appearance be made for infant defendants in a proceeding to open an assignment of dower, and for damages for withholding it, yet, if other defendants appear and plead in bar, plaintiff may assess damages as if all defendants had appeared and defended.—*Kirby v. Holmes*, 6 Ind. 33.

[d] (Sup.)

A widow, to whom certain real estate is set off for dower, cannot maintain an action against a tenant of the heirs for rent accruing after the death, but before the assignment of dower. Her remedy is against the heirs for detention of dower.—(1876) *Williamson v. Ash*, 7 Ind. 495; (1859) *Gray v. Morrison*, 12 Ind. 423.

[e] (Sup. 1857)

Since the widow has no possession before assignment of dower, she cannot lease the property.—*Matlock v. Lee*, 9 Ind. 298.

[f] (Sup. 1863)

A widow, on the recovery of dower in lands conveyed by her husband in which she did not join, is entitled, by way of damage, to one-third of the annual mesne profits of the lands of which dower was claimed, to be computed from the time of demand for assignment thereof.—*Galbreath v. Gray*, 20 Ind. 290.

[g] (Sup. 1878)

The owner of certain real estate, having leased the same for a certain period for mining purposes in consideration of a certain royalty to be paid him by the lessee, died testate, leaving a widow by whom he had no children, and also children by a former marriage. The widow elected to take under the statute, and not under the will. *Held*, that as she took a life estate, under the statute, in one-third of the realty, she was entitled to one-third of the royalty accruing from the coal mines after the

testator's death.—*Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680.

[h] (Sup. 1882)

Under the statute, the widow of an intestate takes, as against the heirs, one-third of the real estate, but, as against creditors, her share may be less, if the value of the land exceed \$10,000 (Rev. St. 1881, § 2483); but in the latter case her right to a full third can only be abridged by a sale to pay debts, and until such sale the rents and profits are hers.—*Kidwell v. Kidwell*, 84 Ind. 224.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Dower, §§ 178-198, 206.

See, also, 14 Cyc. pp. 961, 962.

**§ 57. — Assignability of interest, and conveyance or release.**

[a] (Sup. 1843)

A widow cannot mortgage her dower until it be assigned to her.—*Strong v. Bragg*, 7 Blackf. 62.

[b] (Sup. 1853)

Where a widow has only an equitable right under the statute to be endowed of the interest during her life of one-third of the amount the land of her deceased husband will sell for over the unpaid purchase money due thereon, interest, and costs, she may compromise her claim, and discharge the same by parol agreement with the vendor or his assignee.—*Malin v. Coult*, 4 Ind. 535.

[c] (Sup. 1857)

A widow released her dower for a consideration, and afterwards procured an assignment of dower, under which she entered and leased. *Held*, that the assignment gave her no new right, but simply designated what she had sold.—*Matlock v. Lee*, 9 Ind. 298.

Dower on the death of the husband, becomes an estate, before assignment, that may be released to the heir, or other tenant in possession, and the right of the widow be thereby extinguished.—*Id.*

In an action by the heirs to recover possession of real estate against the widow and her lessee, it appeared that the widow had released her dower to the heirs, the consideration of which was an order on a third person, which was not accepted nor paid. *Held*, that this constituted no bar to the suit. If the drawee of the order had no funds, or they had been withdrawn by the drawers, they not having been prejudiced, the drawers might yet be liable for the price of the dower.—*Id.*

[d] (Sup. 1859)

Before the assignment of dower, a widow has an assignable interest in her husband's lands.—(Ind. 1859) *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

An assignee of a widow's dower rights may sue to enforce the same in his own name.—*Id.*

[e] (Sup. 1883)

An agreement by a widow to renounce her interest in the land of her late husband will not bind her if it is without consideration, and there are no facts constituting an estoppel.—*Switzer v. Hauk*, 80 Ind. 73.

[f] (Sup. 1899)

A widow's conveyance of her right of dower, where not assigned, in 1856, passed only the right to have dower assigned, so that, where such right was not exercised in 20 years, it was barred, under Rev. St. 1843, p. 811, § 112.—*Grubbs v. Leyendecker*, 53 N. E. 940, 153 Ind. 348.

Rev. St. 1843, p. 810, § 107, providing that the widow may continue to occupy any lands in which she is entitled to dower with the children or other heirs of the deceased, or receive one-third of the rents or profits, so long as the children or heirs do not object thereto, without having her dower assigned, gives a personal right, which cannot be conveyed.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 208-217.

See, also, 14 Cyc. pp. 964, 965.

#### § 58. — Election between jointure or settlement and dower.

[a] (Sup. 1900)

No oral acceptance by a married woman of a provision made for her in lieu of dower at the time could deprive her of the right of election after her husband's death, given by Burns' Rev. St. 1894, § 2665.—*Mannan v. Mannan*, 55 N. E. 855, 154 Ind. 9.

Where a widow elects to take under a post-nuptial agreement waiving dower, the value of the land cannot be considered in determining whether she may take notwithstanding the agreement.—Id.

Where a widow elected to take under a deed from her husband which was conditioned in lieu of dower, and was also in consideration of a sum due her from him, she could not afterwards insist on dower, and at the same time keep the land in payment of the debt, notwithstanding the husband had cut timber on the land, and lessened its value.—Id.

Though the right of election between jointure and dower given by Burns' Rev. St. 1894, § 2665 (*Horner's Rev. St. 1897, § 2504*), could not be defeated by proof of oral acceptance of a deed of jointure, yet testimony of the wife's knowledge of the deed when executed, and that it was satisfactory to her, was admissible to show that she had full knowledge of its contents and the purpose for which it was executed.—Id.

Where a widow showed she had full knowledge of a deed of jointure when executed, and claimed under it and accepted rents after her husband's death, error in excluding proof that there was no oral acceptance of the deed at the time of execution was harmless.—Id.

Under Burns' Rev. St. 1894, § 2661 (*Rev. St. 1881, § 2500; Horner's Rev. St. 1897, §*

2500), making a jointure a bar to dower, provided the wife assent thereto in writing; and section 2665 (2504), requiring her to elect whether she will take jointure or dower, but prohibiting her from taking both,—having elected to take the jointure, failure of a wife to assent as required does not entitle her to take dower also.—Id.

[b] (App. 1906)

Burns' Ann. St. 1901, § 2663, provides that the jointure of a wife, if consisting of real estate, must not be less than a freehold estate in lands, to take effect, in business or profit, immediately on the death of her husband, and section 2665 declares that if, before or after coverture, any such jointure or pecuniary provision shall be assured or given for her jointure in lieu of her right to one-third of the lands of her husband, she shall elect within a year after her husband's death whether she shall take such pecuniary provision or retain her statutory right to her husband's land. *Held* that, where a husband held only a life interest in certain real estate conveyed to plaintiffs at the time his wife joined in a contract of family settlement by which certain land was conveyed to her absolutely, she was not entitled, under such sections, to elect to repudiate the settlement under section 2665.—*Case v. Collins*, 76 N. E. 781, 37 Ind. App. 491.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 129, 205.

See, also, 14 Cyc. p. 964.

#### § 62. — Estoppel or waiver.

[a] (Sup. 1849)

A widow who has concurred in an application for an order for the sale of lands of her husband, been present at the sale, and concurred in representing that the purchaser would acquire a clear title, and has received a portion of the purchase money in payment of her dower, is estopped to claim dower in such land.—*Ellis v. Diddy*, 1 Ind. 561, *Smith*, 354.

[b] (Sup. 1863)

Where a guardian, who was also the mother of her ward, and owned a dower interest in the ward's real estate, applied for a sale thereof, described it as the entire title, and said nothing in the proceeding of her own interest, and the order was made for its sale accordingly, which was consummated without any notice or intimation of her interest, she will be forever estopped to claim the same.—*Wiseman v. Macy*, 20 Ind. 239, 83 Am. Dec. 316.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 203, 204.

See, also, 14 Cyc. p. 963.

#### § 67. Demand for assignment.

Pleading, see post, § 78.

[a] (Sup. 1850)

Under Act Jan. 28, 1847, providing that it shall not be necessary for any widow, in applying for the assignment of dower, to make de-

mand of an infant before making the application, but proof of infancy of any defendant shall be sufficient excuse for not making the demand, the demand of dower of infants is unnecessary.—*McCormick v. Taylor*, 2 Ind. 336.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 223-234.

See, also, 14 Cyc. p. 977.

### § 68. Assignment by act or agreement of parties.

[a] (Sup. 1850)

A guardian can assign dower.—*Boyers v. Newbanks*, 2 Ind. 388.

Dower may be assigned by parol. Nothing is required but to ascertain the widow's share, and when this is done, and she has entered, the freehold rests in her, without livery of seisin or writing.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 236-238.

See, also, 14 Cyc. pp. 973-975.

### § 69. Assignment by probate court incident to administration.

[a] (Sup. 1843)

Under Rev. St. 1838, p. 239, a petition to the probate court for the assignment of dower must allege that previous to the filing thereof a demand was made on the defendant for an assignment of the dower, or a good reason shown why the demand was not made.—*Spinning v. Rowland*, 7 Blackf. 7.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 239-246.

See, also, 14 Cyc. pp. 975-977.

### § 70. Actions for dower.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 247-316, 353.

See, also, 14 Cyc. pp. 978-996.

### § 71. — Nature and form of remedy.

[a] (Sup. 1832)

The claim of a widow to dower in an equitable estate, under the statute, can be enforced only by a suit in chancery.—*McMahan v. Kimball*, 3 Blackf. 1.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 247-250, 353.

See, also, 14 Cyc. pp. 978-980.

### § 72. — Right of action and defenses.

[a] (Sup. 1849)

The defendant has a right to plead any matter to the petition which will defeat or diminish the petitioner's claim to dower.—*Ellis v. Diddy*, 1 Ind. 561, *Smith*, 354.

[b] (Sup. 1873)

In a proceeding in equity for the assignment of dower, the plea of a bona fide purchaser for value is no defense against a legal claim for dower.—*Law v. Long*, 41 Ind. 586.

[c] (Sup. 1873)

Under Rev. St. 1843, p. 804, § 67, providing that, if dower is not assigned within 30 days next after demand, it may be assigned by commissioners to be appointed by the court, persons entitled to a freehold are not liable to an action for assignment of dower until 30 days after such assignment has been demanded.—*Hasselman v. Allen*, 42 Ind. 257.

[d] (Sup. 1880)

One who purchased land at an execution sale, subject to certain incumbrances, cannot set up his payment of such incumbrances by way of counterclaim to the petition of the widow of the judgment debtor for partition of her dower interest.—*Blakely v. Boruff*, 71 Ind. 93.

[e] (Sup. 1882)

Acts 1879, p. 160, § 10, provides that a married woman cannot mortgage or incumber real estate acquired by devise, etc., as security for her husband's debt. *Held*, that since such section did not prohibit a married woman from conveying land in payment of her husband's debts, an answer in an action to recover her dower interest in lands conveyed, alleging that she conveyed the same to defendant in payment of her husband's debts, stated a good defense to the action.—*Kocher v. Christian*, 88 Ind. 81.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 252-255.

See, also, 14 Cyc. pp. 980, 981.

### § 75. — Limitations and laches.

Judicial notice as to time of bringing proceedings, see EVIDENCE, § 17.

[a] (Sup. 1859)

Under Rev. St. 1843, p. 456, § 13, prohibiting action for recovery of land sold at judicial sale, by the debtor "or his heirs, or by any person claiming under him," unless brought within 10 years after this sale, a widow's claim of dower is barred within 10 years.—*Frantz v. Harrow*, 13 Ind. 507.

[b] (Sup. 1863)

The plaintiff's husband in 1837 owned real estate, and in 1838 conveyed it by his own sole deed. She was, however, an infant, and came of age April 23, 1842. Her petition for the assignment of dower was filed January 30, 1862. *Held*, that her rights were decided by the dower law of 1843, and that the limitation of 20 years did not begin to run against her until her coming of age.—*Harding v. Third Presbyterian Church*, 20 Ind. 71.

[c] (Sup. 1879)

An administrator sold, in 1858, lands of his intestate to pay debts, pursuant to an order of the probate court in a proceeding to which the widow was not made a party. *Held*, that she might, in 1877, recover her one-third in said lands by partition, as the purchaser had held them merely as tenant in common with her.—*Kent v. Taggart*, 68 Ind. 163.

[d] (Sup. 1885)

Prior to the married woman's act of 1875, the right of action of a married woman to recover her interest in the land of her husband did not accrue until his death, and the statute of limitations did not begin to run until that time.—*Wright v. Tichenor*, 104 Ind. 185, 3 N. E. 853.

[e] (Sup. 1893)

The statute of limitations begins to run against an action by a woman to recover the interest which she has on the death of her husband in land which he had conveyed in his lifetime, without her joining in the deed, only from the death of the husband.—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 260-266.

See, also, 14 Cyc. pp. 982, 983.

### § 76. — Parties.

[a] (Sup. 1863)

In a widow's suit for dower, all persons owning portions of the lands from which it is claimed are properly joined as defendants.—*Galbreath v. Gray*, 20 Ind. 290.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 267-276.

See, also, 14 Cyc. pp. 984-986.

### § 78. — Pleading.

Effect of failure to reply, see PLEADING, § 182.

[a] (Sup. 1840)

Under the statute of 1831, a petition for the appointment of commissioners to assign dower should aver that, previously to its being filed, a demand for the assignment of dower had been made on the parties interested, or show a sufficient reason for not making such demand.—*Dunn v. Loder*, 5 Blackf. 446.

[b] (Sup. 1850)

A petition by A. and wife against B. and the heirs at law of C. for dower on behalf of the wife, who, it was alleged, had married A. after the death of C., alleged that C. died in 1843, seised of certain lands in which B. claimed an interest; that in 1843 the plaintiffs made a demand for said dower, which was refused. B. pleaded that he purchased 60 acres of said land from C. before his marriage, and that he paid the purchase money to C. and his administrator; that he commenced suit against the widow and the heirs of C., and obtained a decree vesting the title to said 60 acres in him; that a commissioner was appointed, who executed a conveyance to him, which was duly reported to the court. B. further alleged that the said widow was perpetually enjoined from interfering in his enjoyment of the said 60 acres. *Held*, that the plea was good on demurrer.—*Adkins v. Holmes*, 2 Ind. 197.

On a petition for dower against the heirs at law of the deceased husband, a plea by the infant heirs, by their guardian ad litem, that as to the matters contained in the petition they neither admitted nor denied them, was insufficient.—*Id.*

A plea to a petition for dower that the marriage was null and void, on the ground that the wife was a niece by affinity of the husband, was insufficient.—*Id.*

A plea to a petition for dower, alleging, generally, that the marriage was unlawful, and traversing no other material allegation, must be construed as an admission of all the material allegations in the petition except the one traversed.—*Id.*

[c] (Sup. 1850)

The Revised Statutes of 1843 require that a petition for dower should allege that the dower had been demanded.—*Boyers v. Newbanks*, 2 Ind. 388.

[d] (Sup. 1852)

The plea to a petition for assignment alleged that the dower of the widow was barred by a decree of the circuit court theretofore rendered, etc., without setting out the decree. *Held*, that the plea was bad.—*Throp v. Johnson*, 3 Ind. 343.

To a petition for the assignment of dower by the widow of a devisee of land devised upon a condition subsequent, a plea setting forth as a defense the nonperformance of the condition, but not showing that the defendant is an heir of the devisor, is bad.—*Id.*

[e] (Sup. 1858)

A bill for dower must allege the demand required by statute.—*Wells v. Sprague*, 10 Ind. 305.

[f] (Sup. 1873)

A proceeding for the assignment of dower, under Rev. St. 1843, cannot be maintained unless it is alleged and proved that a demand has been made for the dower prior to the commencement of the action.—*Law v. Long*, 41 Ind. 586.

[g] (Sup. 1880)

An answer to a widow's petition for partition of her third of her deceased husband's lands admitted the husband's ownership, but did not aver that she had conveyed away her inchoate interest therein, or that it had been sold away from her on legal process. *Held* insufficient on demurrer.—*Blakely v. Boruff*, 71 Ind. 93.

[h] (Sup. 1883)

Under Rev. St. 1881, § 2939, authorizing any married woman "more than eighteen" years of age and less than 21 to convey her right to any lands by joining with her husband in the conveyance, an averment by a widow seeking dower in lands, in the conveyance of which she had joined with her husband, while she was a minor, that at the time of such conveyance she

was "less than nineteen years of age," permitted the inference that she was "more than eighteen," and the complaint was insufficient.—*Fisher v. Payne*, 90 Ind. 183.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 277-293.

See, also, 14 Cyc. pp. 986-990.

### § 79. — Evidence.

[a] (Sup. 1845)

In a suit in chancery for dower, it must appear that the complainant's husband was seised of the premises at some time during the coverture, or she cannot recover.—*Dennis v. Dennis*, 7 Blackf. 572.

[b] (Sup. 1884)

Where a widow claimed to be reimbursed for the value of her share of her deceased husband's lands, which descended to her as his widow and which was sold by the sheriff for the payment of his debts out of the personal estate of the husband, evidence of the actual value of the lands at the time of the husband's death was admissible, though it was insisted that the value of the wife's share in the lands was conclusively determined by the amounts bid for the lands at the sales thereof by the sheriff as shown by his return to the orders of sale.—*McCord v. Wright*, 97 Ind. 34.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 294-306.

See, also, 14 Cyc. pp. 990-995.

### § 80. — Trial or hearing.

[a] (Sup. 1891)

In an action for dower, it appeared that the husband was insane, and that the land was sold by his guardian. *Held* that, while there was no direct finding that the widow did not join in such conveyance, it will be presumed from the finding made that she did not so join, there being no authority by statute for her joining in a guardian's deed in such a case.—*Davis v. Hutton*, 127 Ind. 481, 26 N. E. 187, 1006.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 307-311.

See, also, 14 Cyc. pp. 995, 996.

### § 81. — Judgment or decree for dower.

Conclusiveness of judgment, see JUDGMENT, § 743.

Res judicata, see JUDGMENT, § 590.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 312-316.

See, also, 14 Cyc. p. 996.

### § 82. Appointment and proceedings of commissioners or referees to make assignment.

[a] (Sup. 1832)

The assignment of dower by commissioners, under the statute, limits the extent of dower,

but does not confer a legal right to it.—*McMahon v. Kimball*, 3 Blackf. 1.

[b] (Sup. 1852)

An instruction to commissioners to assign dower by metes and bounds will be presumed to be right when the record does not contain the evidence.—*Throp v. Johnson*, 3 Ind. 343.

[c] (Sup. 1854)

Under Rev. St. 1843, pp. 804, 805, providing for a trial upon notice to the defendants upon the question of the right of dower, before the appointment of commissioners to assign dower, etc., the commissioners to assign dower cannot be appointed before notice to the defendants and a trial, especially where such trial is not waived.—*Weathers v. Weathers*, 5 Ind. 272.

[d] (Sup. 1854)

The right of the court to appoint other commissioners to act on the refusal of those previously appointed to assign dower exists independently of Rev. St. 1843, authorizing the court, when commissioners appointed to assign dower refuse to act, to appoint others in their stead.—*McCormick v. Taylor*, 5 Ind. 436.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, § 321.

See, also, 14 Cyc. p. 997.

### § 83. Valuation and selection of property for assignment.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Dower, §§ 322-328.

See, also, 14 Cyc. pp. 998-1001; note, 9 Am. Dec. 363.

### § 84. — In general.

[a] (Sup. 1874)

A widow entitled to a life estate in her deceased husband's realty is entitled in partition proceedings only to have set off to her one-third of the real estate in value for life.—*Russell v. Russell*, 48 Ind. 456.

[b] (Sup. 1884)

Rev. St. 1881, § 2491, gives a widow dower in lands of which her husband had an equitable interest at the time of his death, and section 2483 provides that, if a husband die leaving a widow, one-third of his real estate shall descend to her in fee simple, free from creditors, provided that, where the real estate exceeds \$10,000 in value, the widow shall have one-fourth only, and where it exceeds \$20,000, one-fifth only, as against the husband's creditors. *Held*, that where a debtor's land was sold under execution, and after his death suit was brought against the wife for partition of that sold, and the evidence showed that two-thirds of the land sold was worth more than the amount of the debt for which it was sold, and that all of the debtor's property, including that sold, was worth more than \$10,000, but less than \$20,000, the wife was entitled to one-third of the land sold.—*Mansur v. Hinkson*, 94 Ind. 395.

## [c] (Sup. 1891)

A husband purchased certain land and paid three-fourths of the purchase price. Afterwards he became of unsound mind, and his guardian procured an order to sell such land for the payment of the unpaid purchase price, and other debts due from the husband, which was done. His widow was not made a party to the proceedings for the order of sale, nor did she join in the conveyance. *Held* that, though but three-fourths of the purchase money had been paid by the husband and the remaining one-fourth was paid by the guardian after the sale, the wife is still entitled to dower in the whole, and not in the three-fourths only.—*Davis v. Hutton*, 127 Ind. 481, 26 N. E. 187, 1006.

## [d] (Sup. 1897)

Under Rev. St. 1894, § 2669 (Rev. St. 1881, § 2508), giving a wife one-third of her husband's realty free from creditors, she need not take her interest in the part that is exempt to him, but may take it in addition to that which is so exempt.—*Isgrigg v. Pauley*, 47 N. E. 821, 148 Ind. 436.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 322-324.

See, also, 14 Cyc. p. 908.

## § 85. — Time of valuation.

## [a] (Sup. 1829)

A title bond conditioned for the conveyance of real estate on payment of the purchase money, was executed, and possession at the same time given to the obligee. The purchase money was afterwards paid, and a title obtained by the purchaser. *Held*, that the date of the bond must be considered the period of alienation, in estimating the value of the property with a view to the dower of the obligor's widow.—*Wilson v. Oatman*, 2 Blackf. 223.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 325, 326.

See, also, 14 Cyc. pp. 998, 999.

## § 86. — Appreciation or depreciation.

## [a] (Sup. 1840)

Dower should be assigned according to the value of the land at the time of the assignment, excluding all the increased value from the improvements made on the premises by the alienee, leaving the widow the benefit of any increase of value arising from circumstances unconnected with such improvements.—*Smith v. Addleman*, 5 Blackf. 406.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 327.

See, also, 14 Cyc. p. 909; note, 18 L. R. A. 425.

## § 87. — Improvements.

## [a] (Sup. 1829)

Where there have been improvements made upon an estate by the purchaser, dower is to be of the estate according to the value which it would have had at the time of the assignment

if no such improvements had been made.—*Wilson v. Oatman*, 2 Blackf. 223.

## [b] (Sup. 1852)

Upon a petition for dower, the right of the petitioner was established, and the court appointed commissioners to make an assignment, instructing them to assign the dower according to the value of the land at the time of the assignment, exclusive of the improvements made after the husband's alienation. *Held*, that the defendant could not complain of the instruction, being the grantee of the husband.—*Throp v. Johnson*, 3 Ind. 343.

## [c] (Sup. 1885)

On partition by a widow for her interest in lands conveyed by her husband alone, she is entitled to one-third of the value of the land at the time of partition, less the value of improvements made by the alienee.—*Quick v. Brenner*, 101 Ind. 230.

## [d] (Sup. 1891)

Dower must be assigned to the widow, exclusive of improvements made by the purchasers of the land since the alienation thereof.—*Davis v. Hutton*, 127 Ind. 481, 26 N. E. 187, 1006.

## [e] (Sup. 1908)

Where a husband conveys his lands by deed in which his wife does not join, his grantee is entitled to the benefit of the increased value of the land conveyed, caused by improvements made thereon by him during the life of the grantor, as against the rights of the grantor's widow in the land.—*Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 328.

See, also, 14 Cyc. pp. 1000, 1001.

## § 88. Actual admeasurement or allotment.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, §§ 329-336.

See, also, 14 Cyc. pp. 1001-1004.

## § 91. — Distinct parcels.

## [a] (Sup. 1882)

A tract of land cannot, without a widow's consent, be set off to her in lieu of her interest in several tracts.—*Compton v. Pruitt*, 88 Ind. 171.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Dower, § 332.

See, also, 14 Cyc. pp. 1002, 1003.

## § 93. Division of rents and profits.

## [a] (Sup. 1908)

Where a husband conveyed lands by deed in which his wife did not join, the grantor's widow, not being a tenant in common with the grantee until after the death of the husband during coverture, was not entitled to have the aggregate rental value of the land between the date of the conveyance and the death of the



husband set off against the increased value of the land caused by improvements made by the grantee during the husband's lifetime, in determining the value of the widow's interest.—*Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531.

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. Dower, §§ 351, 352.  
See, also, 14 Cyc. pp. 1004, 1005.

**§ 97. Return or report as to admeasurement or assignment.**

Impeachment of assignment by testimony of commissioner making assignment, see WITNESSES, § 74.

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. Dower, §§ 342-347.  
See, also, 14 Cyc. pp. 1008, 1009.

**§ 112. Conclusiveness and effect of assignment.**

[a] (Sup. 1850)

If a widow demand assignment of dower of an infant, she will be bound by her acceptance, but the infant may have a writ of admeasurement of dower.—*McCormick v. Taylor*, 2 Ind. 336.

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. Dower, §§ 235, 317, 318.

**§ 114. Rights and liabilities of tenant in dower.**

Nature of action to recover possession from tenant as legal or equitable, see ACTION, § 22.

[a] (Sup. 1829)

A. died possessed of a tract of land which he held under a title bond executed by C. A.'s widow remained in possession and married B., who also continued in possession, and C., having the legal title, brought an action of disseisin for the premises against B., without having previously demanded possession. *Held* that, although the statute gave to A.'s widow a right of dower in his equitable estate, her claim of dower was no defense at law to C.'s action of disseisin.—*Taylor v. McCrackin*, 2 Blackf. 260.

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. Dower, §§ 367-373, 376, 377.  
See, also, 14 Cyc. pp. 1014-1016.

**§ 116. Liens and enforcement thereof.**

Judgment lien on land as affecting widow's interest, see JUDGMENT, §§ 772, 776.

[a] As against general creditors and heirs of a decedent, his widow is entitled, where part of his land is sold to pay his debt secured by mortgage thereon, to be reimbursed out of his personality and other real estate, so that she may obtain the value of her statutory third of the real estate of which he died seised.—(Sup. 1897) *Shobe v. Brinson*, 47 N. E. 625, 148 Ind. 285; (1898) *Lewis v. Watkins*, 49 N. E. 944, 150 Ind. 108.

[b] (Sup. 1898)

Where land set off to a widow as dower is subject to a purchase-price mortgage, and the remainder of the land of decedent, when sold to pay debts, is insufficient to pay the other preferred debts of the estate, the land set apart as dower can be sold by the administrator, on leave of court, to satisfy such mortgage, since *Burns' Rev. St. 1894, § 2656* (*Horner's Rev. St. 1897, § 2695*), provides that a widow shall not be entitled, as against a mortgage for purchase money, to her one-third interest in the mortgaged premises, and *Burns' Rev. St. 1894, § 2504* (*Horner's Rev. St. 1897, § 2349*), empowers the court to order the sale of the interest of decedent's widow in his real estate when it is liable to sale to satisfy a lien thereon.—*Denton v. Arnold*, 51 N. E. 240, 151 Ind. 188.

[c] (App. 1904)

The right of a woman in land by virtue of her marriage, both while it remains inchoate and after it has become consummate, is subject to the lien of the grantor for unpaid purchase money.—*Bryson v. Collmer*, 71 N. E. 229, 33 Ind. App. 494.

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. Dower, § 374.  
See, also, 14 Cyc. p. 1014.

**DRAFTS.**

See **BILLS AND NOTES.**

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# DRAINS.

## *Scope-Note.*

[INCLUDES channels and other works constructed by public authority for drainage of swamp or low lands; nature and scope of power to establish and maintain such works; constitutional and statutory provisions relating thereto; creation of drainage districts, and appointment, rights, powers, duties, and liabilities of drainage boards, officers, etc.; and construction and maintenance of such works, and taxes and local assessments therefor.

[EXCLUDES drains, sewers, etc., in incorporated cities, etc. (see *Municipal Corporations*); rights and liabilities of owners of land in respect of surface or subterranean waters in general (see *Waters and Water Courses*); and private rights of drainage through others' lands (see *Waters and Water Courses*); and exercise of power of eminent domain (see *Eminent Domain*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### I. Establishment and Maintenance.

- § 1. Right to establish and maintain in general.
- § 2. Constitutional and statutory provisions.
- § 3. Purposes for which drains may be established.
- § 4. — In general.
- § 5. — Improvement of land.
- § 6. — Promotion of public health or welfare.
- § 7. Establishment by public authorities.
- § 9. — By counties or other local authorities.
- § 12. Drainage and reclamation districts and commissions.
- § 17. — Commissioners and other officers.
- § 18. — Powers and proceedings in general.
- § 19. — Rights and liabilities in general.
- § 20. — Actions.
- § 21. Drainage companies.
- § 22. Establishment by landowners over lands of others.
- § 24. Proceedings for establishment.
- § 25. — In general.
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- § 27. — Parties.
- § 28. — Petition for drain.
- § 29. — Bond.
- § 30. — Notice.
- § 31. — Remonstrances or answers to petition.
- § 32. — Appointment, proceedings, and report of commissioners, or viewers.
- § 33. — Remonstrances or objections to report of commissioners or viewers.
- § 34. — Hearing and determination of questions.
- § 35. — Decisions and record.
- § 36. — Appeal.
- § 38. — Costs and expenses of proceedings.
- § 39. Collateral attack on proceedings.
- § 40. Restraining construction.
- § 41. Location.
- § 42. Mode and plan of construction.
- § 43. — In general.
- § 44. — Improvement of water course.
- § 45. Right of way and other interests in land.
- § 46. Construction.
- § 47. — In general.

**I. Establishment and Maintenance—Continued.**

- § 48. — Allotment of work among landowners.
- § 49. — Contracts.
- § 50. Improvement, extension, or alteration.
- § 51. Maintenance, cleaning, and repair.
- § 52. — In general.
- § 53. — Allotment of work among landowners.
- § 54. — Contracts.
- § 55. Construction and maintenance of bridges and crossings.
- § 56. Damages from construction or maintenance.
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**II. Assessments and Special Taxes.**

- § 66. Power to levy in general.
- § 67. Constitutional and statutory provisions.
- § 68. Purposes of levy or assessment.
- § 69. Amount of tax or assessment.
- § 70. Property liable.
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- § 84. Lien.
- § 85. Payment, and recovery of assessment paid.
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- § 88. — In general.
- § 89. — Summary remedies.
- § 90. — Actions.
- § 91. — Remedies for wrongful enforcement.

*Cross-References.*

<i>See—</i>	
Benefits from, construction and operation of findings of court. TRIAL, § 404.	Construction across railroad right of way. RAILROADS, §§ 107, 108.
Bonds for, mandamus to compel issuance. MANDAMUS, § 103.	Ditch certificate in payment for land sold for taxes. TAXATION, § 742.
City drains, assessments for improvements. MUNICIPAL CORPORATIONS, § 417.	Drainage of highways. HIGHWAYS, § 120.
Damages to abutting owners from improvements. MUNICIPAL CORPORATIONS, § 388.	Of surface waters, private rights. WATERS AND WATER COURSES, §§ 119, 150.
Injuries from defects or obstructions. MUNICIPAL CORPORATIONS, §§ 827-840.	Expert testimony as to utility of. EVIDENCE, § 555.
Legislative control of municipal acts. MUNICIPAL CORPORATIONS, § 70.	Injuries to, liability of railroad company for. RAILROADS, § 113.
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Condemnation of property for as taking for public use. EMINENT DOMAIN, § 31.	Regulations constituting exercise of power of eminent domain. EMINENT DOMAIN, § 2.
	Tiling drain, plea of want of jurisdiction in action for. PLEADING, § 104.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

## I. ESTABLISHMENT AND MAINTENANCE.

Pleading matters of fact or conclusions, in action to enjoin removal of bridge in construction of drain, see **PLEADING**, § 8.  
Revocation of license to drain land, see **LICENSES**, § 58.

### § 1. Right to establish and maintain in general.

[a] (**Sup.** 1902)

The state can authorize the improving of a drain across the right of way of a railroad company by enlarging a natural channel.—*Pittsburgh, C. & St. L. R. Co. v. Machler*, 63 N. E. 210, 158 Ind. 159.

[b] (**Sup.** 1903)

Acts 1891, p. 445 (*Burns' Rev. St.* 1901, § 5690 et seq.), entitled "An act concerning drainage under specified conditions," and providing that the board of county commissioners are authorized to cause to be located, constructed, straightened, widened, or deepened any ditch, drain, or water course of the length of five miles and upwards, when the same is necessary to drain any lots, lands, etc., and declaring that the word "ditch" shall be held to include any drain or water course heretofore constructed, and that the petition for such improvement shall be held to include any side, lateral, spur, or branch ditch, drain, or water course, the lowering of any lake, or other work necessary to secure fully the object of the improvement petitioned for, does not authorize the construction of a levee, which is not incidental to the construction of a drainage ditch.—*Royse v. Evansville & T. H. R. Co.*, 67 N. E. 446, 160 Ind. 302.

[c] (**Sup.** 1909)

The right to construct a drain over lands of others does not exist at common law, but is purely statutory.—*Kaufman v. Alexander*, 88 N. E. 502.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. **DRAINS**, § 1.

See, also, 14 *Cyc.* pp. 1024, 1025.

### § 2. Constitutional and statutory provisions.

Construction of statutes in pari materia, see **STATUTES**, § 225.

Denial of due process of law, see **CONSTITUTIONAL LAW**, § 280.

Determination of constitutional questions, see **CONSTITUTIONAL LAW**, § 46.

Grant of privileges and immunities, see **CONSTITUTIONAL LAW**, § 205.

Impairing obligation of contracts, see **CONSTITUTIONAL LAW**, § 143.

Implied repeal of act relating to same subject, see **STATUTES**, § 161.

Re-enactment of former statute and adoption of provision previously construed, see **STATUTES**, § 225½.

Repealing of statute as affecting pending actions, see **STATUTES**, § 276.

Retroactive operation of repealing acts, see **STATUTES**, § 275.

Retroactive operation of statutes, see **STATUTES**, § 206.

Saving clauses in statutes, see **STATUTES**, § 277.

Subjects and titles of acts, see **STATUTES**, § 123.

Vesting in executive officer judicial power, see **CONSTITUTIONAL LAW**, § 80.

[a] (**Sup.** 1869)

The statute (Acts 1869, p. 82) "to authorize and encourage the construction of levees, dikes, and drains, and the reclamation of wet and overflowed lands by incorporated companies," is a proper exercise of the police power of the Legislature.—*O'Reiley v. Kankakee Val. Draining Co.*, 32 Ind. 169.

[b] Act March 9, 1875 (1 *Rev. St.* 1870, p. 428), providing for drainage of lands, does not repeal Act March 11, 1867 (*Davis' Rev. St. Supp.* 1870, p. 228), on the same subject, except when in conflict therewith.—(*Sup.* 1877) *McKinsey v. Bowman*, 58 Ind. 88; (1878) *Bate v. Sheets*, 64 Ind. 209.

[c] (**Sup.** 1832)

Acts 1875 (1 *Rev. St.* 1870), p. 428, providing that it shall not repeal any law now in force to encourage the construction of levees, dikes, and drains, and to enable the owners of wet lands to drain and reclaim them, but shall be an addition thereto, did not repeal by implication Act 1867, p. 186, and the two must be construed together.—*Powell v. Clelland*, 82 Ind. 24.

[d] (**Sup.** 1834)

Act March 10, 1873, concerning drainage, was not repealed by Act March 13, 1879, as to corporations organized prior to the latter date.—*Barren Creek Ditching Co. v. Beck*, 90 Ind. 247.

[e] (**Sup.** 1835)

The amendatory act of 1883 was not an independent statute, covering the whole subject of drainage, and intended to be a substitute for the act of 1881, but was an amendment of certain sections only, and as such the amended sections, as amended, became parts of the original act, and are to be enforced as such, and pending proceedings up to the time the amendatory act went into force are to be controlled by the act of 1881, and, after the amendment took effect, they are to be governed by the act as amended.—*Moss v. State ex rel. Mann*, 101 Ind. 321.

[f] (**Sup.** 1836)

Act April 21, 1881, relative to ditching and draining, does not repeal Act April 8, 1881.—*Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

[g] (*Sup.* 1886)

The drainage act of March 13, 1879, was not inconsistent with that of March 9, 1875, and proceedings under the earlier act might still be taken after the act of 1879 went into effect.—*Hardy v. McKinney*, 107 Ind. 304, 8 N. E. 232.

[h] (*Sup.* 1886)

Pending drainage proceedings were not affected by the act of 1885, but might be carried on under the act under which they were begun.—*Claybaugh v. Baltimore & O. R. Co.*, 108 Ind. 262, 9 N. E. 100.

[i] (*Sup.* 1887)

Where proceedings for the establishment of a ditch are absolutely void, under the law in force at the time they were had, a claim for an assessment based on such proceedings cannot be rendered valid and enforceable by an averment that they were had under the provisions of an act which had been repealed 18 months before they were begun.—*Phillips v. Lewis*, 109 Ind. 62, 9 N. E. 395.

[j] (*Sup.* 1888)

Act April 6, 1885, § 13, repealing the drainage law of March 8, 1883, contains a proviso that where application has been made, or proceedings are pending, or works are in process of construction, under said act, they may be completed and assessments collected. *Held*, that the proviso authorizes the township trustee, where improvements have been made under the act of 1883, and before the repealing act was passed, to file after the repealing act, with the county auditor, the statement of his assessment of benefits.—*Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12.

[k] (*Sup.* 1892)

The Legislature may provide how lands should be described in a petition for a drain and what notice should be given.—*Killian v. Andrews*, 30 N. E. 700, 130 Ind. 579.

[l] (*Sup.* 1896)

District Drainage Act 1893 (Acts 1893, pp. 316-328; Rev. St. 1894, §§ 5718-5742) § 22,—which authorizes the formation of a drainage district upon the signing of an agreement by at least two-thirds of the owners, owning in acreage two-thirds or more, of the land to be included in the proposed district, and confers the power to assess property within the district of those who have not signed the agreement, or in any manner consented thereto, whether or not the establishment of the district will benefit the public health or be of public utility, and does not even require that the lands within the proposed district shall be swamp or wet lands,—is not within the police power of the state.—*Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. 636.

[m] (*Sup.* 1898)

Act 1881, § 26, providing, as to joint county drains, that "such joint ditch shall be cleaned and repaired, or enlarged, in like manner as for ditches in but one county, by the joint ac-

tion of the public officers of the county interested," cannot stand; section 23, providing for repairs of drains in one or more townships of a county by the trustees, and providing a system of assessments, being unconstitutional, and there being, therefore, no method or procedure to aid section 26.—*Watkins v. State ex rel. Van Auker*, 49 N. E. 169, 51 N. E. 79, 151 Ind. 123.

[n] (*Sup.* 1899)

Acts 1889, p. 285, providing that whenever any owner or owners of any separate and distinct tract or tracts of land lying outside the corporate limits of any city or town in the state which would be benefited by drainage, and which cannot be accomplished without extraordinary labor and expense, as determined by the court, provided, also, that where such drain passes through the corporate limits of such city or town the same shall be located in and upon and along the streets or alleys thereof, whenever the same may be practicable, without affecting other lands, shall desire such drainage or drainage which cannot be accomplished in the best and cheapest manner without passing through the corporate limits of any city or town, such owner or owners may apply for such drainage by petition to the circuit court, or superior court of the county in which the lands of the petitioner or petitioners are situated, applies only to the drainage of country lands having no available outlet without extraordinary labor and expense except through the corporate limits of the city.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

Under the drainage act, as existing prior to 1889, the supreme court decided that the drainage commissioners had no authority to construct a drain within the limits of a municipality. The act was amended by Acts 1889, p. 285 (Burns' Rev. St. 1894, § 5622 et seq.; Horner's Rev. St. § 4273 et seq.), providing that when owners of land "lying outside the corporate limits of any city or town," which would be benefited by drainage, which cannot be accomplished without extraordinary labor and expense, "provided, also, that where such drain passes through the corporate limits of such city or town, the same shall be located in, upon and along the streets or alleys thereof whenever the same may be practicable, without affecting other lands shall desire such drainage, or which can not be accomplished in the best and cheapest manner without passing through the corporate limits of such city or town, such owner or owners may apply for such drainage by petition." *Held*, that the amending act does not violate Const. Ind. art. 4, § 20, providing that "every act and joint resolution shall be plainly worded, avoiding as far as practicable the use of technical terms."—*Id.*

The drainage law (Acts 1889, p. 285), amending drainage law 1885, and providing that a petition for drainage shall be dismissed on the remonstrance of two-thirds of the landowners, did not repeal the proviso of section 3 of the act of 1885, requiring the remonstrants to

be resident landowners, but such amended section requires a dismissal only in case the improvement is opposed by two-thirds of the landowners, without regard to residence, who own or represent two-thirds of the lands affected, and hence applies both to city and country drainage.—Id.

[o] (Sup. 1900)

Act March 4, 1893 (Burns' Rev. St. 1894, § 5656; Horner's Rev. St. 1897, § 4286), amending Rev. St. 1881, § 4286, by providing that, when it is found impracticable, the work on a drainage ditch need not be allotted to the property benefited, but may be let by contract, applies to a case where a petition for a ditch, filed before the time when the act went into effect, had had no action taken on it until after such time.—*Sarber v. Rankin*, 56 N. E. 225, 154 Ind. 236.

[p] (Sup. 1903)

Proceedings for construction of a ditch under the drainage law, instituted before passage of the amendatory act of March 8, 1901 (Acts 1901, pp. 161-170; Burns' Rev. St. 1901, §§ 5623, 5624, 5626, 5629), are by express provision of section 4 thereof (Burns' Rev. St. 1901, § 5628) not affected thereby.—*Keiser v. Mills*, 69 N. E. 142, 162 Ind. 366.

[q] (App. 1906)

Burns' Ann. St. 1894, § 5646, repealing the drainage acts of 1881 (Acts 1881, p. 401, c. 43; Rev. St. 1881, § 4277) and 1883 (Acts 1883, p. 178, c. 126; Elliott's Supp. § 1178), expressly provides that, where application has been made or proceedings are pending or drainage works are in course of construction under said acts, the same shall be completed and assessments therefor collected according to the provisions of said acts.—*Ellison v. Branstrator*, 73 N. E. 146, 34 Ind. App. 410.

[r] (Sup. 1906)

Burns' Ann. St. 1901, § 243, provides that no rights vested or suits instituted under existing laws shall be affected by the repeal thereof, but all such rights may be asserted and such suits prosecuted as if such laws had not been repealed. *Held*, that such section was primarily passed to reserve rights and suits instituted under laws repealed by 1 Rev. St. 1852, pt. 1, c. 92, and does not prevent the repeal of Burns' Ann. St. 1901, §§ 5655-5671, authorizing the establishment of drainage ditches by Acts 1905, p. 456, c. 157, which established a new law for such proceedings, from affecting proceedings which had not matured to a judgment establishing the ditch prior to the repeal.—*Taylor v. Strayer*, 78 N. E. 236, 167 Ind. 23, 119 Am. St. Rep. 469.

Proceedings were instituted for the establishment of a drain as authorized by Burns' Ann. St. 1901, §§ 5655-5671. Remonstrances were filed, and proceedings were had resulting in a judgment of the circuit court on appeal

dismissing the proceeding. This judgment was appealed from, and reversed by the Supreme Court. The cause was remanded, and before further proceedings were taken, Acts 1905, p. 456, c. 157, was passed providing a new drainage law, section 14 (page 480) of which repealed all other laws relating to drainage, except that it should not affect any pending proceeding in which a ditch had been ordered established, or in which there was no attempt to and which would not lower or affect any lake or body of water not exceeding ten acres in area. *Held*, that the appeal from the order establishing the ditch vacated it, and hence the proceeding was not within the saving clause as a pending proceeding in which a ditch had been ordered constructed.—Id.

Burns' Ann. St. 1901, § 248, declaring that the repeal of any statute shall not release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing statute shall so expressly provide, etc., has no application to proceedings to establish a drainage ditch, under Burns' Ann. St. 1901, §§ 5655, 5671, which were expressly repealed by Acts 1905, p. 456, c. 157.—Id.

Where subsequent to an appeal from an order of a board of county commissioners establishing a drainage ditch, the statutes under which the proceedings were taken were repealed, and a new act passed covering the whole subject which contained provisions prohibitive of the ditch sought to be established, it was proper for the circuit court to permit the filing of an answer asserting remonstrant's rights under such act.—Id.

[s] (Sup. 1907)

The provisions of the Civil Code are to be resorted to to supply omissions in the drainage statutes.—*Hart v. Scott*, 168 Ind. 530, 81 N. E. 481.

[t] (Sup. 1907)

Acts 1905, p. 456, c. 157, repealed all prior laws not saved by section 14, providing that such repeal should not affect any pending proceedings in which a ditch had been ordered established, or in which there was no attempt to or which would not lower or affect any lake or body of water that did not exceed 10 acres of surface at high-water mark, etc. *Held* that, where it did not appear that certain proposed drainage would affect a lake containing a surface area of more than 10 acres, proceedings, though not having progressed to final judgment when such act took effect, were not annulled thereby.—*Smith v. Gustin*, 169 Ind. 42, 80 N. E. 959, 81 N. E. 722.

[u] (Sup. 1907)

Under Acts 1905, p. 456, c. 157, relative to drainage, which repeals all prior laws upon the subject, but provides that such repeal shall not affect any pending proceedings in which there is no attempt to or which will not lower or

affect any lake or body of water that does not exceed ten acres of surface at high water mark, etc., where proposed drainage did not affect any lake, proceedings, though not having progressed to final judgment when the act took effect, were not annulled.—*Kline v. Hagey*, 81 N. E. 209, 169 Ind. 275.

[v] (App. 1907)

Acts 1905, p. 480, c. 157, § 14, repealing all laws previously enacted relating to drainage, but providing that such repeal shall not affect pending proceedings in which a ditch has been ordered, or which will not affect any body of water exceeding 10 acres in area at high-water mark, preserves all ditch proceedings that have progressed to final establishment and all pending proceedings not finally established, where the drains would not affect lakes having a greater surface area at high water than 10 acres.—*Jaqua v. Harkins*, 40 Ind. App. 639, 82 N. E. 920.

[w] (Sup. 1908)

The drainage act (Acts 1905, p. 456, Burns' Ann. St. 1905, §§ 5622-5635) should receive a liberal construction so as to attain the legislative intent.—*Righter v. Keaton*, 170 Ind. 461, 84 N. E. 977.

[x] (Sup. 1908)

Act March 6, 1905 (Acts 1905, p. 456, c. 157) provides a new drainage law, and declares that all other laws relating to drainage are repealed, but that such repeal shall not affect any pending proceeding in which there is no attempt to, and which will not, lower or affect any lake exceeding 10 acres in area. *Held* that, where it appeared that one branch of a proposed drain was to commence at the outlet of a lake of more than 10 acres in area, and that dredging along waterways extending into lakes and from such lakes into further waterways was designed to accomplish the ordinary purposes of such work, it was sufficiently shown that the lakes would be affected by the plan of drainage.—*Kunkalman v. Gibson*, 171 Ind. 503, 84 N. E. 985, 86 N. E. 850.

Under the act, there is no jurisdiction to continue a proceeding which at the time the act goes into effect attempts to affect lakes of that area, or to modify the proceeding to one that shall not so attempt.—*Id.*

Under the act it is not necessary in order to terminate a drainage proceeding that there should be both an attempt to lower a lake and an actual situation in which the construction of the drain will have that effect, either being sufficient.—*Id.*

Where there was an attempt in fact to lower or affect a protected lake at the time said act of 1905 (Acts 1905, p. 456, c. 157) became operative, there was no authority in law for the continuing of the proceeding, since it only awaited the ascertainment of the fact to require its dismissal; the time referred to being necessarily the testing time with every drainage proceeding then pending.—*Id.*

[xx] (Sup. 1909)

It is for the General Assembly to determine the measure of jurisdiction it will grant or withdraw in the matter of construction of public drains.—*Kunkalman v. Gibson*, 171 Ind. 503, 84 N. E. 985, 86 N. E. 850; *Thorn v. Silver*, 89 N. E. 943.

[y] (Sup. 1909)

Under Acts 1905, p. 456, c. 157, providing a new drainage law, repealing all former drainage laws, but that such repeal shall not affect any pending proceedings in which a ditch has been finally established, or proceedings which will not affect any body of water having more than 10 acres of surface at high-water mark, pending proceedings for the establishment of a ditch, not designed to affect any body of water within the protection of the act, may be continued and completed as though the act had not been passed.—*Johnson v. Amacher*, 172 Ind. 248, 86 N. E. 1014.

[yy] (Sup. 1909)

The Legislature may grant the right to construct a drain over lands of others, and it may at will take away such right, and it may prescribe, modify, and substitute the terms of enjoyment of such right, and it may give to those who must bear the cost of the improvement the right to discontinue it at any time while the same remains in fieri, and, on the repeal of the statute, the Legislature may extend to the persons affected by the proceedings pending at the time of the repeal remedies different to those allowed by parties to be affected by future proceedings.—*Kaufman v. Alexander*, 88 N. E. 502.

Acts 1907, p. 508, c. 252, relating to drainage, repealing prior laws without any saving provision other than the right to conclude cases pending under the provisions of the act, extinguishes by the repeal of the old law all rights and remedies awarded thereby.—*Id.*

A provision in Acts 1907, p. 512, c. 252, § 3, providing that, in cases where a two-thirds remonstrance had not been filed, such remonstrance may be filed to the report of the drainage commissioners, except in cases pending on petition filed under Act March 6, 1905, when considered in connection with the duty of the court as defined with respect to similar remonstrances provided by statute and in force since the act of 1885, is reasonably certain, and shows that the Legislature intended that the judgment of the court in such cases should be a dismissal of the proceedings.—*Id.*

[z] (Sup. 1909)

Under Acts 1907, p. 532, c. 252, § 17, conferring jurisdiction of drainage cases on the boards of commissioners only where the proposed work and the lands to be affected are wholly within one county, and section 21 (page 537), repealing all laws previously enacted in relation to the drainage, and providing that any pending proceeding shall be continued under the act, etc., the board of commissioners of a county have no jurisdiction of the subject-mat-

ter of proceedings to construct drains extending into two or more counties, and the fact that the circuit court, after the passage of the act of 1907, dismissed an appeal from a judgment of the board of commissioners and certified the proceedings back to the board to proceed in accordance with the law, does not estop the objectors from insisting that the board was deprived of jurisdiction by the repeal by the act of 1907 of the law under which the proceeding was brought.—*Zintsmaster v. Aikin*, 88 N. E. 509.

Burns' Ann. St. 1908, § 243, declaring that the repeal of any statute shall not release or extinguish any penalty, forfeiture, or liability unless the repealing statute shall so expressly provide, etc., is enacted to save pending proceedings at the time of its enactment in 1852, and does not apply to proceedings instituted under drainage laws repealed by Acts 1907, p. 508, c. 252, relating to drainage, and repealing laws in conflict therewith.—*Id.*

[xx] (Sup. 1909)

Drainage Act 1907, § 3, second proviso (Burns' Ann. St. 1908, § 6142), providing that, in proceedings for drains pending when the act shall take effect where a two-thirds remonstrance has not been filed, such a remonstrance may be filed to the report of the drainage commissioners, except in cases pending on appeal filed under a specified prior act, is not retroactive.—*Thorn v. Silver*, 89 N. E. 943.

Prior to the drainage act of 1907 (Burns' Ann. St. § 6140 et seq.), and subsequent to Acts 1903, p. 505, c. 232, § 2, as amended, there was no law authorizing a two-thirds remonstrance in proceedings for drains; the latter act having omitted the provision therefor in previous acts.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 17; 10 CENT. DIG. CONST. LAW, § 884.

§ 3. Purposes for which drains may be established.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 2.  
See, also, 14 Cyc. pp. 1025, 1026.

§ 4. — In general.

[a] (Sup. 1891)

Act April 6, 1885 (Acts 1885, p. 129) § 3, relating to drainage, gives the circuit courts jurisdiction to "determine that the method of drainage shall be, by removing obstructions from a water course; by deepening, widening, straightening or changing its channel," etc. *Held*, that this confers no jurisdiction of proceedings to straighten the channel of a river to prevent its cutting a new channel in times of high water, when the drainage is a mere incident of the contemplated operation.—*Scruggs v. Reese*, 128 Ind. 390, 27 N. E. 748.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 2.

§ 5. — Improvement of land.

[a] (Sup. 1890)

In the passage of the drainage statutes of April 8, 1881, and March 8, 1883, it was not the legislative intent to provide a system of drainage for the fresh-water lakes of the state, but only for wet and marshy lands, swamps, ponds, and the like; hence no proceedings can be had under the drainage laws for the purpose of draining a lake.—*Baltimore & O. & C. R. Co. v. Ketring*, 122 Ind. 5, 23 N. E. 527.

[b] (Sup. 1896)

The Legislature has no power under the Constitution to enact a law forcing one person to improve his own or the lands of another by draining or otherwise, and compel the persons benefited to pay therefor, unless the public is also benefited thereby.—*Gifford Drainage Dist. v. Shroer*, 44 N. E. 636, 145 Ind. 572.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 2.

§ 6. — Promotion of public health or welfare.

Allegation in petition for drain, see post, § 28. Necessity in order to justify levy of assessment, see post, § 66.

[a] (Sup. 1877)

Under Act March 9, 1875 (1 Rev. St. 1876, p. 428), re-enacting the subject of drainage, a drain must be conducive to the public health, convenience, or welfare, or of public benefit or utility.—*McKinsey v. Bowman*, 58 Ind. 88.

[b] (Sup. 1878)

In an action to collect an assessment made for constructing a drain, where the proceedings to establish such drain were commenced after the act of the Legislature of March 9, 1875, took effect, where neither the petition, nor the finding of the board of commissioners, nor any evidence tending to prove that the drain was necessary and conducive to public health, convenience, or welfare, or of public benefit or utility, is shown, the defendant is entitled to a verdict.—*Tillman v. Kircher*, 64 Ind. 104.

[c] (Sup. 1878)

The provisions of Act March 9, 1875, that a proposed drain must be shown to be conducive to public health or welfare, or of public benefit, apply to drain proceedings which were in fieri at the time of the taking effect of such act.—*Bate v. Sheets*, 64 Ind. 209.

[d] (Sup. 1880)

The construction of a ditch or drain, under Act March 11, 1867, is illegal, unless it is shown that it will be conducive to the public health or welfare, or be of public benefit and utility.—*Deisner v. Simpson*, 72 Ind. 435.

[e] (Sup. 1884)

In order that a drain may be considered of public utility, and therefore permissible under Acts 1881, p. 397 (Rev. St. 1881, § 4273 et seq.), it is not necessary that the whole com-



munity should share the benefits. If it is of public benefit, its public character is not affected by the special benefit to a few individuals.—*Ross v. Davis*, 97 Ind. 79.

[f] (*Sup.* 1884)

The gravel road of an incorporated turnpike company is a public highway, within the meaning of the drainage law; hence a ditch, beneficial to such road, will benefit a public highway, as required by Rev. St. 1881, § 4274 (Amend. Act 1883, p. 173).—*Neff v. Reed*, 98 Ind. 341.

[g] (*Sup.* 1884)

The right to establish a drain under Rev. St. § 4273 et seq., depends upon whether the drain will be of public utility.—*Ross v. Davis*, 97 Ind. 79; *Anderson v. Baker*, 98 Ind. 587.

The test whether a ditch may be constructed over the land of others than the petitioner for such ditch is whether or not the ditch is of public utility and will benefit public health or public highways, and not whether it might not be constructed in as cheap and as efficient a manner wholly upon petitioner's lands.—*Id.*

[h] (*Sup.* 1889)

Where the drainage of wet lands will promote health, there is a constitutional warrant for levying assessments to pay the expense of the drainage of such lands, and assessments may be authorized without proving what particular citizens will be beneficially affected.—*Zigler v. Menges*, 22 N. E. 782, 121 Ind. 99, 16 Am. St. Rep. 357.

The Legislature has declared that the drainage of wet lands is a matter of public benefit, and it has left to local tribunals nothing more than the duty of determining whether a particular ditch will be a public utility or will be conducive to the public health, welfare, and convenience, and, if a particular ditch will drain any considerable body of wet lands, it is of public utility and benefit.—*Id.*

[i] (*Sup.* 1890)

It is not necessary that a drain shall be of public utility, benefit highways, and promote public health, in order to authorize a special assessment. It is sufficient if it accomplishes any one of these things.—*Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033.

[j] (*Sup.* 1896)

The reclamation of wet land and the drainage of ponds and marshes is a public utility and is for the benefit of the public health and welfare, and, so far as the drainage of wet lands will promote the health of the public, it is by virtue of the police power of the state that the authority is exercised to enact laws providing therefor.—*Gifford Drainage Dist. v. Shroer*, 44 N. E. 636, 145 Ind. 572.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 2.

See, also, 14 Cyc. p. 1025.

## § 7. Establishment by public authorities.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 1, 3.

See, also, 14 Cyc. pp. 1024, 1025.

## § 9. — By counties or other local authorities.

[a] (*Sup.* 1898)

The county through the agency of its board of commissioners is not the trustee of the fund derived from the sale of drainage bonds under Burns' Rev. St. 1894, § 5690 (*Horner's Rev. St. 1897*, § 4317c).—*Conn v. Board of Com'rs of Cass County*, 51 N. E. 1062, 151 Ind. 517.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 1, 3.

## § 12. Drainage and reclamation districts and commissions.

Establishment of district as within police power of state, see ante, § 2.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 4-13; 12 CENT. DIG. Corp. § 9.

See, also, 14 Cyc. pp. 1026-1029.

## § 17. — Commissioners and other officers.

Bonds of treasurer of ditching corporation, see OFFICERS, § 37.

Embezzlement by commissioner, see EMBEZZLEMENT, § 21.

[a] (*Sup.* 1883)

The facts that the commissioners provided for in the act of April 8, 1881, relating to drains, are appointed by the court, that they must report to the court, and are liable to be removed by the court, do not render them the mere agents of the court, and a contention that the act imposes on the court legislative and executive duties, because of such facts, is untenable.—*Scott v. Brackett*, 89 Ind. 413.

[b] (*Sup.* 1889)

A complaint on a drainage commissioner's bond, taken under the drainage act of April 8, 1881, showed that the recovery was sought for the purpose of raising funds for completing the drain, and did not show that the final report of the commissioner had been made and approved. *Held*, that it might be inferred that the proceedings for the construction of the drain were still pending, and the action is saved from the repeal of the act of 1881 and amendments by Act April 6, 1885, § 13, which provides that pending proceedings may be completed according to the provisions of the former acts.—*Smith v. State ex rel. Ingberman*, 117 Ind. 167, 10 N. E. 744.

An action on such bond for the improper construction of the work, and the conversion of drainage funds, would not be destroyed by the repealing act, though it contained no saving clause.—*Id.*

The drainage act of 1881 requires the drainage commissioners, to whom the matter of the construction of a drain is referred, to determine the best method of drainage, the termini, route, etc., and fix the same by metes, bounds, etc., and make report, and provides that the order confirming the same shall be conclusive, and that the commissioner charged with the work shall have it constructed as ordered. *Held*, that the commissioner having charge cannot deviate from the specifications without procuring authority to do so, and he is liable on his bond for any damage resulting from an unauthorized deviation.—*Id*.

The measure of damages for such deviation is the amount required to complete the work as ordered.—*Id*.

Evidence of the general reputation of the persons employed to construct the drain, for skill and diligence in drain construction, is inadmissible.—*Id*.

The court may properly modify an instruction so as to include in it unfinished, as well as imperfect, work, where the drain as constructed is not of the required depth in some places.—*Id*.

In an action on a drainage commissioner's bond, the parties having made an issue that the commissioner negligently paid insolvent contractors before the work was done according to the specifications, a request to charge that, if the defects could not have been avoided by the exercise of reasonable care by the commissioner, there can be no recovery, is properly refused as ignoring such issue. The contractors should not have been paid until the defects were remedied, though the commissioner, in exercising reasonable diligence, could not have avoided such defects.—*Id*.

[c] (*Sup*. 1890)

Under Rev. St. § 4273, providing for the appointment of drainage commissioner, and requiring him to give bond for the faithful performance of his duties, and to account for all money that shall come into his hands, and section 4277, authorizing him to divide the work in his charge into parts, let it out on contract, and levy assessments on the land benefited to pay for it, an ex-commissioner is entitled to credit for money paid out on contracts, and for costs and expenses in an action on his bond, for conversion of assessments, brought by his successor in office.—*Harris v. State ex rel. Wright*, 123 Ind. 272, 24 N. E. 241.

[d] (*Sup*. 1905)

*Burns' Ann. St. 1901*, § 240, disqualifies persons to act in matters affecting others, where they are related within the sixth degree of consanguinity or affinity, and section 5624, providing for the construction of drains, requires all objections to the qualifications of drainage commissioners to be made within 10 days after the filing of the petition, and declares that all objections not made within such time shall be deemed waived. *Held* that, where a landowner was brought into court for the first time in such

proceedings in response to a notice that his lands were assessed for the construction of a ditch by the report of drainage commissioners, he was not estopped by section 5624 to then object to the competency of such commissioners on account of their kinship to some of the petitioners.—*Small v. Buchanan*, 76 N. E. 167, 165 Ind. 549.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 11, 12.

See, also, 14 Cyc. pp. 1027, 1028.

### § 18. — Powers and proceedings in general.

Assessments and special taxes, see post, §§ 66-91.

[a] (*Sup*. 1908)

Drainage proceedings are adversary in character, and in determining the rights affected boards of commissioners act judicially.—*Honold v. Endicott*, 170 Ind. 16, 83 N. E. 502.

[b] (*Sup*. 1908)

*Drainage Act 1885* (Laws 1885, p. 139, c. 40, § 7; *Burns' Ann. St. 1901*, § 5628), providing that the drainage commissioner shall at all times be under the control and direction of the court and obey its directions, includes orders of the judge made in vacation.—*Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 11, 13.

See, also, 14 Cyc. pp. 1027-1029.

### § 19. — Rights and liabilities in general.

Contracts, see post, §§ 40, 54.

Injuries from defects or obstructions in drains, see post, § 63.

[a] (*Sup*. 1908)

The commissioner and the contractor in a drainage proceeding being agencies or arms of the court, it is a necessary incident of the authority to construct a drain that both be under the jurisdiction, and subject to contempt for disobedience of the ad interim orders of the court or the judge thereof made in vacation.—*Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 11, 13.

See, also, 14 Cyc. pp. 1028, 1029.

### § 20. — Actions.

[a] (*Sup*. 1889)

In an action for breach of a drainage commissioner's bond, an instruction that if the work was defective and imperfect when completed, but the defects could not have been avoided by the exercise of reasonable care on the part of the commissioner in the proper discharge of his duties, the jury should find for defendant, is erroneous in ignoring the issue that defendant carelessly and negligently paid out the

money in his hands to insolvent contractors before the work was done according to the plans and order of the court; for, if the work was defective, he could not have paid out the money until the defects were remedied, though the imperfections could not have been avoided by the exercise of reasonable care by the commissioner.—*Smith v. State ex rel. Ingberman*, 19 N. E. 744, 117 Ind. 167.

### § 21. Drainage companies.

Fraud by officers and agents, see CORPORATIONS, § 317.

Judicial notice of drain association, see EVIDENCE, § 22.

Liability of stockholders, see CORPORATIONS, §§ 243, 246.

Married women as members of, see HUSBAND AND WIFE, § 98.

Recovery for services in amending articles of association, see WORK AND LABOR, § 23.

#### [a] (Sup. 1861)

The funds of a draining association are to be derived from assessments on the lands benefited, and not on the individual organizers; hence the corporators are not individually liable for the debts of the association, in the absence of a contrary provision in the law under which they organized.—*Shaw v. Boylan*, 16 Ind. 384.

Corporators of a corporation established under the act of 1852, authorizing the construction of levees and drains, are individually liable for the amounts respectively assessed on their several tracts of land, but no further, for payment of the corporate debts.—*Id.*

#### [b] (Sup. 1868)

Though the personal liability of stockholders of ditching corporations imposed by Act 1859 (1 Gav. & H. St. p. 305), § 4, declaring that all members of such companies shall be individually liable for all debts contracted, and damages assessed against them, is collateral only, a creditor is only required to show that he had been unable to compel payment from the corporation by execution or due process of law, in order to proceed against such stockholder.—*Todhunter v. Randall*, 29 Ind. 275.

#### [c] (Sup. 1868)

Procuring an assessment to be made upon lands for the purpose of constructing a drain is a corporate act, and cannot be legally done, therefore, until after the articles have been recorded, which is necessary to the formation of draining associations formed under Act June 12, 1852.—*New El River Draining Ass'n v. Durbin*, 30 Ind. 173; *Same v. Carriger*, *Id.* 213.

#### [d] (Sup. 1869)

The lands to be affected by the proposed work of a draining company must be clearly described in the articles of association, with such a plain description of the commencement, the line, and the termination of the ditch, as will enable all persons to form with reasonable certainty an opinion concerning their personal

interest in the corporation.—*West v. Bullskin Prairie Ditching Co.*, 32 Ind. 138; *O'Reiley v. Kankakee Val. Draining Co.*, *Id.* 169.

#### [e] (Sup. 1869)

The Legislature has power to authorize the organization of companies for the purpose of draining swamp lands. This authority of the Legislature is referable to the police power—the right of the Legislature to require the owner of property to so use his own that his neighbor may have such reasonable enjoyment in his own possession as naturally adheres thereto. The abuse of this power can be prevented by the courts, but its reasonable exercise cannot be denied.—*O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169.

#### [f] (Sup. 1870)

The articles of association of a draining company organized under the act of 1869 stated: "The object of the association shall be to drain and reclaim the wet and overflowed lands lying along and contiguous to the valley of the Calumet river \* \* \* by digging, if deemed expedient, a new channel and outlet for the waters of said valley, or a portion thereof, and by digging, excavating, and constructing such other ditches and channels as may seem best adapted to drain, improve, and reclaim same lands." *Held*, in a suit by owners of lands liable to be beneficially affected by the proposed drain to enjoin the company from proceeding to assess and make a charge upon their lands, that the statement of the purposes to be accomplished was sufficiently set out in the articles of the association, so as to comply with the requirements of the statute.—*Seyberger v. Calumet Draining Co.*, 33 Ind. 330.

#### [g] (Sup. 1872)

Under Act June 12, 1852 (1 Gav. & H. St. p. 303) § 5, requiring a drainage company to record its articles in the recorder's office of the counties in which the contemplated work is situated, "and thereafter such association shall be a body corporate," etc., the filing of the articles is a condition precedent to the investment of corporate powers.—*McIntire v. McLain Ditching Ass'n*, 40 Ind. 104.

#### [h] (Sup. 1873)

Where the articles of association of a draining company failed to describe and particularly specify the mode of draining, as required by Acts Sp. Sess. 1869, p. 82 (Davis' Rev. St. Supp. 1870, p. 322), so that appraisers would have no basis on which to act in making the examination of the lands liable to be affected, and assessing the benefits and injuries to such lands, they are fatally defective, and any assessments for benefits made thereunder are illegal.—*Skelton Creek Draining Co. v. Mauck*, 43 Ind. 300.

#### [i] (Sup. 1873)

Articles of association of a drainage company are insufficient if they merely provide that the jurisdiction of the company shall extend to all the wet and overflowed lands in two certain

townships, particularly the lands of designated persons, a schedule of whose lands is appended to the articles, without further defining the route of the proposed improvements.—*Newton County Draining Co. v. Nofsinger*, 43 Ind. 566.

[j] (Sup. 1873)

The articles of association of a company organized to reclaim wet or overflowed lands must so distinctly state the purposes intended to be accomplished that all whose lands are liable to be affected by the work may know the fact, and be able to avail themselves of the right given by the statute to become members of the association; and such articles should give the commencement, course, and terminus of the ditch proposed to be constructed.—*Crawford v. Prairie Creek Ditching Ass'n*, 44 Ind. 361.

[k] (Sup. 1874)

In an action against a part only of the members of a ditching association for labor performed in the construction of a ditch, a verified answer alleging that other persons, who are named, living and within the jurisdiction of the court, are members of the company and signers of the articles of association, is good on demurrer.—*Shafer v. Moriarty*, 46 Ind. 9; *Same v. Cravens*, Id. 171.

The liability of the members of a ditching association for manual labor performed is primary, and it is no defense to an action against the members to recover for such labor, that the uncollected assessments upon lands for benefits accruing thereto by the construction of the work are sufficient to pay the indebtedness.—*Id.*

Where a ditching association was organized under, though not in strict conformity to, the law therefor, by persons who had subscribed articles of association which contemplated the construction of a ditch upon which the plaintiff performed manual labor, such persons, having brought the company into existence and permitted it to exercise the functions of a corporation de facto under the law relative to such organizations, making the members individually liable for manual labor performed in constructing the ditches, could not deny the corporate existence of the company in an action to recover for such labor.—*Id.*

The liability of the members of a ditching association for manual labor performed in the construction of a ditch contemplated by the articles of association is joint, and not several.—*Id.*

[l] (Sup. 1876)

Articles of association of a draining company which do not describe the commencement, course, and terminus of the drain proposed, with certainty, do not create a valid corporation.—*Smith v. Duck Pond Ditching Ass'n*, 54 Ind. 235.

[m] (Sup. 1876)

The members of a ditching company are jointly liable to one of their number for labor

done by him for the company.—*Polk v. Reynolds*, 54 Ind. 449.

[n] (Sup. 1877)

Act Dec. 14, 1872, repealing Act May 22, 1869 (authorizing "the construction of levees, dikes, and drains \* \* \* by incorporated companies," provided that the existence of corporations under the latter act shall be unaffected where the main line of its contemplated work does not exceed 16 miles), ends the existence of all corporations organized under the latter act, where the line of their contemplated work exceeds 16 miles.—*Cooper v. Arctic Ditchers*, 56 Ind. 233.

[o] (Sup. 1877)

In the articles of association of a draining company organized under 1 Rev. St. p. 418, the description of the proposed drain need only be reasonably certain. The particularity prescribed by the statutes repealed at page 427 is not required.—*Milligan v. State ex rel. Bittinger*, 60 Ind. 206.

[p] (Sup. 1879)

In an action under Act 1860, § 16, rendering all members of any drainage company organized thereunder liable for debts contracted by the company for manual labor, a complaint alleging that "all of said defendants, together with this plaintiff, had signed the articles of association, and were members thereof at the time of the performance of said labor, and at the time of the rendition of said judgment therefor," sufficiently showed that the defendants were members of the company at the time the debt was created.—*Reeder v. Maranda*, 66 Ind. 485.

In an action against the individual members of a draining company to recover for labor, a complaint alleging that the defendants were members of the association "at the time of the performance of said labor, and at the time of the rendition of said judgment therefor," sufficiently alleges that the defendants were members at the time the debt was contracted.—*Id.*

[q] (Sup. 1882)

The liability of members of a corporation organized for the construction of levees and drains, under Acts June 12, 1852, and June 4, 1861, for the debts of the corporation, exists as individuals, and a suit upon a judgment had against the corporation as such cannot be maintained and is demurrable.—*Trippe v. Huncheon*, 82 Ind. 307.

The liability of members of a draining association for labor performed, upon default of payment by the association, is independent of any judgment against the association; hence a complaint in an action against the individual members is bad if founded upon a judgment against the association, and not on the original debt.—*Id.*

[r] (Sup. 1884)

A corporation organized under Drainage Law March 10, 1873, prior to the passage of

Repealing Act March 13, 1879, was not dissolved by that act, under the proviso thereof saving rights acquired in proceedings had under existing laws.—*Barren Creek Ditching Co. v. Beck*, 99 Ind. 247.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drains, §§ 14, 15, 95;  
12 CENT. DIG. Corp. §§ 2375, 2377.  
See, also, 14 Cyc. pp. 1026-1029.

**§ 22. Establishment by landowners over lands of others.**

[a] (Sup. 1906)

No right to construct an artificial drain over lands of others exists at common law.—*Taylor v. Strayer*, 78 N. E. 236, 167 Ind. 23, 119 Am. St. Rep. 469.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drains, §§ 1, 2.

**§ 24. Proceedings for establishment.**

Arrest of judgment, see JUDGMENT, § 263.

Change of venue, see VENUE, § 36.

Proceedings for improvement, extension or alteration of drains, see post, § 50.

Right to trial by jury, see JURY, § 19.

Venue, see VENUE, § 16.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drains, §§ 16-53.

See, also, 14 Cyc. pp. 1029-1050; note, 60 L. R. A. 161.

**§ 25. — In general.**

[a] (Sup. 1886)

In drainage cases the modes of procedure and the rules of practice prescribed by the civil code may properly be used to supply omissions in the drainage statute.—*Crume v. Wilson*, 4 N. E. 169, 104 Ind. 583.

[b] (Sup. 1886)

A proceeding for the location and construction of a ditch under the statute concerning drainage is so far a civil action that the provisions of the Civil Code in relation to a change of venue are applicable thereto.—*Bass v. Elliott*, 105 Ind. 517, 5 N. E. 683.

[c] (Sup. 1887)

No provision being made in Acts 1883, p. 173, for pleading a former adjudication, the Legislature did not intend that failure to secure the drain petitioned for should bar all future attempts to obtain it.—*Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

[d] (App. 1904)

An agreement made between all the petitioners for a drainage ditch and a landowner that a private ditch then constructed and in operation on a certain portion of his lands should not be entered or affected between certain dates was valid, in the absence of any mistake or fraud.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

[e] (Sup. 1906)

Under Burns' Ann. St. 1901, § 5653a, authorizing the county commissioners on petition, etc., to tile public drains previously constructed, proceedings for the tiling of a drain which are void in part because of the attempted construction of a new drain along part of the route of the drain proposed to be tiled are altogether void.—*Kemp v. Adams*, 73 N. E. 590, 164 Ind. 258.

[f] (Sup. 1906)

There being no statute prohibiting county commissioners from serving in matters in which they are interested, proceedings for the establishment of a drain were voidable only, and not void because one of the commissioners before whom the proceedings were had was disqualified by interest.—*Carr v. Duhme*, 78 N. E. 322, 167 Ind. 76.

[g] (Sup. 1907)

The rules of practice, prescribed by the Civil Practice Code, are applicable to proceedings to establish a drain, as authorized by Acts 1885, p. 129, c. 40 (Burns' Ann. St. 1901, § 5622), as amended by Acts 1903, p. 504, c. 232, as to all matters not especially provided for in such act.—*Clarkson v. Wood*, 168 Ind. 582, 81 N. E. 572.

[h] (Sup. 1908)

A degree of liberality is allowed in construing the pleadings in ditch proceedings, and the strictest rules of pleading are not enforced.—*Stevens v. Templeton*, 170 Ind. 248, 84 N. E. 148.

[i] (Sup. 1908)

In the absence of provisions of the drainage act to the contrary, general procedure provisions for the government of courts, wherein jurisdiction over drainage proceedings is vested, may be properly resorted to, in determining the proper practice respecting such proceedings.—*Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drains, §§ 16, 17; 1 CENT. DIG. Action, § 86.

**§ 26. — Jurisdiction.**

Police power, see ante, § 2.

[a] (Sup. 1884)

Two members of a board of county commissioners constitute a quorum, and the fact that one of the three was interested in the ditch proceedings in which the board was acting did not oust the jurisdiction of the tribunal.—*Cauldwell v. Curry*, 93 Ind. 363.

The filing of a proper petition for the establishment of a ditch invokes the jurisdiction of the board of commissioners, and the statute invests the board with general jurisdiction of the subject-matter.—*Id.*

## [b] (Sup. 1884)

The courts of a county where a petition for a drain is filed, and where part of the lands affected lies, have jurisdiction of lands affected by the drain, but situated in another county.—*Shaw v. State*, 97 Ind. 23; *Crist v. State ex rel. Whitmore*, Id. 389; *Buchanan v. Rader*, Id. 605.

## [c, d] (Sup. 1885)

The court in which the petitioner resides, and where the proceedings are commenced, can establish a drain extending into another county.—*Meranda v. Spurlin*, 100 Ind. 380.

## [e] (Sup. 1886)

Where a proposed ditch or drain extends into two counties, proceedings may be prosecuted in either.—*Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353.

## [f] (Sup. 1888)

On petition by residents of one county for the establishment of a ditch extending into another county, under Rev. St. 1881, § 4274, the circuit court of the former county has jurisdiction to establish it, and to make and confirm assessments therefor upon lands in the latter.—*Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390.

## [g] (Sup. 1895)

Where, in proceedings to establish a public drain, appellant prayed and filed a remonstrance, she thereby waived the defects in the notice, if any, and was not entitled to question the jurisdiction of the court.—*Steele v. Empson*, 41 N. E. 822, 142 Ind. 397.

## [h] (Sup. 1899)

Under Burns' Rev. St. 1894, § 5622 et seq. (*Horner's Rev. St. 1897*, § 4273 et seq.), giving the circuit court jurisdiction to establish drains, the court has jurisdiction to straighten and deepen a river for drainage purposes, although the county commissioners have exclusive jurisdiction to straighten a water course to prevent the banks from washing, or to protect a highway or avoid the construction of a bridge.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

The Legislature may give the circuit court jurisdiction to construct drains partly within a city's limits, since the previous exclusive jurisdiction of the common council over drainage within the city limits, had been granted by the Legislature, and since the matter of drainage in county and city conjointly was a new subject-matter, previously unprovided for.—Id.

## [i] (Sup. 1903)

Though the circuit court drainage act of 1885, authorizing the construction of drains for the drainage of wet marshy lands, does not authorize the drainage of fresh-water lakes, the fact that in the construction of a projected drain one or more small bodies of water described as lakes, but which in fact were nothing more than ponds, were proposed to be drained, did not deprive the court of jurisdiction over

the subject-matter.—*Strayer v. Taylor*, 69 N. E. 145, 163 Ind. 230.

Burns' Rev. St. 1901, § 5655, authorizes county commissioners to construct drainage ditches within the county under certain circumstances. Section 5656 provides that the viewers shall cause stakes to be set along the line, numbered progressively down stream at each 100 feet, and that the viewers shall give the depth of the cut, width of bottom, and width of top of the source and outlet and at each 100-foot stake of the ditch; and section 5688 provides that the statute shall be liberally construed. *Held*, that where the line of a ditch passed through a natural water course or pond, etc., the failure of the viewers to place stakes along the water course, and give the depth of the cut, etc., therein, was not a jurisdictional defect in the proceedings.—Id.

Under Const. art. 6, § 10, granting boards of county commissioners powers of a local administrative character, where a petition is filed for the construction of a drainage ditch in two counties, the board of commissioners in a county where the petition is first filed acts in a judicial capacity.—Id.

## [j] (Sup. 1905)

The board of commissioners of the county in which ditch proceedings originate has general jurisdiction over the entire work, and its orders and judgments are certified to the boards of other counties concerned to be spread of record and carried out by them in an administrative capacity.—*State ex rel. Fast v. Popejoy*, 165 Ind. 177, 74 N. E. 904.

Jurisdiction of the board of commissioners of the county in which a ditch proceeding originates does not prevent the commissioners of other counties concerned in the proceedings from appointing its own viewers, and in case of vacancy in the board of viewers to reappoint members thereto.—Id.

## [k] (Sup. 1906)

Under Burns' Rev. St. 1901, §§ 5655, 5656, the board of drainage commissioners had jurisdiction of subject-matter of drains and acquired jurisdiction of the parties by giving the notice therein required.—*Carr v. Duhme*, 167 Ind. 76, 78 N. E. 322.

## [l] (Sup. 1908)

The circuit court of one county may order and complete the construction of a public drain extending into an adjoining county.—(1908) *Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 18.

See, also, 14 Cyc. pp. 1029, 1030; note, 60 L. R. A. 174.

## § 27. — Parties.

Bringing in new parties, see PARTIES, §§ 55, 56.

## [a] (Sup. 1880)

If an assessment is made against land under 1 Rev. St. 1876, p. 430, and names the owner thereof, he thereby becomes a party to the proceedings, although not named in the petition, and is entitled to an appeal therefrom.—*Houk v. Barthold*, 73 Ind. 21.

## [b] (Sup. 1884)

In order to authorize the court to make any order in an application to establish a ditch, which is in the nature of a proceeding in rem, the persons on whose lands the ditch is to be constructed must be before the court, either by notice or by appearance.—*Wright v. Wilson*, 95 Ind. 408.

## [c] (Sup. 1895)

In a proceeding under Act April 6, 1885 (Elliott's Supp. § 1184 et seq.; Rev. St. 1894, § 5622 et seq.), to establish a public drain, one not named in the petition who appears and claims that his lands will be affected by the proposed drain may, upon the determination of that fact in his favor, be made a party, as provided by section 3 of said act, declaring that new parties may be admitted when the commissioner's report, as affected, lands not included in the petition, and, under section 8, upon the petition of any interested person whose lands will be affected.—*Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

## [d] (Sup. 1899)

Evidence that a certain deceased owner of land affected by a proposed drain had left eight children is not sufficient to entitle the petitioners for the drain to have them made parties, where there is no showing that the children had any interest in the land.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

## [e] (Sup. 1908)

In a proceeding for the construction of a public drain affecting a public highway bridge, it is proper to make the township trustee, upon whose township the primary duty of repairing the bridge rests, a party, as a necessary step in obtaining jurisdiction over the bridge.—*Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

Since all landowners, including holders of easements, affected by the proposed establishment of a public drain are required to be made parties to the proceeding, it is necessary, either by the original or by supplemental proceedings, to take proper steps to make the political subdivision having the ownership or quasi ownership of a bridge or highway affected by the drain a party, in order that the public interest may be represented in determining whether the taking is necessary.—*Id.*

FOR CASES FROM OTHER STATES,  
SEE 17 CENT. DIG. DRAINS, § 19.  
See, also, 14 Cyc. p. 1030.

## § 28. — Petition for drain.

Motion to make more definite or certain, see PLEADING, § 367.

Secondary evidence, see EVIDENCE, § 178.

## [a] (Sup. 1880)

In order to render legal and valid the proceedings under a petition or application for the construction of a ditch or drain, under Act March 11, 1867, such petition, etc., must allege that the proposed ditch or drain will be conducive to the public health, convenience, or welfare, or that the same would be of public benefit or utility.—*Deisner v. Simpson*, 72 Ind. 435.

## [b] (Sup. 1881)

The necessity of a ditch may be inferred, where the petition for its establishment avers that its construction would be "conducive to the public health, convenience, and welfare," and would be "of public benefit and utility."—*Corey v. Swagger*, 74 Ind. 211.

By 1 Rev. St. 1876, p. 428, a petition to establish a ditch is required to give a general description of the proposed starting point, route, and terminus. The certainty of the description is not materially impaired by the use of the word "about," where there are other words limiting and restraining its meaning.—*Id.*

## [c] (Sup. 1882)

A petition to the county commissioners, under Act March 9, 1875, to construct a ditch for drainage, may be amended, even as to a jurisdictional fact.—*Coolman v. Fleming*, 82 Ind. 117.

In a petition for a drainage ditch, a general description of the route and terminus is sufficient if the description is reasonably certain.—*Id.*

A petition, under Act March 9, 1875, for the construction of a ditch for drainage, stating that the drain would be of public utility, need not further state that it would benefit the public health.—*Id.*

## [d] (Sup. 1883)

Under Act March 9, 1875, requiring that the petition to construct a ditch "be signed by one or more of the landowners," it need not contain the names of all the landowners to be affected.—*Watkins v. Pickering*, 92 Ind. 332.

## [e] (Sup. 1884)

A petition for the construction of a drain, which substantially adopts the language of the statute (Rev. St. 1881, § 4284), is sufficient, without specific statements how the public health will be improved by the ditch or how it is of public utility.—*Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 360.

## [f] (Sup. 1884)

A petition for the location of a ditch, giving its starting point, and describing it as running parallel with a certain railroad, and thence along with a certain channel to a certain termi-

nus, is sufficiently definite.—*Wright v. Wilson*, 95 Ind. 408.

[g] (Sup. 1884)

Rev. St. 1881, §§ 4274, 4275, 4281, relating to the establishment of drains, and requiring that the petitioner shall give in his petition a description of the lands, with the names of the owners and state that the public health will be improved, or that one or more highways will be benefited, direct that the commissioners of drainage shall make a personal inspection of the lands described in the petition, and assess the benefits to each separate tract of land to be affected and to easements therein held by railways or other corporations, and requiring that any benefits assessed to any highway shall be assessed against the proper township and be paid by the trustee. *Held*, that as there must be a description of the lands or the names of the owners in the petition and notice, so there must be in the petition and notice some kind of description or designation of the highways for benefits to which assessments are to be against the township or a naming of the township, if not both, so that its officers and agents may have notice and time to defend the township against any contemplated assessment.—*Young v. Wells*, 97 Ind. 410.

[h] (Sup. 1885)

A petition in drainage proceedings, the verification of which substantially follows the form given in Rev. St. 1881, § 4284, is sufficient.—*Shields v. McMahan*, 101 Ind. 591.

[i] (Sup. 1885)

The owner of land against whom benefits are assessed for drainage must be named in the petition asking for the improvement proposed, under Rev. St. § 4274.—*Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728.

[j] (Sup. 1885)

It is sufficient to give the names of land-owners as they appear on the tax duplicate, and where the name of the owner is given on the tax duplicate as "the estate of Thomas Carr and Clarka Carr, of which Joseph Booth is the executor," it is sufficient to so describe the owner in the petition.—*Carr v. State*, 103 Ind. 548, 3 N. E. 375.

[k] A failure to indorse on the petition a date on which it will be docketed is a mere irregularity, which does not affect the rights of remonstrant, and should be disregarded.—(Sup. 1885) *Carr v. State*, 103 Ind. 548, 3 N. E. 375; (1894) *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[l] (Sup. 1886)

A verification of a petition in drainage proceedings in the following form:

"A. B. swears, and says that the matters alleged are true, as he believes. A. B.

"Sworn and subscribed 13th, 1882,  
[Notarial Seal.]

"X. Y.,  
"Notary Public."

—is sufficient.—*Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353.

[m] (Sup. 1887)

A petition for the establishment of a drain under the act of 1883, which states that the proposed work will improve the public health, benefit a public highway, described as "running east and west between sections 30 and 31, in township 22 north, of range 14 east," and that it will be of public utility, is sufficient without giving the name of the civil township.—*Collins v. Rupe*, 109 Ind. 340, 10 N. E. 91.

[n] (Sup. 1887)

The act of 1883 requires that the petition for the establishment of a ditch shall contain a statement of the method by which it is believed the proposed drainage can be accomplished in the cheapest and best manner. A petition for the establishment of a ditch, after describing certain lands which it was alleged belonged to the petitioner, and which would be benefited by drainage, recited that such drainage "cannot be accomplished \* \* \* in the best and cheapest manner without affecting the land of others," and alleged that the petitioner "believes that such drainage can be best had and effected by a ditch commencing," etc., followed by a general description of the proposed work and the manner of accomplishing the drainage of the land described. *Held*, that the petition sufficiently complied with the statute.—*Iieick v. Voight*, 11 N. E. 306, 110 Ind. 279.

Under section 1 of the act of 1883 (Acts 1883, p. 173), amending the drainage law, the petition must "state generally the method by which it is believed such drainage can be accomplished in the cheapest and best manner."—*Id.*

[o] (Sup. 1889)

A description of land in drainage proceedings and assessment as "Pt. S. E.  $\frac{1}{4}$  of N. E. Qr. Frac. Sec. 7, T. 6, S. R. 5 E." is void for uncertainty.—*Ross v. State*, 119 Ind. 90, 21 N. E. 345.

[p] (Sup. 1890)

A petition for a ditch, which describes it as beginning at the center of a certain government subdivision; running thence in a northeasterly direction to a given point in a certain section line; thence north about 40 rods; thence a little north of west until it intersects a certain creek—and which states that the ditch is to follow the natural water channel the entire distance, sufficiently complies with the statutory requirement (Rev. St. 1881, § 4286) that the petition shall contain a general description of the proposed starting point, route, and terminus of the ditch.—*Metty v. Marsh*, 124 Ind. 18, 23 N. E. 702.

[q] (Sup. 1892)

Where the descriptions of the tracts of land involved in the proceedings are copied, as the statute requires, from the tax duplicate, the description will, prima facie at least, sustain an assessment for benefits accruing from the construction of the ditch.—*Sample v. Carroll*, 32 N. E. 220, 132 Ind. 496.



The fact that three of the twelve petitioners signed their Christian names by initials only does not entitle a remonstrator to defeat an assessment.—Id.

[r] (Sup. 1894)

A verified petition for the construction of a public ditch specifically described its beginning, terminus, and courses, and the lands to be affected, and gave the owners' names. It alleged that it would benefit such lands, and a certain highway, and that the cost of such drainage would be less than the benefits to the owner of the land likely to be benefited thereby. *Held*, that the petition was sufficient.—*Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[s] (Sup. 1896)

A petition for a ditch need not allege that a dredging machine will be used in the construction thereof, to justify the use of such machine and the temporary removal of such bridges as are too low to let the machine pass underneath.—*Lake Erie & W. R. Co. v. Clugish*, 143 Ind. 347, 42 N. E. 743.

[t] (Sup. 1899)

Under Burns' Rev. St. 1894, § 5622 et seq. (Horner's Rev. St. § 4273 et seq.), authorizing the circuit court, on petition, to lay out a drain through a city when it cannot be otherwise "accomplished without extraordinary labor and expense," the petition need not allege the particular circumstances making it necessary to construct the drain through the city to avoid extraordinary labor and expense.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

[u] (Sup. 1900)

Where a petition for a drain for which remonstrant, as a benefited landowner, was to be assessed, did not ask for the drainage of lakes, the fact that the proposed route ran through several small natural water basins or courses did not invalidate the proceedings as being for the drainage of lakes.—*Goodrich v. Stangland*, 58 N. E. 148, 155 Ind. 279.

[v] (Sup. 1901)

Under Burns' Rev. St. 1894, § 5636, providing that a petition to the board of county commissioners for the construction of a ditch shall be signed by a landowner whose lands shall be affected thereby, and shall set forth the necessity for the ditch and a description of the route, the sufficiency of the petition is not affected by the failure of the petitioner to allege that he was the owner of land liable to be assessed, since the qualification might as well be affixed to his signature as expressed in the body of the petition.—*Shoemaker v. Williamson*, 59 N. E. 1051, 156 Ind. 384.

[w] (Sup. 1903)

Burns' Rev. St. 1894, § 5623, provides that the petition for the construction of a ditch shall describe the lands affected in tracts of 40 acres according to fractions of government surveys, and give the names of the owners, and state

that, in the opinion of the petitioners, one or more highways of the town will be benefited by the proposed drainage. Section 5630 declares that the benefits assessed to any highway shall be assessed against the township, and shall be paid out of the township funds. *Held*, that a petition for the construction of drains which alleges a benefit to a highway in a township without particularly describing any highway is sufficiently specific, the reason for a specified description of real estate not existing in the case of highways, the benefits assessed against the township not being a lien on real estate, but a debt payable by the township.—*Pleasant Civil Tp. v. Cook*, 67 N. E. 262, 160 Ind. 533.

[x] (Sup. 1903)

Where a petition was filed under Burns' Rev. St. 1901, § 5690 et seq., asking the construction of a drainage ditch and a levee, and alleging that "the construction of said work is necessary" to accomplish the objects mentioned in the petition, it could not be treated as sufficient for the construction of the ditch alone, after holding that the statute did not authorize the construction of the levee.—*Royse v. Evansville & T. H. R. Co.*, 67 N. E. 446, 160 Ind. 592.

[y] (Sup. 1905)

Where a petition for the establishment of a public ditch was not signed as required by law, but the proper parties were duly notified and regularly appeared, and they made no objection to the petition or proceedings until after final judgment, the defect is waived.—*Plew v. Jones*, 74 N. E. 618, 165 Ind. 21.

[z] (Sup. 1908)

After the dismissal or withdrawal of the only petitioners for a drain under Burns' Ann. St. 1901, § 5623, as amended by Act March 10, 1903 (Acts 1903, p. 504, c. 232), who owned land benefited outside the limits of a city, the remaining petitioners could not maintain the proceedings; the ownership of outside land being required by the statute to give the court jurisdiction of the subject-matter.—*Pavey v. Braddock*, 170 Ind. 178, 84 N. E. 5.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 20-23.

See, also, 14 Cyc. pp. 1030-1033.

## § 29. — Bond.

[a] (Sup. 1886)

Although Rev. St. 1881, § 4286, seems to require that the bond given by the petitioner to establish a drain should be signed by two or more sureties, yet, the county auditor having approved the bond as provided by law, it will be presumed, in the absence of a contrary showing, notwithstanding it is signed by but one surety, that such surety is a sufficient freehold surety, and a motion to dismiss the petition for want of a sufficient bond should not be sustained.—*Schneck v. Cobb*, 107 Ind. 439, 8 N. E. 271.

**[b] (Sup. 1892)**

Where a bond filed in a petition for opening a ditch is sufficient in form and substance, signed by solvent obligors, and affords ample security, and is taken and approved by the auditor, it is immaterial that the obligors in the bond are all petitioners.—*Sample v. Carroll*, 32 N. E. 220, 132 Ind. 496.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. DRAINS, § 24.

See, also, 14 Cyc. p. 1033.

**§ 30. — Notice.**

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

**[a] (Sup. 1881)**

The fact that the notice required for cutting a ditch was published in the name of the husband of the owner of the land rather than in the name of the owner is no ground for enjoining the cutting, the requirement of the statute that the owners' names be published not being mandatory.—*Featherston v. Small*, 77 Ind. 143.

**[b] (Sup. 1883)**

The filing of an affidavit showing that notice has been given, as required by Rev. St. § 4275, is a condition precedent to the power of the circuit court, under sections 4273, 4284, to refer a petition for the location of a ditch to a drainage commissioner; and such reference cannot be authorized by a defective affidavit, nor can the defect be cured by the subsequent filing of a sufficient affidavit.—*Scott v. Brackett*, 89 Ind. 413.

When notice to parties interested in drain proceedings is defective, such parties are not estopped to have the judgment therein set aside on motion, nor can the proceedings be deemed valid, under Act April 8, 1881, providing that the judgment shall be deemed conclusive as to the regularity of the proceedings. The defect is jurisdictional, and cannot be cured.—*Id.*

**[c] (Sup. 1884)**

Under 1 Rev. St. 1876, p. 428, providing that notice of a petition for the construction of a drain "shall contain a \* \* \* description of the terminus of such \* \* \* work, its direction and course, \* \* \* and the names of the owners of the lands that will be affected thereby," held that, in order for the commission to obtain jurisdiction, the notice must contain the name of the owner of the land affected.—*Vizard v. Taylor*, 97 Ind. 90.

**[d] (Sup. 1885)**

Since the amendment of 1883 to the drainage acts, proof of notice of the posting of the petition need not necessarily be made by affidavit, but may be made orally.—*Meranda v. Spurlin*, 100 Ind. 380.

**[e] (Sup. 1885)**

The court has power to cause the clerk to affix his jurat to the affidavit of posting of

the notice required in a proceeding to establish a drain.—*Williams v. Stevenson*, 103 Ind. 243, 2 N. E. 728.

**[f] (Sup. 1885)**

It is sufficient to give notice of drainage proceedings by posting notices as the statute requires.—*Carr v. State*, 103 Ind. 548, 3 N. E. 375.

An affidavit that notices have been posted is sufficient evidence of such posting.—*Id.*

**[g] (Sup. 1886)**

Under the drainage act as amended in Acts 1883, p. 173, notice must be given of the filing of the petition after it is filed, and not merely of an intention to file at some future time.—*McMullen v. State ex rel. Kendle*, 105 Ind. 334, 4 N. E. 903.

**[h] (Sup. 1886)**

Notice may be waived by a voluntary appearance, and one who joins in a remonstrance against the construction of a ditch is considered as appearing to the proceedings, thereby waiving all objections thereto based on a failure to give notice.—*Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867.

**[i] (Sup. 1886)**

Where proceedings to establish a ditch are void as to one of several tenants in common, who are owners of the land affected, for want of notice, they are void as to all.—*Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569.

**[j] (Sup. 1886)**

Where landowners are parties to a petition to establish a ditch of which some notice, although insufficient, is given, and they have actual knowledge of such petition, and the proceedings thereunder, they will, in case they permit, without objection, money to be expended on the faith that such proceedings were valid, be precluded from afterwards questioning the sufficiency of the notice.—*Peters v. Griffie*, 108 Ind. 121, 8 N. E. 727.

**[k] (Sup. 1886)**

The petitioner in a proceeding for the establishment of a ditch cannot avail himself of a defect in the form of the notice, nor successfully object to the manner in which it was proved.—*Carr v. Boone*, 9 N. E. 110, 108 Ind. 241.

Where the court ascertains that the first notice is insufficient, it may order a second one to be given.—*Id.*

The fact that one or more landowners were not notified will not vitiate the proceedings as to those who were notified.—*Id.*

Proof of posting notices need not necessarily be made by affidavit.—*Id.*

Notice in drainage proceedings is essential, and, although it may be waived, parties who enter a special appearance, and object to the sufficiency of the notice, cannot be deemed to have waived objections.—*Id.*

## [l] (Sup. 1887)

In proceedings for the establishment of a drain, where a party appears, and, without objection to the notice, files a remonstrance, he cannot afterwards raise any question as to the sufficiency of the notice.—*Ford v. Ford*, 110 Ind. 89, 10 N. E. 648.

## [m] (Sup. 1888)

An owner of lands who was one of the petitioners for a drain is estopped to allege that he did not have proper notice of the presentation of the petition, in an action to enforce the assessment on his land for the construction of such drain.—*Hackett v. State*, 113 Ind. 532, 15 N. E. 799.

## [n] (Sup. 1888)

An owner of land affected by a proposed ditch, after appearing specially to move to set aside the notice of petition for insufficiency, waives such defects by making another motion, pending the first, to require the petition to be amended for nonconformity to the statute.—*Gilbert v. Hall*, 115 Ind. 549, 18 N. E. 28.

## [o] (Sup. 1889)

Drainage proceedings under Act March 13, 1879, are actions in rem, and constructive notice only, by publication of the filing of the petition, is necessary, as against the land of nonresidents.—*Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317.

## [p] (Sup. 1889)

The court, if it concludes that the commissioners' report is not a proper one, may set it aside, and order them to make a second report, without requiring any further notice to be given to the landowners.—*Chaney v. State ex rel. Ely*, 118 Ind. 494, 21 N. E. 45.

## [q] (Sup. 1889)

Where a petitioner for drainage has failed to give the statutory notice, though some of the parties interested have waived the proper notice, and the cause has proceeded to a final report of the commissioners, it is proper, upon motion of a party who has not made such waiver, to set aside the notice and subsequent proceedings.—*Sites v. Miller*, 120 Ind. 19, 22 N. E. 82.

## [r] (Sup. 1893)

Plaintiff sought to have an assessment levied against his land for the construction of a public ditch set aside on the ground that he had no notice of the proceedings. It appeared that he was the owner of the land assessed at the time the petition for the ditch was filed, and that the ditch ran through his land. He was not personally in court nor present by counsel during the proceedings, was not served with notice of the original petition, and no notices of it were posted in the township where the proposed ditch would cross his land, but he lived only a short distance from the land on which the ditch was to be constructed, and had personal knowledge of its location very soon after it was located. He also had personal knowledge of the filing of the report and of the amount of the assessment reported against him before the ex-

piration of 10 days from the filing of the report. He also knew of the work being done on the ditch, and of money being expended, but took no steps in the matter until notified to pay his assessment. *Held*, that the facts showed an entire absence of notice to plaintiff, and the proceedings were ineffective, no jurisdiction of his person having been acquired.—*Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221.

## [s] (Sup. 1893)

Rev. St. 1881, § 4289, requires drain viewers to report the names of the owners of land assessed, so far as they can be ascertained. Section 4293 requires the auditor to give notice, stating the names of the owners, ascertained from the records of the clerk, recorder, auditor, and treasurer. Section 4317 provides for a liberal construction of the act, the commissioners' order establishing the ditch being conclusive of the regularity of prior proceedings. Plaintiff bought land which had been sold for taxes the year before, and redeemed, but the redemption was not recorded, and held it unimproved 15 years, without trying to clear her title. Meantime a large ditch had been established and built 11 miles, notice being given to the heirs of the tax-title holder. *Held*, that the statute did not require the names of the owners to be stated with absolute correctness, and plaintiff had no standing now to enjoin further construction, because she lacked notice.—*Keppler v. Wright*, 136 Ind. 77, 35 N. E. 1017.

Plaintiff purchased land which had been sold for taxes the year before and redeemed, but the redemption was not recorded, and held it unimproved without trying to clear his title for many years. In the meantime a large ditch had been established and built 11 miles; notice being given to the heirs of the tax title holder. The ditch was completed from the source thereof towards the outlet when the land of plaintiff was reached. *Held*, that the plaintiff, knowing that the record showed legal title in the tax holder, and knowing of the legislative requirements as to notice of drainage proceedings, could not reasonably complain that the notice given was not sufficient.—*Id.*

The system of drainage because of the expenditure of large sums of money and promises of great public and private benefits, could not be interfered with in equity because of the irregularity in the notice.—*Id.*

The ditch proceedings were not void as to plaintiff and the threatened construction of the drain should not be enjoined.—*Id.*

## [t] (Sup. 1894)

On the 13th day of August, petitioner served on remonstrant a notice describing the proposed ditch, and the lands to be affected, with the names of the owners, and stating that he would, "on the first day of the September term of the Clinton circuit court for the year 1891," petition for such ditch, and at the same time move the court to docket the same as a cause pending therein. The first day of such

term, as fixed by statute, was September 7th. *Held*, that the notice was sufficient.—*Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[u] (Sup. 1900)

Under Burns' Rev. St. 1894, § 5629, permitting the filing of supplemental petitions in drainage cases, and authorizing the court "to require the person filing the same to give such notice as it may deem proper and sufficient to the persons affected thereby," the court is not required to fix in advance what notice shall be given; and a notice containing a description of defendant's real estate, and sufficient to advise him that a supplemental petition had been filed in a pending drainage proceeding, which was served by the sheriff reading it to defendant's president and leaving with him a copy thereof, is sufficient.—*Osborn v. Maxinkuckee Lake Ice Co.*, 56 N. E. 33, 154 Ind. 101.

[v] (Sup. 1900)

Burns' Rev. St. 1894, § 5654, which prescribes a form for a notice of the filing of a petition for a drain, and requiring it to contain a description of the land, is from Acts 1881, while Burns' Rev. St. 1894, § 5624, giving the requisites of such notice, and not requiring a description of the land, is from the later act of April 6, 1885; hence such notice is valid, if conforming to section 5624, and is without any description.—*Goodrich v. Stangland*, 58 N. E. 148, 155 Ind. 279.

[w] (Sup. 1905)

Under Burns' Ann. St. 1901, § 5663 (*Horner's Ann. St. 1901*, § 4293; Acts 1893, p. 331, c. 148), authorizing notice of the hearing in a proceeding for the construction of a ditch only when the viewers' report is in favor of the proposed work, a notice given by the auditor is without authority, where the report is not signed by a majority of the viewers.—*Whirlledge v. Shoup*, 75 N. E. 871, 165 Ind. 486.

[x] (Sup. 1908)

Under the drainage act (Acts 1905, p. 456, c. 157) a petition for a main drain and a subsequent supplemental petition for an arm, notice of which section 3 (page 458) provides shall be given as provided in case of the filing of the original petition, are not one and the same proceeding in the sense that a party served with notice of the principal petition shall be deemed to have notice of the filing of the supplemental petition, though in fact given none.—*Righter v. Keaton*, 170 Ind. 461, 84 N. E. 977.

Under Drainage Act (Acts 1905, p. 458, c. 157) § 3, providing that notice of a supplemental petition for an arm shall be given as provided in case of the filing of the original petition, and that in case any lands not named in the petition are named in the preliminary report, notice for 20 days of the filing of such report shall be given to the owners of such lands, while to make a valid assessment on lands under a supplemental petition landowners brought into the proceeding by the preliminary report must waive or receive 20 days' notice of the filing of the re-

port, yet the time when or within which notice of the filing of the preliminary report shall be given the new parties brought in by it, not being fixed by the statute, the service must be within a reasonable time, and it cannot be said that the reasonable time therefor has elapsed, when, 14 days after the filing of the preliminary notice, a remonstrance and motion to dismiss is filed, so that the court can then order such notice to be given such new parties.—*Id.*

[y] (Sup. 1910)

A provision for service of notice on the owner of land to be affected by a drain, to be paid for by special assessment on the land benefited, does not authorize service on the mortgagee of the land; and service of notice on him is not necessary.—*Baldwin v. Moroney*, 91 N. E. 3.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 25-28.

See, also, 14 Cyc. pp. 1033-1036.

§ 31. — Remonstrances or answers to petition.

Repeal of statute, see ante, § 2.

[a] (Sup. 1834)

A motion to dismiss the petition for the establishment of a ditch, and to set aside the proceedings thereon, for the reason that the petitioners had not fixed and noted on such petition any day for the docketing of the cause, presented such an irregularity as would not render the proceedings void, but was cured by the judgment confirming the assessment.—*Smith v. Smith*, 97 Ind. 273.

[b] (Sup. 1836)

A general statement of objections to the petition in proceedings in drainage cases is not sufficient. Objections must be specifically stated.—*Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353.

[c] (Sup. 1887)

In drainage proceedings, under the provisions of the act of 1883 (Acts 1883, p. 173), answers filed before a reference to the commissioners was made, attempting to set up a former adjudication as to part of the proposed drain, and to raise an issue as to its practicability and cost, are properly stricken out. The statute does not contemplate any trial upon the merits until after the report of the commissioners, when a remonstrance may be filed, setting forth any of the statutory grounds.—*Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

[d] (Sup. 1890)

Under Elliott's Supp. § 1186, which provides that if two-thirds in number of the landowners named in a petition for a ditch, resident in the county, remonstrate against the construction of the ditch, the petition shall be dismissed, it is error to dismiss such a petition where the two-thirds required is made up by including some nonresidents.—*Bell v. Cox*, 122 Ind. 153, 23 N. E. 705.

## [e] (Sup. 1892)

Drainage Act 1885, § 2 (Elliott's Supp. § 1185), provides for the institution of proceedings for the construction of a drain by filing a petition containing a description of the lands which will be affected, with the names of the owners thereof. Section 3, Elliott's Supp. § 1180, provides for a notice of the filing of the petition, and 10 days thereafter is allowed to those named in the petition to object to the form of the petition or to the drainage commissioners, and "at this stage of the proceedings" the petition shall be dismissed, provided two-thirds of the landowners named therein "shall remonstrate in writing" against the work. In case no remonstrance is filed, and the court deems the petition sufficient, it shall be referred to the drainage commissioners for further action, and all objections to the petition or to the acting of the commissioners not made within 10 days "shall be deemed waived." After the commissioners have inspected the lands "described in the petition, and all other lands likely to be affected by the proposed work," and made their report, naming therein lands as affected by such proposed work, which are not named in the petition, 10 days' notice of the hearing of the report shall be given to the owners of such lands, and "the same proceedings shall be had in regard to such report as if all the lands mentioned therein and the owners thereof had been named in \* \* \* the petition." Section 4, Elliott's Supp. 1889, § 1187, enumerates the grounds upon which objections and remonstrances may be made to the commissioners' report. *Held* that, after the report of the commissioners, the time having gone by for two-thirds of those whose names were mentioned in the original petition to remonstrate and dismiss the petition, the new parties brought in on the commissioners' report, though constituting two-thirds of all those whose lands are affected, occupy the same position, and have only the same rights, as the original parties at that time, and cannot dismiss the petition by remonstrance.—*Yancey v. Thompson*, 130 Ind. 585, 30 N. E. 630.

## [f] (Sup. 1895)

A plea in abatement, filed by objectors to a petition for a public ditch, which alleges that the proposed ditch is eleven miles in length; that the lands of petitioners are within two miles of its outlet; that the owners for the other nine miles are opposed to its construction; and that the ditch proposed lies in the line of one already constructed, which, if repaired, would afford sufficient drainage,—is insufficient.—*Bonfoy v. Goar*, 140 Ind. 202, 39 N. E. 56.

## [g] (Sup. 1895)

In a proceeding under Act April 6, 1885 (Elliott's Supp. § 1184 et seq.; Rev. St. 1894, § 5622 et seq.), to establish a public drain, one who, though not named in the petition, has been admitted as a party before remonstrance is made has a right to remonstrate against the

proposed drain.—*Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

A township which is not named in a petition to establish a public drain, and which, under Elliott's Supp. § 1192 (Rev. St. 1894, § 5630), is subject to an assessment therefor, payable from the township fund, is a "landowner," within the meaning of the provision that the petition shall be dismissed upon the remonstrance of two-thirds of the landowners.—*Id.*

## [h] (Sup. 1897)

A demurrer to a petition for drainage is waived by filing a remonstrance before the ruling on the demurrer.—*Earheart v. Farmers' Creamery*, 148 Ind. 79, 47 N. E. 226.

## [i] (Sup. 1899)

Under Burns' Rev. St. 1894, § 5622 et seq. (Horner's Rev. St. 1897, § 4273 et seq.), requiring remonstrances by landowners against the construction of a drain to be filed within 10 days after the docketing of a petition for such drain, signers of such a remonstrance cannot withdraw their names after the 10 days have elapsed.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

Since no grounds need be stated in a remonstrance by landowners against the construction of a drain, several remonstrances, stating different grounds, signed by different owners, may have the ground stricken out, and be joined as one remonstrance, without authority from the signers.—*Id.*

Under Burns' Rev. St. 1894, § 5622 et seq. (Horner's Rev. St. 1897, § 4273 et seq.), which requires the dismissal of a petition for a drain if a certain number of landowners "shall remonstrate in writing," such remonstrance is not a pleading, and hence need not state grounds constituting a defense to the petition.—*Id.*

## [j] (Sup. 1900)

A remonstrance may be made to the construction of a ditch by the board of commissioners on the ground that the damage will exceed the benefits to be derived therefrom, since the statute authorizing such drains requires the damages to be paid out of assessments for benefits.—*Trittip v. Beaver*, 58 N. E. 1034, 153 Ind. 652.

## [k] (Sup. 1901)

Under Burns' Rev. St. 1894, § 5624, providing that any person named in a petition for a drain as the owner of land affected shall have 10 days to file a remonstrance, and, if two-thirds of those named sign such remonstrance, the court may dismiss the petition, the question on consideration of the remonstrance being whether it had the requisite signers at the end of the 10 days, no remonstrant can withdraw after that time.—*Hinchman v. Wilson*, 60 N. E. 36, 156 Ind. 476.

## [l] (Sup. 1902)

In drainage proceedings, where a party appears and files a remonstrance, without object-

ing to the sufficiency of the notice or the regularity of the filing of the petition, he thereby waives all objections pertaining to the jurisdiction of the court growing out of such matters.—*Pittsburgh, C., C. & St. L. R. Co. v. Machler*, 63 N. E. 210, 158 Ind. 159.

In drainage proceedings a party served with notice and appearing cannot take advantage of a failure to notify others unless such failure will prevent a construction of the drain.—*Id.*

[m] (*Sup.* 1903)

That persons not named in a drainage petition, but who are interested in lands affected by the proposed ditch, may file a remonstrance after the original parties have lost the right under Burns' Rev. St. 1894, § 5624, by lapse of time, they must show that their failure to act sooner was not due to lack of diligence.—*Keiser v. Mills*, 69 N. E. 142, 162 Ind. 366.

[n] (*Sup.* 1903)

Where an objector to the jurisdiction of a board of county commissioners to establish a drain waived his right to the appointment of reviewers, such waiver did not estop him from maintaining his objection that the board had no jurisdiction.—*Strayer v. Taylor*, 69 N. E. 145, 163 Ind. 230.

Where, in a proceeding to establish a county drain, an objector alleged that the board of county commissioners had no jurisdiction, the burden was on him to show that the board had no jurisdiction over the subject-matter by more than a mere suggestion in the record of a possibility that the board was without authority.—*Id.*

[o] (*Sup.* 1905)

Where the want of jurisdiction of the county commissioners to act in the construction of drains does not appear from the face of the petition or from the viewers' report, the question can only be raised by plea.—*Kemp v. Adams*, 73 N. E. 500, 164 Ind. 258.

[p] (*Sup.* 1906)

Where parties have the requisite qualifications, they may join in a remonstrance against the establishment of a public drain on grounds of a general character not affecting their interests severally.—*Beery v. Driver*, 76 N. E. 967, 167 Ind. 127.

[q] (*Sup.* 1907)

Remonstrances to drainage proceedings may be amended by leave of court at any time before the expiration of the time for filing the same, but cannot afterward be amended so as to present new grounds for the remonstrance.—*Clarkson v. Wood*, 168 Ind. 582, 81 N. E. 572.

[r] (*Sup.* 1908)

Acts March 6, 1905 (Acts 1905, p. 456, c. 157), authorize remonstrances to be filed by any person, etc., against whose lands benefits are assessed too heavily as compared with other

persons or other lands, etc., specifying such other persons or lands. In an appeal from drain proceedings, a description of the remonstrator's lands was given, and it was charged that such lands were assessed too much as compared with other lands assessed, naming the lands of such other persons. *Held*, that the remonstrance followed the statute, and was sufficiently definite as against a motion to strike it out, and was improperly stricken on that ground.—*Stevens v. Templeton*, 170 Ind. 248, 84 N. E. 148.

[s] (*Sup.* 1909)

A two-thirds remonstrance, within Acts 1907, p. 512, c. 252, § 3, providing that in cases pending, where a two-thirds remonstrance had not been filed, such a remonstrance may be filed, is a remonstrance that has been duly executed by two-thirds of the persons affected by the proposed drain, and such remonstrance must have been successfully filed to preclude such filing under the permission granted by the act of 1907.—*Kaufman v. Alexander*, 88 N. E. 502.

[t] (*Sup.* 1909)

A two-thirds remonstrance in a proceeding for a drain is not strictly a pleading or answer.—*Thorn v. Silver*, 89 N. E. 943.

A two-thirds remonstrance of landowners in such a proceeding must contain the required two-thirds at the expiration of the time for filing and the status thus fixed cannot be affected by subsequent additions or withdrawals; the withdrawals only affecting the question of liability for costs.—*Id.*

Drainage Act 1907, § 3 (Burns' Ann. St. 1908, § 6142), provides that in proceedings for drains if within a specified time two-thirds in number of the landowners named as such in the petition or who may be affected by any assessment or damages, resident in the counties where the lands affected are situated, shall remonstrate in writing against the construction of the drain, the petition shall be dismissed. *Held* that, if the petition fails to disclose all those affected by an assessment or damages, such persons may, upon a showing of their interest, come in and remonstrate, as may those who may be brought in on supplementary petition.—*Id.*

If the petition is sufficient and proper notice is given and there is jurisdiction, those who assert the right to have the petition dismissed by a two-thirds remonstrance must show that two-thirds of those affected by any assessment or damaged have signed the remonstrance.—*Id.*

In computing whether two-thirds in number of landowners named in a petition for a drain or who may be affected by any assessment or damages have signed a two-thirds remonstrance allowed by Drainage Act 1907, § 3 (Burns' Ann. St. 1908, § 6142), all resident owners of land named in the petition and resi-

dent owners of land at the time of filing the remonstrance must be counted.—Id.

[u] (Sup. 1910)

Drainage Law (Acts 1907, c. 252) § 3 (Burns' Ann. St. 1908, § 6142), providing that a remonstrance filed within 10 days after docketing the petition to establish the drain, and signed by two-thirds of the property owners affected, would defeat the proceedings, and, if no remonstrance was filed, the petition should be referred to the drainage commissioners to make a report, etc., new parties brought in by the report of commissioners, and duly notified after a remonstrance had been denied because not having sufficient signers, cannot unite in the remonstrance so denied where the 10 days provided by the section had expired.—*Ross v. Hannah*, 91 N. E. 232.

Under Drainage Law (Acts 1907, c. 252) § 3 (Burns' Ann. St. 1908, § 6142), providing that a petition to establish a drain shall be docketed on due notice given to those named in the petition, and providing that a remonstrance signed by two-thirds of the property owners affected, filed within 10 days after the petition is docketed, would defeat the proceedings, one named in the petition cannot, after the 10 days have expired, and the petition has, by the judgment of the court been duly docketed, file a remonstrance alleging that she had no notice, since such allegation could have no effect against the finding of the court that she was notified as evidenced by ordering the petition docketed.—Id.

[v] (Sup. 1910)

Burns' Ann. St. 1908, § 6142, providing for notice of drainage proceedings, and the filing and hearing of reports and remonstrances therein, is inapplicable to a proceeding under Acts 1907, c. 252, § 17 (Burns' Ann. St. 1908, § 6151), for the construction of a ditch wholly within one county, less than two miles long, and costing less than \$300; and hence in such a proceeding it was error to dismiss a remonstrance because it was not filed within the time prescribed by section 6142, filing on the day of the hearing being proper.—*Ginn v. Hinton*, 91 N. E. 1093; *Nixon v. Same*, Id. 1095.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 29, 53.

See, also, 14 Cyc. pp. 1036, 1037.

### § 32. — Appointment, proceedings, and report of commissioners or viewers.

Mandamus to compel official action by viewer, see MANDAMUS, § 63.

[a] (Sup. 1873)

The order appointing ditch appraisers need not affirmatively show that they are disinterested freeholders, and not of kin to the parties.—*Kellogg v. Price*, 42 Ind. 360.

[b] (Sup. 1873)

One appointed to appraise the benefits and damages to accrue to landowners along the line of a ditch, whose sister-in-law, niece, and nephew own land along the line, is not a disinterested party, and is disqualified from acting.—*Hugh v. Big Creek Ditching Ass'n*, 44 Ind. 356.

[c] (Sup. 1879)

In a viewers' report in drainage proceedings under Act March 9, 1875, the ditch is described as beginning in the "southeast quarter of section 4-16-4," and the end of the ditch is described as running from a given point "thence under said pike, through the mill race, into Fall creek, said mill race belonging to House, Schofield, and Ryan." Held, that the description was insufficient to sustain the proceedings.—*Spahr v. Schofield*, 66 Ind. 168.

[d] (Sup. 1881)

The record in drain proceedings must show that the viewers reported on the cost of the ditch; but an allegation, in a bill to enjoin the construction of the ditch, that the viewers "did not report the cost," is not sufficient, as it should allege that the record does not show that the viewers so reported.—*Featherston v. Small*, 77 Ind. 143.

[e] (Sup. 1884)

A report of commissioners in drainage proceedings under Rev. St. 1881, which adopts the language of the statutory forms (section 4284) in stating that the ditch will benefit public health and be of public utility, is sufficient, without stating how the public health will be benefited or its usefulness become general.—*Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 360.

[f] (Sup. 1884)

The viewers appointed under the drainage act can only employ a surveyor under the terms and for the purposes specified in the statute, and the services he shall perform and what compensation he shall receive cannot be fixed by the viewers, for their authority, granting it to go that far, terminates with the appointment.—*Moon v. Board of Com'rs of Howard County*, 97 Ind. 176.

The authority of viewers appointed under the drainage act to appoint a surveyor does not extend to fixing his services and compensation, both of which are determined by statute.—Id.

[g] (Sup. 1884)

The commissioners of drainage should examine and report as to all lands affected by the proposed work; but, as to lands not so affected, no report is required, even though such lands are described in the petition.—*Smith v. Smith*, 97 Ind. 273.

[h] (Sup. 1884)

The decision of drainage commissioners upon the questions whether the proposed drain is located upon the best, cheapest, and most

available route, and if it is practicable to construct it without affecting the land of others than the petitioners, is final in the absence of fraud, and such decision need not be embodied in the report.—*Anderson v. Baker*, 98 Ind. 587.

It is not necessary that the decision of the commissioners on the questions whether or not the proposed drain is located on the best, cheapest, and most available route, and whether or not it is practicable to construct it without affecting the lands of others than the petitioners, shall be embodied in their report, as Rev. St. 1881, § 4284, prescribes a form, and a report in such form is sufficient at least so far as concerned such questions.—*Id.*

[i] (Supp. 1885)

In proceedings to establish a drain, the report of commissioners which is in substantial compliance with the statutory form is sufficient.—*Meranda v. Spurlin*, 100 Ind. 380.

The decision of commissioners as to whether or not the method of drainage adopted is the cheapest and most practicable need not be embodied in their report, but it will be presumed that they first determined such question.—*Id.*

[j] (Supp. 1885)

The difference between \$2,855 and \$2,912 in the total expense and aggregate benefits of a drain is sufficient to justify the commissioners' report in favor thereof.—*Roberts v. Gierss*, 101 Ind. 408.

[k] (Supp. 1885)

Commissioners appointed to report upon the expediency of constructing a ditch are not required to set out evidence in their report, but only their conclusions of fact, under Rev. St. § 4275, prescribing proceedings for establishing drains.—*Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735.

[l] (Supp. 1886)

When a judicial tribunal has a general power to designate a time within which a report of drainage commissioners shall be filed, it may extend the time, unless such power is limited to a certain time.—*Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

[m] (Supp. 1886)

Where a matter is referred to the commissioners under the drainage act, as amended by Acts 1883, p. 173, the subsequent resignation of a commissioner does not stop proceedings, as the court has power to appoint one to take his place, under Rev. St. 1881, § 4273.—*McMullen v. State ex rel. Kendle*, 105 Ind. 334, 4 N. E. 903.

[n] (Supp. 1886)

Objections to the reference of a petition for a drain to the drainage commissioners are too late when made after the commissioners have filed bonds which have been approved by the court, and one of them has taken the oath

required by law.—*Updegraff v. Palmer*, 6 N. E. 353, 107 Ind. 181.

[o] (Supp. 1886)

The report of the drainage commissioners must be made at the time fixed by the court, unless the time is extended.—*Claybaugh v. Baltimore & O. R. Co.*, 108 Ind. 262, 9 N. E. 100.

[p] (Supp. 1889)

The clerk's failure to deliver to commissioners appointed in drainage proceedings copies of the petition and order fixing the time at which they should file their report will not vitiate the commissioners' report.—*Bohr v. Neuenchwander*, 120 Ind. 449, 22 N. E. 416.

Act April 8, 1881, as amended by Act March 8, 1883, establishing a system of drainage, requires the petition to lay out a drain to be filed in the clerk's office, whereupon the clerk, after noting thereon the day on which it should be docketed, shall give notice thereof, after which the procedure shall be the same as in ordinary actions, unless otherwise provided. There is no special provision as to what shall constitute a discontinuance of the proceeding, but Rev. St. § 1325, provides that an action shall not be discontinued for the failure of the judge to attend on the first or any other day of the term, the omission to hold any term, or the expiration of the term, with pending business still undetermined. A petition had been referred to commissioners, who were directed to report to the court on a day named. Before that day the time for holding the term was changed, and no term was to be held until after the time had passed. The act changing the time contained a clause saving pending proceedings from discontinuance. *Held*, that the court could, on the request of the petitioners, fix another day for the filing of the report, and the proceeding would not be discontinued.—*Id.*

Even without the statutory provisions, the failure of the commissioners to file their report would not discontinue the proceeding, as their omission should not prejudice the petitioners.—*Id.*

It is immaterial that the commissioners did not themselves appear in court and ask further time to file their report.—*Id.*

[q] (Supp. 1889)

In proceedings for the construction of a ditch, it is not necessary that the finding of the jury should specifically describe the tract of land the ditch would drain, but a finding that six acres of a person's land will be benefited is too indefinite, as no assessment could be based thereon.—*Zigler v. Menges*, 121 Ind. 90, 22 N. E. 782, 16 Am. St. Rep. 357.

[r] (Supp. 1893)

*Elliott*, Supp. § 1186, provides that, where a petition is filed with the drainage commissioners for drainage improvements, they shall consider the practicability, the benefits to be derived, and the cost, and, if they approve the petition, they shall estimate the cost, and report to



the court under oath. *Held* that, where the commissioners made a negative report, it was not necessary for them to verify it.—*Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277.

When the commissioners' report in drainage proceedings is adverse to the establishment of the ditch, it is not necessary that it should contain a statement of the estimated cost of the work, and the benefits or injuries to each tract.—*Id.*

[a] (Sup. 1893)

If the report of viewers finds that the benefits of a drain are equal to the costs of construction, it will be construed as referring to the entire cost, including expenses of officers in charge.—*Denton v. Thompson*, 136 Ind. 446, 35 N. E. 264.

[t] (Sup. 1894)

The fact that a drainage commissioner was engaged in the business of making tile did not disqualify him, in the absence of a showing that he had some interest in the tile used in the ditch constructed.—*Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[u] (Sup. 1899)

Where viewers were appointed to report at the March term, the fact that they did not report until the September term does not invalidate the proceeding, where, at the March and the June terms, for cause, an extension was granted on the petition of the viewers at the September term.—*Bondurant v. Arney*, 53 N. E. 169, 152 Ind. 244.

[v] (Sup. 1900)

Proceedings for the construction of a drainage ditch are not rendered void by the fact that the viewers obtained extensions of time in which to file their report.—*Sarber v. Rankin*, 56 N. E. 225, 154 Ind. 236.

[vv] (Sup. 1900)

Where a petition for a drain asked for certain branches and such other lateral and branch drains as should be deemed necessary, the proceedings were not invalidated because the commissioners' report embraced branch drains not expressly petitioned for.—*Goodrich v. Stangland*, 58 N. E. 148, 155 Ind. 279.

[w] (Sup. 1903)

Burns' Rev. St. 1894, § 5624, provides that where lands are named in the report of the drainage commissioners as affected by a proposed drain which are not named in the petition for the drain, the court shall fix a time for hearing the report, and give notice to the owners of the lands of the time of the hearing. A petition for the construction of a drain alleged that the highway in a certain township would be benefited by the proposed work. *Held*, that the township was not entitled to notice of the filing of the drainage commissioners' report, or of the time when it would be heard.—*Pleasant Civil Tp. v. Cook*, 67 N. E. 262, 160 Ind. 533.

[ww] (Sup. 1904)

Burns' Ann. St. 1901, § 5624, relating to the establishment of drainage ditches, provides that when the ditch crosses a railroad right of way the drainage commissioners shall name such right of way and the railroad company owning it, and that if such requirement is not complied with their report shall not be "according to law." *Held*, that where an original report or such commissioners was held invalid for noncompliance with such section, and the proceeding was re-referred to the commissioners, as authorized by section 5625, the commissioners were not bound to determine the location of the ditch as in the first report, but were entitled to relocate it so as to terminate at the railroad right of way in question, and file a new report of such location.—*Turner v. Lay*, 71 N. E. 217, 163 Ind. 103.

[x] (App. 1904)

Burns' Ann. St. 1901, § 5670, provides that whenever a public ditch is established the board of commissioners shall order the viewers to meet at a time and place specified and make a final report, in which they shall specify the time in which each share or allotment shall be constructed, and they shall apportion the costs of the location thereof, the damage, if any shall have been allowed, and compensation to the surveyor or engineer, the viewers, reviewers, and laborers who assisted in marking out the ditch, including the estimated cost of receiving the ditch, and award to each person owning lands assessed for the work their proportionate share of costs and expenses, and shall specify the time in which the same shall be paid. *Held*, that the fact that viewers did not allot a ditch, but recommended that it be let as an entirety, did not dispense with the necessity for the final report.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

[xx] (Sup. 1905)

Under Burns' Ann. St. 1901, § 5677, relative to drainage proceedings, and providing that the board of commissioners of each county shall appoint viewers to represent the county in the joint enterprise, viewers appointed in any county may resign, and have their resignations effectually accepted by the board of that county, although it is not the county in which the proceeding originates.—*State ex rel. Fast v. Popejoy*, 74 N. E. 994, 165 Ind. 177; *Same v. Board of Com's of Wells County*, 74 N. E. 995, 165 Ind. 709.

[y] (Sup. 1905)

Where the resignations of viewers appointed in ditch proceedings have been accepted, a vacancy in the board of viewers is thereby created.—*State ex rel. Fast v. Popejoy*, 165 Ind. 177, 74 N. E. 994.

Viewers in proceedings for the construction of a drain through several counties must present their resignations to the county board by which they were appointed, and not to the county board before which the proceedings originated.—*Id.*

[77] (Sup. 1905)

Under Burns' Ann. St. 1901, § 5677 (Rev. St. 1881, § 4308; Horner's Ann. St. 1901, § 4308), relating to the construction of a ditch in two or more counties, requiring the board of commissioners of each of the counties to appoint three viewers to act jointly, and providing that the joint viewers shall perform the duties required of viewers in a ditch in one county, and Burns' Ann. St. 1901, § 240 (Rev. St. 1881, § 240; Horner's Ann. St. 1901, § 240), providing that words importing joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared, where there are six viewers in a proceeding to construct a ditch in two counties, the report, in favor of the proposed work, must be signed by at least four of the viewers.—Whirlledge v. Shoup, 75 N. E. 871, 105 Ind. 486.

Where three viewers are appointed from each of two counties to meet and act jointly in a proceeding for constructing a drain, reports of three viewers for the proposed ditch and three against must be treated as a report against the construction of the proposed ditch, under Burns' Ann. St. 1901, § 5664 (Rev. St. 1881, § 4294; Horner's Ann. St. 1901, § 4294), and the petition must be dismissed.—Id.

[1] (Sup. 1906)

Drainage commissioners, being clothed with judicial or quasi judicial functions, must be disinterested and unbiased as to all matters brought before them.—Small v. Buchanan, 165 Ind. 549, 76 N. E. 167.

[12] (App. 1908)

A town engineer's report as finally adopted should fix the boundaries of the drainage district, the size and kind of sewer, the outlet determined upon, the probable cost thereof, etc.—Liebole v. Traster, 41 Ind. App. 278, 83 N. E. 781.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 30-33.

See, also, 14 Cyc. pp. 1037-1040.

#### § 33. — Remonstrances or objections to report of commissioners or viewers.

[a] (Sup. 1883)

Rev. St. 1881, § 396, giving the court power to allow a party to file his pleadings after the time limited therefor, and providing for relief from judgments inadvertently rendered, etc., applies only to civil actions, and is in no way applicable to a special proceeding under the drainage act of April 8, 1881, for the construction of a ditch or drain; hence a party cannot be permitted to file a remonstrance to the commissioner's report after the time therefor has elapsed.—Hays v. Tippy, 91 Ind. 102.

[b] (Sup. 1884)

In a proceeding for the establishment of a ditch, an averment in the remonstrance that the commissioners did not meet at the time and

place prescribed in the order was too general, as it admitted that they met at some time and place, and such time and place should have been stated, so that the court could determine whether the discrepancy between the actual time and place of meeting and the time and place fixed in the order of the court was material.—Smith v. Smith, 97 Ind. 273.

A remonstrance to the report of commissioners on drainage, complaining that they "did not meet at the time and place" fixed by the court, is too indefinite.—Id.

[c] A remonstrance against the commissioners' report in drainage proceedings must be specific. It is not enough to object, in the terms of the statute, that "the report is not according to law."—(Sup. 1884) Higbee v. Peed, 98 Ind. 420; (1885) Meranda v. Spurlin, 100 Ind. 380; (1888) Hudson v. Bunch, 116 Ind. 63, 18 N. E. 390.

[d] (Sup. 1884)

A remonstrator in proceedings to establish a drain may properly be ordered by the court to make a cause of remonstrance, stating that the amount of benefits assessed against his land is too much, more certain by a statement of the specific land compared with which he claims he is excessively assessed.—Higbee v. Peed, 98 Ind. 420.

A cause of remonstrance in proceedings to establish a drain, stating that the commissioners did not locate it upon the most practicable route, or which contradicts the commissioners' report by stating that they did not view the land therein described, is properly stricken out.—Id.

[e] (Sup. 1884)

In a proceeding for the establishment of a drain, a remonstrance against the report of the commissioners, stating that the report does not describe the best and cheapest method of drainage, termini, and route for the complete drainage of the petitioner's land, does not show what would be a cheaper or better route or method of drainage, and tenders no definite issue for trial.—Anderson v. Baker, 98 Ind. 587.

[f] (Sup. 1885)

Where the commissioners of drainage presented their report subsequently to the time when they were directed to report, a landowner who was prevented by the wrongful act of the commissioners from filing a remonstrance to the report should have been permitted to file it at a subsequent term.—Munson v. Blake, 101 Ind. 78.

Where a commissioners' report establishing a drain was not filed within the statutory time, but the remonstrance was offered within the statutory time after the filing of the report, held, that the remonstrance should have been entertained.—Id.

The fact that those remonstrants to the location of a ditch who certified the remonstrance withdraw therefrom does not invalidate it, or prevent the rest from proceeding.—Id.

[g] (*Sup.* 1885)

Under Acts 1883, p. 176, § 3, providing that on report of the drainage commissioners 10 days should be allowed to "any owner of lands affected by the work proposed to remonstrate against the report," a person whose land would be injured by the proposed ditch to the extent of \$700 was entitled to remonstrate, though no damages or benefits were assessed for or against him.—*Reasoner v. Creek*, 101 Ind. 482.

[h] (*Sup.* 1886)

Under the law, a remonstrance against the establishment of a ditch must be made within 10 days from the filing of the report of the commissioners of drainage. It must be verified, and, if not verified when put in, it cannot be amended by adding the verification when the 10 days have gone by.—*Morgan Civil Tp. v. Hunt*, 104 Ind. 590, 4 N. E. 209.

[i] (*Sup.* 1888)

One whose lands may be affected by a drain petitioned for may have the petition dismissed, where the drainage commissioners, without an order of court extending the time, fail to report at the time fixed; but the motion to dismiss or reject the report must be made at the earliest opportunity, and comes too late after the movant has so far recognized the validity of the proceedings and report as to remonstrate or ask leave to remonstrate against it on its merits.—*Blake v. Quivey*, 113 Ind. 124, 14 N. E. 916.

[j] (*Sup.* 1888)

The provision of the drainage law of 1885, requiring the remonstrance of an owner of land which would be affected by the construction of a proposed drain to be filed within 10 days after the filing of the final report of the commissioners provided for in the act, does not apply to cases where all the owner's land so affected is not described in the petition; but these cases are governed by the last proviso in section 3 of the act, which leaves the entire case open until the notice there specified has been given; and it is error to admit a remonstrance as to land not described, and strike it out as to land described.—*Goodwine v. Leak*, 114 Ind. 490, 16 N. E. 816.

[k] (*Sup.* 1888)

Under the drainage law, giving landowners affected by a ditch, about which a commissioners' report is made, 10 days from the filing to present a remonstrance to the court against the action of the commissioners, the remonstrance must not only be filed in the clerk's office, but presented to the court, within the time prescribed, such presentation not being prevented by the adjournment of court or other circumstance beyond remonstrant's control.—*Gilbert v. Hall*, 115 Ind. 549, 18 N. E. 28.

[l] (*Sup.* 1892)

If land is described, although imperfectly, a remonstrator who seeks to defeat an assessment must make a timely and specific ob-

jection in the trial court, a vague, general objection being insufficient.—*Sample v. Carroll*, 32 N. E. 220, 132 Ind. 496.

[m] (*Sup.* 1893)

Where the grounds of a motion to set aside the report of drainage commissioners appointed pursuant to Act April 6, 1885, are based on matters outside the record, and are not supported by affidavit or other proof of their truth, such motion is properly overruled.—*Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277.

[n] (*Sup.* 1894)

It is not error to strike from a remonstrance matters that are not statutory causes for remonstrance.—*Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[o] (*Sup.* 1894)

The persons assessed for the construction of a ditch could assume, before the work ceased, that the ditch would be constructed in substantial compliance with the order of the court; and they could then except to the final report of the drainage commissioner without having previously cited the commissioner and the contractor for contempt in disobeying the order of the court.—*Racer v. Wingate*, 138 Ind. 114, 36 N. E. 538.

It seems that, where the only question for consideration on exceptions to the report of drainage commissioners is as to whether the work for the construction of a public ditch has been done according to the order of the court, there can be no issue involving the question whether the ditch as constructed is as beneficial to those assessed for its payment as it would have been if it had conformed to the plans and specifications.—*Id.*

[p] (*App.* 1894)

Drainage commissioners assessed the benefit of a ditch to defendant's land thus: "All of reserve 53, except 200 acres of the N. E. side thereof, township 20, range 10, 443 acres, \$4,900." Reserve 53 lay in townships 28 and 29, and defendant knew that only 150 acres of his described 443 acres lay in township 20. *Held*, that defendant could not have been misled by the description so as to be induced to refrain from remonstrating because her land in township 28 was not benefited.—*Smith v. State ex rel. Ely*, 8 Ind. App. 661, 36 N. E. 298.

[q] (*Sup.* 1895)

Rev. St. 1894, § 5625, with reference to the establishment of drainage ditches, provides that on the filing of a remonstrance, if the first cause of remonstrance be held true, namely, that the report of the commissioners is not according to law, the court may direct the commissioners to amend and perfect their report, or the court may in its discretion set aside the report and refer the matter back to the commissioners for a new report. Remonstrances filed to the original report, but not refiled, are not good as against a new report.—*West Creek Tp. v. Miller*, 41 N. E. 452, 143 Ind. 210.

Where, in proceedings to establish a drainage ditch, the remonstrants both by the original notice given to them and by their appearance to the first report filed by the drainage commissioners were in court for all purposes of the case, it was no excuse for their failure to refile their remonstrance against a new report of the drainage commissioners that they had no knowledge or notice of its filing.—Id.

Under Rev. St. 1894, § 5625, providing that on the filing of a remonstrance to the report of drainage commissioners, if it is found that the report is not according to law, the court may direct the commissioners to amend it, or may set it aside, and refer the matter back to the commissioners for a new report, and that, when such new report is made, any person whose lands are affected thereby may remonstrate within a time equal to that allowed for remonstrance against the first report, where the matter is so referred back, and a new report is made, the first remonstrance will not stand against the second report, though such report made no change in the assessments, and the new matter contained therein was mere additional specifications; and the fact that a witness is sworn in the case by direction of the court does not amount to an admission by the petitioners that the first remonstrance is valid as against the second report.—Id.

[r] (Sup. 1895)

An objection to the report of a board of viewers for a public drain, that one of the board was also a surety on the bond of the petitioner, is waived by failure to make such objection to the report before the board of commissioners.—Steele v. Empson, 41 N. E. 822, 142 Ind. 397.

[s] (Sup. 1897)

Objection to the report of drainage commissioners for failure to designate the county in which the lands affected are situated cannot be taken by motion for a new trial of the issues of fact on remonstrance to the petition.—Earheart v. Farmers' Creamery, 47 N. E. 226, 148 Ind. 79.

Where the reported benefits by a proposed drain exceed the reported cost thereof, and the several property owners do not question the benefits assessed against them, remonstrants against the drain cannot, upon the ground that the expense of the drain would exceed the aggregate benefits (Rev. St. 1894, § 5625), question the amount of the benefits, but only the cost of the drain.—Id.

[t] (Sup. 1897)

One who fails to remonstrate, as provided by statute, to benefits or damages assessed to property in proceedings for the construction of a drain, is as much barred by the judgment as though he had remonstrated, and an adverse judgment had been rendered.—Hoefgen v. Harness, 47 N. E. 470, 148 Ind. 224.

[u] (Sup. 1901)

Burns' Rev. St. 1894, § 5655 et seq. (Horne's Rev. St. 1897, § 4285; Rev. St. 1881, §

4285), authorizes the construction of drainage ditches, and section 5665 declares that any person interested in the location of the proposed work may file with the board of commissioners a remonstrance, accompanied by a bond for costs. Held, that a paper filed by an objector, and styled a "motion to strike out the report of the viewers," assigning reasons therefor, but not accompanied by any bond for costs of the trial of the objections, was not a sufficient remonstrance to authorize the commissioners to try the objections, and hence such motion was properly overruled.—Makeever v. Martindale, 60 N. E. 341, 156 Ind. 655.

[v] (App. 1904)

Burns' Ann. St. 1901, § 5665, provides that any person interested in the location of a public ditch may file with the board of county commissioners at or before the time set for the hearing of the petition a remonstrance against the ditch as located by the viewers, and that any one deeming his assessment too high, or the damages too low, may remonstrate. Held that, inasmuch as the statute has fixed the time within which a remonstrance may be filed, the right to file it is lost if it is not filed within the time specified.—Tolin v. Jones, 71 N. E. 678, 33 Ind. App. 423.

[vv] (Sup. 1905)

Under Burns' Ann. St. 1901, § 5624 (Acts 1901, p. 161, § 2), providing that all objections in drainage proceedings shall be made within 10 days, an objector is entitled to 10 days in which to file his objections, computed from the time he is served with notice of the proceeding.—Small v. Buchanan, 165 Ind. 549, 76 N. E. 549.

[w] (Sup. 1907)

Burns' Ann. St. 1901, § 5625, providing for the construction of drains, declares that 10 days should be allowed to landowners to remonstrate against the report of the commissioners; one of the grounds of the remonstrance specified being that the expense would exceed the benefits. Held that, where a remonstrance filed within the time recited that the undersigned landowners whose lands were affected remonstrated against the report because the expense of the proposed drainage would exceed the benefits to the lands affected thereby, it was sufficient to tender an issue, and was subject to amendment after the time for filing had expired so as to provide that the signers whose lands were affected "separately and severally" remonstrated, etc.—Clarkson v. Wood, 168 Ind. 582, 81 N. E. 573.

[ww] (Sup. 1908)

Drainage Act 1905, p. 471, c. 157, § 9, requires a preliminary report by the drainage commissioner or surveyor, giving a description of the land and the names, etc., of the landowners affected by the proposed drainage, "also" the names of any city, town, or other public corporation, highway, etc., affected by such drainage. It further provides that upon remon-

strance of two-thirds of the landowners affected, as shown by such preliminary report, the petition for the drain shall be dismissed. *Held*, upon a construction of the whole act, that a county named in the preliminary report of the surveyor as a landowner affected was not a "landowner," within the provision requiring the dismissal of the petition upon remonstrance of two-thirds of the "landowners" affected.—*Honold v. Endicott*, 170 Ind. 16, 83 N. E. 502.

[x] (Sup. 1908)

The right to have a petition for a drain under the drainage act (Acts 1905, p. 456, c. 157) dismissed being declared by the act to depend on two-thirds of the landowners affected, as shown by the preliminary report remonstrating in writing, failure of the petitioner to give the required notice of the filing of such report to the landowners brought into the proceeding by such report does not remove them from the number of affected landowners, two-thirds of whom must remonstrate.—*Righter v. Keaton*, 170 Ind. 461, 84 N. E. 977.

[xx] (Sup. 1908)

In drainage proceedings, where remonstrators' exceptions to the preliminary report of the commissioners went to the merits of the report, a motion thereafter made by them to dismiss or strike out said report, on the ground that it was not filed within the time directed by the court, came too late, as such a motion must be made at the earliest opportunity, and the remonstrators had recognized the validity of the report by objecting to it on the merits.—*Northern Indiana Land Co. v. Tyler*, 170 Ind. 468, 84 N. E. 828.

In drainage proceedings, even though the commissioners did not file their preliminary report within the time directed by the court, an objection that such report "is not according to law" is not sufficiently specific to present on appeal any question concerning the report, as such an objection would not be sufficient as a remonstrance to a final report under Acts 1905, p. 461, c. 157, § 4, providing that a final report may be objected to as "not made according to law."—*Id.*

Under Acts 1905, p. 458, c. 157, § 3, providing that the preliminary report of drainage commissioners shall, in all subsequent proceedings, be prima facie evidence of the facts stated therein, remonstrators having waived their right to strike out the preliminary report of the commissioners for their failure to file same within the time fixed by the court, they thereby waived any right to object to its admission as prima facie evidence of the facts stated therein as provided by the statute, and its introduction in evidence was not reversible error.—*Id.*

[y] (Sup. 1909)

Where, in a proceeding for the establishment of a public ditch, the verdict of the jury and the judgment of the court providing that the ditch is to be constructed on the route as set

out in the reviewers' report, the objection that the report of the reviewers was not made in accordance with the law, for the reason that the route specified in the petition was not followed, cannot be raised by an unverified motion to dismiss on that ground.—*Johnson v. Amacher*, 172 Ind. 248, 86 N. E. 1014.

[yy] (Sup. 1909)

Proceedings for a drain being a special statutory proceeding, the general rules of practice in civil actions are only applicable when the special statute is silent, and Drainage Act 1907, § 3 (Burns' Ann. St. 1908, § 6142), providing that in proceedings for drains pending when the act shall take effect, where a two-thirds remonstrance has not been filed, such remonstrance may be filed to the report of the drainage commissioners except in cases pending on petition filed under specified prior act, rules of practice in civil actions do not apply to such procedure.—*Thorn v. Silver*, 89 N. E. 943.

Drainage Act 1907, § 3 (Burns' Ann. St. 1908, § 6142), providing that in proceedings for drains pending when the act shall take effect, where a two-thirds remonstrance has not been filed, such remonstrance may be filed to the report of the drainage commissioners, except in cases pending on petition, filed under a specified prior act, fixes no time for filing the remonstrance. *Held* that under the rules that, in construing statutes, the mischief sought to be remedied and kindred laws may be looked to, and that a thing within the intent of a statute is as much a part of it as if it were within the letter, upon analogy to the immediately preceding proviso, allowing in proceedings instituted under the act a two-thirds remonstrance to be filed within 20 days exclusive of Sundays from the day set for docketing of the petition, the remonstrance in pending cases may be filed within 20 days from the date the act went into effect.—*Id.*

The purpose of Drainage Act 1907, § 3 (Burns' Ann. St. 1908, § 6142), providing for the filing of a two-thirds remonstrance to the commissioners' report in pending proceedings for drains where such remonstrance had not been filed, was to give the right to file such remonstrance in proceedings begun after the taking effect of Acts 1903, p. 505, c. 232, § 2, relating to drains which omitted the provision for such remonstrance contained in prior acts.—*Id.*

[z] (Sup. 1910)

In drainage proceedings, a remonstrance to the commissioners' report may not be filed after the time allowed therefor by law has expired, and, if so filed, may be stricken out by the court at any time.—*Smith v. Biesada*, 90 N. E. 1000.

[zz] (Sup. 1910)

In proceedings for the establishment of a drain, remonstrances must be filed within the time prescribed by statute; the court having no

power to extend the time.—*Shaum v. Harrington*, 91 N. E. 226.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 34, 35, 53, 80.

See, also, 14 Cyc. pp. 1041, 1042; note, 11 Am. Dec. 780.

### § 34. — Hearing and determination of questions.

Best and secondary evidence, see EVIDENCE, § 178.

Evidence admissible by reason of admission of similar evidence of adverse party, see EVIDENCE, § 155.

Opinion evidence, see EVIDENCE, §§ 471, 472, 493.

#### [a] (Sup. 1884)

In proceedings to establish a ditch, where adversary parties file a remonstrance controverting allegations of the petition, the petitioner has the burden of proof, and is entitled to open and close.—*Neff v. Reed*, 98 Ind. 341.

Although the view of premises by a jury, in drainage proceedings, to confirm the report of the drainage commissioners, is simply to enable them to apply the evidence, yet it is proper to refuse to instruct the jury that their view is not for the purpose of enabling them to determine any question involved in the case, as such statement is too broad.—*Id.*

No question as to whether drainage commissioners adopted the cheapest and best mode for doing the work can be tried upon a remonstrance to their report in proceedings to establish a ditch.—*Id.*

In a drainage proceeding under Rev. St. 1881, §§ 4273-4284, a motion for a new trial is allowable, as in ordinary cases.—*Id.*

In a proceeding for the establishment of a ditch, a motion in arrest did not properly present the question that the report of the commissioners showed that the costs and damages of the work would exceed its benefits, but, if it did, it was not well taken where the report of the commissioners was not open to the objection mentioned.—*Id.*

#### [b] (Sup. 1884)

Error in striking out a cause of remonstrance in proceedings to establish a drain, under Rev. St. 1881, § 4273 et seq., is harmless, where such cause is embraced in other remaining causes.—*Higbee v. Peed*, 98 Ind. 420.

In proceedings to establish a drain under Rev. St. 1881, § 4373 et seq., a remonstrator's proof on the trial must be restricted to the issues raised by his remonstrance.—*Id.*

#### [c] (Sup. 1885)

In settling the question of the public utility of a proposed drain, the question is not to be split up, and the drain defeated by proof that it will not be of public utility in one of the counties into which it extends, but the

question of public utility has reference to the drain as a whole and to the public generally.—*Meranda v. Spurliin*, 100 Ind. 380.

#### [d, e] (Sup. 1886)

After the lapse of the period allowed by the statute for filing remonstrances against commissioners' report in drainage proceedings, and when the cause is ready for final order and judgment, it is too late for the petitioner to obtain leave of court to dismiss his case and withdraw his petition.—*Crume v. Wilson*, 4 N. E. 169, 104 Ind. 583.

Under Rev. St. 1881, § 333, the petitioner in a drainage case may dismiss the proceedings if his motion to do so be made before the statutory period of 10 days (Act March 8, 1883, § 3) has elapsed, and before the cause is ready for final order and judgment.—*Id.*

#### [f] (Sup. 1886)

Since a new ditch may be constructed along the line of an old one, the papers and proceedings in the establishment of the old ditch are admissible to show its character, and thus to aid in determining whether the new drain is necessary and practicable.—*Drebert v. Trier*, 106 Ind. 510, 7 N. E. 223.

#### [g] (Sup. 1886)

Where the only issue presented by the remonstrance in a drainage case is as to the amount of the assessment, the burden is on the remonstrant.—*Conwell v. Tate*, 107 Ind. 171, 8 N. E. 36.

#### [h] (Sup. 1886)

The fact that the report of the commissioners, in drainage proceedings, is invalid, or that the orders thereon are erroneous, will not supply grounds for dismissing the petition.—*Udegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353.

#### [i] (Sup. 1886)

Under the drainage act of March 9, 1875, which prohibits a second assessment for drainage of the same lands, evidence that the remonstrants had already been assessed for the construction of the same ditch, or one on the same line, with same beginning and terminus, as the one sought to be established, is admissible in opposition to drainage proceedings.—*Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232.

#### [j] (Sup. 1886)

After an order approving the report of the drainage commissioners, the petitioner cannot dismiss the proceedings.—*Carr v. Boone*, 108 Ind. 241, 9 N. E. 110.

A petitioner in a drainage case cannot dismiss his petition after the drainage commissioners have reported, and money has been expended in constructing the ditch.—*Id.*

#### [k] (Sup. 1887)

In proceedings for the establishment of a ditch, the court found that it was practicable to accomplish the proposed drainage without incurring an expense exceeding the aggregate benefits to result therefrom; that the proposed work

would not improve the public health, but that it would benefit the public highways of the county; that the improvement of such highways would be of no peculiar or special benefit to the opponents to the ditch; that the assessments made and confirmed against their lands were based on benefits to accrue to such lands from the construction of the ditch, and not from the improvement of the highways, and that the proposed work would render more valuable and productive some 500 or 600 acres of marsh land. *Held*, that the conclusion of law that the improvement of the public highways and the benefits to the lands were such public purposes as justified the assessment of benefits against the lands of the individuals assessed was proper. —Heick v. Voight, 11 N. E. 306, 110 Ind. 279.

Whether a system of drainage is more comprehensive and costly than need be in order to drain the petitioner's land is a matter for the commissioners of drainage to determine, and their determination is not reviewable by the court.—Id.

It is not error, upon the trial of a remonstrance to the establishment of a drain, to permit a drainage commissioner, who had examined the proposed work, and was acquainted with all the facts, to testify as to whether certain lands would be benefited, and how many acres would be benefited, the amount of benefit not being asked nor stated.—Id.

[l] (*Sup.* 1889)

After the close of a term of the circuit court at which an order has been made establishing a drain, but before the commissioner of drainage to whom the work has been referred has completed the ditch and made his final report, and while the court still retains control over the drainage proceedings, under Rev. St. § 4279, such court has power, on the mere motion of parties interested, to correct a mistake in description made through inadvertence by the commissioners, in a report with regard to the establishment of the drain.—Steele v. Hanna, 117 Ind. 333, 20 N. E. 237.

[m] (*Sup.* 1889)

The report of the commissioners appointed in drainage proceedings as to the propriety of establishing the drain is not competent evidence to prove the utility of the drain, etc., as the report only embodies the opinion of the commissioners.—Bohr v. Neuenschwander, 120 Ind. 449, 22 N. E. 416.

[n] (*Sup.* 1891)

A person cannot for the first time by a motion for new trial make the objection that the drainage commissioners, upon whose report a public ditch was established and his land assessed for benefits, had no authority to act, when he interposed no objections to their reports when presented to the court, nor in any way raised the question before the decree establishing the ditch.—Goodwine v. Leak, 127 Ind. 569, 27 N. E. 161.

That other lands than his were improperly assessed is no ground for granting such person a new trial.—Id.

[o] (*Sup.* 1893)

Plaintiff purchased land which had been sold for taxes the year before and redeemed, but the redemption was not recorded, and held it unimproved without trying to clear his title for many years. In the meantime a large ditch had been established and built 11 miles; notice being given to the heirs of the tax title holder. The ditch was completed from the source thereof towards the outlet when the land of plaintiff was reached. *Held*, that the court could not know that the failure to enter the redemption of record was the failure of the auditor, whose duty it was to give the notice, nor could the court presume the existence of knowledge on his part or by the board of commissioners that the tax deed was invalid either because executed after the death of the purchaser at the tax sale, or because of a prior redemption.—Kepler v. Wright, 35 N. E. 1017, 136 Ind. 77.

[p] (*Sup.* 1894)

Where a landowner remonstrates against the construction of a ditch on the ground that his land is assessed for too much to aid therein, he has the burden of the issue thus raised.—Rogers v. Venis, 137 Ind. 221, 36 N. E. 841.

It is proper to allow the drainage commissioners to correct a clerical error in their report.—Id.

[q] (*Sup.* 1894)

Where a drainage commissioner's report stated that a contractor had completed an open ditch "according to the plans and specifications adopted and approved by the court," a finding by the court "that such open ditch, as constructed, has been completed by the contractor," is insufficient to authorize a conclusion of law that the commissioner is entitled to a judgment approving his report, since such finding does not show that the work has been done according to the plans and specifications, or according to the order.—Racer v. Wingate, 138 Ind. 114, 36 N. E. 538.

[r] (*Sup.* 1895)

The question whether a proposed ditch is more comprehensive, or whether it embraces and affects more than is necessary in order to accomplish the drainage of the lands of those petitioning in the cheapest and best manner, is a question which is exclusively for the viewers.—Bonfoy v. Goar, 39 N. E. 56, 140 Ind. 292.

[s] (*Sup.* 1895)

Where the report of drainage commissioners failed to report the grades, courses, and distances as required by the drainage act (Rev. St. 1894, § 5623), such report is "not according to law," within section 5625, providing that in such case the court may refer the matter back to the commissioners for a new report.—West Creek Tp. v. Miller, 41 N. E. 452, 142 Ind. 210.

Where, on remonstrance by a landowner to the report of drainage commissioners, the matter is referred back to the commissioners for further report without objection by such landowner and in pursuance to the remonstrance, he cannot assert that the reference was illegal.—Id.

[t] (Sup. 1895)

Where, in proceedings to establish a public drain, the verdict specially found on each of the four questions submitted to the jury as provided by Rev. St. 1894, § 5671 (Rev. St. 1881, § 4301), with reference to the necessity of the ditch, the practicability of the route, the assessments and benefits, and the amount of damages allowed, it was not bad for informality, though it might have been more definite and certain on the issues of damages and benefits.—Steele v. Empson, 41 N. E. 822, 142 Ind. 397.

[u] (Sup. 1896)

On petition for a public drain the burden is on remonstrant to show any error in the report of the viewers.—Wilson v. Talley, 144 Ind. 74, 42 N. E. 362, 1009.

[v] (Sup. 1896)

Under Act March 7, 1891, p. 455, providing for petition for a ditch to the county commissioners, who shall appoint viewers, and shall dismiss it if the viewers report against the improvement, and shall, if they report favorably, direct them to return a schedule of benefits and damages, and, after notice to landowners affected, if the apportionment is fair and just according to benefits, shall approve and confirm it, otherwise shall amend it so as to make it fair and just according to benefits, and determine the said apportionment and spread it on the record; and providing that no assessment shall be made of benefits to any land upon any principle other than that of such benefits derived,—even if the board is authorized to find in favor of the improvement on the preliminary report of the viewers, they may, after the second report, if the evidence shows that the costs exceed the benefits, dismiss the petition.—Thompson v. Board of Com'rs of Jasper County, 148 Ind. 136, 45 N. E. 519.

[vv] (Sup. 1897)

Under Burns' Rev. St. 1894, § 3598, providing that, when a city files a petition for drainage, the same shall be conclusive of every fact required to be alleged except as to the assessment of benefits or damages and shall be prima facie conclusive thereof, the only question to be tried in the circuit court was the amount of damages or benefits to landowners outside the city limits, provided that the issue was properly presented by remonstrance.—City of Valparaiso v. Parker, 47 N. E. 330, 148 Ind. 379.

[w] (Sup. 1899)

Where a petition was filed for the construction of a drain in three several counties, and dismissed as to a portion in one county be-

cause beyond the jurisdiction, a joint session by the commissioners of the remaining counties without the commissioners from the county as to which the dismissal was had, was a proper joint session.—Bondurant v. Armey, 53 N. E. 169, 152 Ind. 244.

[ww] (Sup. 1900)

An assessment for benefits of a drainage ditch constructed in two counties will not be enjoined on the ground that the boards of commissioners of the two counties, in acting on the petition for the drain, sat separately, and not conjointly; since, if the commissioners wrongly construed the statute providing for such meeting, it was merely an erroneous exercise of power, and not a usurpation.—Sarber v. Rankin, 56 N. E. 225, 154 Ind. 236.

[x] (Sup. 1902)

A judgment of the circuit court in proceedings to establish a ditch under the drainage law of 1885 and the amendment of 1889 (Burns' Rev. St. 1894, §§ 5622-5631, 5644-5646), confirming the report of the commissioners as modified by it, and establishing the work, is final and conclusive, where it had jurisdiction of the subject-matter and of the parties.—Pleasant Civil Tp. v. Cook, 67 N. E. 262, 160 Ind. 533.

[xx] (Sup. 1906)

An instruction, in a proceeding to establish a public drain, that the purpose of the petitioners in asking for the construction of the ditch was immaterial, and that the jury should only determine whether the proposed ditch would be of public utility, etc., was erroneous, as withdrawing from the jury the consideration of evidence that an existing ditch, properly maintained, would subserve the purposes to be accomplished by the new one.—Beery v. Driver, 76 N. E. 967, 167 Ind. 127.

[y] (Sup. 1907)

On a petition to establish a drain, it is not necessary to show that the proposed drain will empty into another drain, and the exclusion of evidence that it will have a natural or prescriptive watercourse for its outlet is reversible error.—Hart v. Scott, 168 Ind. 530, 81 N. E. 481.

[yy] (Sup. 1909)

On the hearing of a remonstrance to a petition under the drainage act (Acts 1907, p. 508, c. 252), to condemn a milldam, the report of the commissioners may be received in evidence, as Acts 1907, p. 508, c. 252, makes such reports prima facie evidence of facts therein set forth.—Zehner v. Milner, 172 Ind. 493, 87 N. E. 209, 24 L. R. A. (N. S.) 383.

[z] (Sup. 1910)

A motion to dismiss drainage proceedings, made after the judgment establishing the drain was rendered and a motion for a new trial overruled, could not be entertained.—Smith v. Bicsaida, 90 N. E. 1009.



[zz] (Sup. 1910)

An instruction that, to entitle remonstrators in drainage proceedings to prevail, they must prove the material facts alleged in two causes of remonstrance, or one of them, by preponderance of the evidence, was not open to the objection that the remonstrators to recover must establish the facts alleged in both of the causes.—*Stevens v. Templeton*, 91 N. E. 563.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 36-39, 43.

See, also, 14 Cyc. pp. 1042, 1043.

#### § 35. — Decisions and record.

Correction of judgment, see JUDGMENT, § 323.  
Time for entry of judgment, see JUDGMENT, § 272.

[a] (Sup. 1883)

Act 1881, § 8, providing that the act shall be liberally construed to promote the drainage and reclamation of wet lands, and that collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessments of benefits and injuries, but that the judgment shall be conclusive that all prior proceedings were regular and according to law, is ineffective to cure the want of notice sufficient to give the court jurisdiction.—*Scott v. Brackett*, 89 Ind. 413.

[b] (Sup. 1884)

It is not necessary to enter a special order finding any fact involved in the general order directing the construction of a ditch or the levying of a tax for a railroad or other public work, but the general order of the board of commissioners is sufficient.—*Cauldwell v. Curry*, 93 Ind. 363.

[c, d] (Sup. 1884)

In proceedings to establish a drain under Rev. St. 1881, § 4273 et seq., the order directing the commissioners to construct a drain is properly a part of the final judgment approving the commissioners' report.—*Higbee v. Peed*, 98 Ind. 420.

[e] (Sup. 1885)

In proceedings to establish a drain after the filing of a remonstrance and the ruling upon it and at a subsequent term, the petitioner moved for a nunc pro tunc entry, so that the recital by the clerk might show the proof of the posting of the notice at the door of the courthouse. The motion was based on affidavits and an entry on the court's docket as follows: "Proof of notice filed, cause ordered docketed." Held, that these affidavits and entry upon the court's docket clearly furnished sufficient ground on which to base an order for a nunc pro tunc entry.—*Meranda v. Spurlin*, 100 Ind. 380.

[f] (Sup. 1885)

It is not necessary for the board of commissioners to enter a formal finding or order that notice has been given.—*Carr v. State*, 103 Ind. 548, 3 N. E. 375.

[g] (Sup. 1886)

Where a remonstrance has been filed against the establishment of a ditch or drain, and the court, having been requested to make a special finding, fails to find that "the public health will be improved, or that one or more public highways of the county or street or streets of a town or city will be benefited by the proposed drainage, or that the proposed work will be of public utility," the construction of the ditch should not be ordered.—*Bass v. Elliott*, 105 Ind. 517, 5 N. E. 663.

[h] (Sup. 1886)

Where the record fails to show any notice to a landowner affected, or the finding of any such notice by the board, the drainage proceedings are void as to such party.—*Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 509.

[i] (Sup. 1886)

The statute declaring that the judgment of the court shall be conclusive that all prior proceedings were regular and according to law is applicable in drainage proceedings.—*Udengraff v. Palmer*, 6 N. E. 353, 107 Ind. 181.

The assumption of jurisdiction and exercise of authority, in proceedings to assess benefits and damages resulting from the laying of a drain, is a sufficient decision as to the sufficiency of the notice, without any formal order.—*Id.*

[j] (Sup. 1886)

Though, in a proceeding to establish a ditch, there was no express or formal judgment declaring the notice sufficient, the judgment involved that question and settled it without any formal declaration to that effect.—*Carr v. Boone*, 9 N. E. 110, 108 Ind. 241.

[k] (Sup. 1892)

The drainage law (Rev. St. 1881, § 4279) contemplates that, after judgment has been rendered by the court establishing a ditch and ordering its construction, the case shall still remain on the docket of the court while the ditch is in the progress of construction, and the ditch commissioner, to whose supervision the work is intrusted, acts throughout under the direction of the court, but the entire proceeding is not in fieri during all the time, and after the judgment establishing the ditch and ordering its construction is rendered adversary proceedings are thereby terminated, and the proceedings remain on the docket only for the purpose of carrying into effect the judgment actually rendered, and not for any action modifying or changing the judgment.—*Perkins v. Hayward*, 31 N. E. 670, 132 Ind. 95.

[l] (Sup. 1900)

Under Burns' Ann. St. 1894, § 5653, in relation to the laying out of drains by boards of county commissioners, when the board has once obtained jurisdiction, it is invested with power to decide all questions or matters which may properly arise in the course of proceedings leading up to and including its final hearing, and such decision or order whether right or

wrong is binding on all persons properly made parties until vacation on an appeal to the circuit court.—*Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson County*, 58 N. E. 837, 50 N. E. 856, 156 Ind. 260.

Where it appears that the board of commissioners of a county had jurisdiction over a railroad company's predecessor from which the railroad company in question subsequently acquired all of its title to its right of way, the railroad company in question must be deemed to be bound by a former final order of the board establishing a ditch along the right of way.—*Id.*

[m] (App. 1904)

The fact that the board of county commissioners, after the filing and confirmation of the viewers' report, made an unauthorized order allowing credit for the utilization of a previously constructed private ditch, did not affect the validity of the final order as a whole.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

[n] (Sup. 1905)

Where a board of county commissioners made a final order for the establishment and construction of a public ditch, its jurisdiction was at an end, and it had no authority at a subsequent term to vacate the judgment and annul the proceedings.—*Plew v. Jones*, 74 N. E. 618, 165 Ind. 21.

[o] (Sup. 1906)

In proceedings to establish a drainage ditch, as authorized by Burns' Ann. St. 1901, §§ 5655-5671, the power to construct the ditch is derived from the judgment of the circuit court directing its establishment which judgment that court may either execute or certify to the board of county commissioners for execution.—*Taylor v. Strayer*, 78 N. E. 236, 167 Ind. 23, 119 Am. St. Rep. 460.

[p] (Sup. 1908)

Where the court acquires no jurisdiction over the subject-matter of drainage proceedings, the proceedings will be dismissed at the cost of petitioners.—*Pavey v. Braddock*, 170 Ind. 178, 84 N. E. 3.

[q] (Sup. 1908)

Since courts possess broad power respecting the establishment of public drains, a mere improper use of that power will not render a judgment ipso facto void.—*Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 40-42.

See, also, 14 Cyc. pp. 1043, 1044.

§ 36. — Appeal.

Appeal from decisions of county board in general, see COUNTIES, § 58.

Courts invested with appellate jurisdiction, see COURTS, § 220 (1, 2).

Decisions reviewable, see APPEAL AND ERROR, §§ 77, 78, 83, 123.

Right to trial by jury on appeal from commissioners' court, see JURY, § 17.

[a] (Sup. 1873)

The question whether appraisers appointed by the county commissioners to view a proposed ditch, and assess benefits and damages, have the qualifications prescribed by statute, may arise on trial on appeal, but cannot be raised by demurrer.—*Kellogg v. Price*, 42 Ind. 360.

[aa] (Sup. 1877)

Where an appeal to the circuit court is taken in proceedings to establish a drain under 1 Rev. St. 1876, p. 428, the proceeding stands for trial de novo.—*McKinsey v. Bowman*, 58 Ind. 88.

Upon appeal to the circuit court from an order granting a petition for a proposed drain, the report of appraisers does not make a prima facie case in support of the order, nor throw the burden of proof on the party opposing the drain.—*Id.*

[b] (Sup. 1879)

On appeal from the decision of a board of county commissioners in proceedings to establish a ditch, pleadings are not contemplated, but a demurrer may be treated as a motion to dismiss.—*Spahr v. Schofield*, 66 Ind. 168.

[bb] (Sup. 1880)

An appeal may be taken by "any one aggrieved," under 1 Rev. St. 1876, p. 357, § 31, from the finding and order of the county board on a petition for the appointment of appraisers in drainage proceedings, under Act March 10, 1873, although no appeal is provided for by that act.—*Hume v. Little Flat Rock Draining Ass'n*, 72 Ind. 490.

[c] (Sup. 1880)

Under the drainage law (1 Rev. St. 1876, p. 430, § 10), providing that any party may appeal from orders of the board of commissioners, an appeal will lie from orders made under any of its sections.—*Houk v. Barthold*, 73 Ind. 21.

[cc] (Sup. 1881)

On appeal to the circuit court from the order of the board of commissioners establishing a ditch, the case stands for trial de novo, and the report of the reviewers has there no force or effect whatever, nor can such report be read in evidence on the trial.—*Corey v. Swagger*, 74 Ind. 211.

On a trial of ditch proceedings in the circuit court, the reviewers' report is not competent evidence.—*Id.*

[d] In proceedings to establish a drain under Act March 13, 1879, the decisions of the commissioners are judicial, not discretionary; hence appeal lies to the circuit court.—(Sup. 1881) *Bryan v. Moore*, 81 Ind. 9; (1882) *Campbell v. Parker*, 83 Ind. 440.

[dd] (*Sup.* 1881)

On appeal to the circuit court in drain proceedings, the fact that the petition for the drain was vague and uncertain cannot be taken advantage of by motion in arrest of judgment.—*Bryan v. Moore*, 81 Ind. 9.

On appeal to the circuit court in drainage proceedings, the court can remand the case to the county board with an order how to proceed.—*Id.*

Objections to the sufficiency of a petition for a drain, not specified in a motion to dismiss the case in the circuit court on appeal, cannot be considered.—*Id.*

[e] (*Sup.* 1882)

Under 1 Rev. St. 1876, p. 357, § 31, an order establishing a ditch is a decision from which the aggrieved party may appeal, and the naming of the owner in the assessment makes him a party to the proceeding, so that, although not named in the petition, he may appeal from the proceedings.—*Powell v. Clelland*, 82 Ind. 24.

[ee] (*Sup.* 1882)

Where, in a proceeding to construct a ditch, the parties interested appeared and submitted to a hearing in the commissioners' court without objection to the form or sufficiency of the notice, it was too late to make such objection in the circuit court.—*Coolman v. Fleming*, 82 Ind. 117; *Morrison v. Foust*, *Id.* 601.

[eee] (*Sup.* 1882)

On appeal from drainage proceedings, under Act March 9, 1875, the petition may be amended by the addition of an allegation that the ditch will be conducive to public health and of public utility.—*Coolman v. Fleming*, 82 Ind. 117.

[f] (*Sup.* 1882)

In proceedings de novo on appeal to the circuit court in drainage proceedings, the verdict of the jury that the proposed work would be conducive to the public health, convenience, and welfare, and would be of public utility, is sufficient, without also finding that the work is necessary.—*Blizzard v. Riley*, 83 Ind. 300.

[ff] (*Sup.* 1882)

Act March 13, 1879 (Acts 1879, p. 238), § 12, provides that any person aggrieved by proceedings for the establishment of a drain may appeal the same to the circuit court of the county on giving bond within the time, as in case of appeal from justices of the peace, except that the bond shall be filed with and approved by the clerk of the court; that the appeal shall be tried as other civil actions are tried, and the burden of proof shall be on the party appealing, and upon such appeal the court trying the same, in case the benefits assessed originally be more than enough to pay for the construction of the work, including necessary expenses, shall take into consideration the cost of the construction of the proposed work and all necessary costs and expenses thereof in determining the amount of such assessment, and the amount thus ascer-

tained shall stand and be enforced as the proper assessment. *Held* that, as on an appeal under the statute the only question to be determined is the amount of the proper assessment, the verdict of the jury on conflicting evidence is conclusive.—*Campbell v. Parker*, 83 Ind. 449.

An appeal may be taken to the circuit court by parties aggrieved by the action of appraisers in proceedings for the drainage of wet lands, under act of March 13, 1879, but such appeal brings up only the action of the appraisers, not the preliminary proceedings of the county board.—*Id.*

[fff] (*Sup.* 1882)

In drainage proceedings on appeal to the circuit court, such parts of the proceedings below as can be considered as pleadings to show the issues are admissible in evidence.—*Bennett v. Meehan*, 83 Ind. 506, 43 Am. Rep. 78.

[g] (*Sup.* 1883)

If a defective appeal bond in a drainage proceeding is objected to and a sufficient bond filed, the appeal is not affected thereby, and will be considered valid.—*Meehan v. Wiles*, 93 Ind. 52.

All proceedings in a draining case taken pending appeal to the circuit court from an order declaring the proposed drain of public utility are void, though the order be sustained.—*Id.*

[gg] (*Sup.* 1883)

A drainage proceeding is not in any sense a civil action, and the proper mode of reserving questions upon the evidence for decision in the supreme court is by saving exceptions to the findings of the circuit court.—*Dukes v. Working*, 93 Ind. 501.

A proceeding under Act April 8, 1881 (Rev. St. 1881, §§ 4273-4284), for the establishment of a drain, is not a civil action, but is a special proceeding, and no motion for a new trial is contemplated or necessary to reserve questions upon the evidence, but the only proper mode of reserving such questions is by saving exceptions to the findings of the court.—*Id.*

[h] (*Sup.* 1884)

The mere fact that an order by commissioners establishing a ditch was made at an unauthorized time will not prevent the circuit court from acquiring jurisdiction on appeal.—*Wright v. Wilson*, 95 Ind. 408.

[hh] (*Sup.* 1885)

In proceedings to establish a drain, the question as to whether or not the method of drainage adopted is the cheapest and most practicable are questions for the judgment of the commissioners, and, in the absence of fraud, their judgment on this question cannot be reviewed.—*Meranda v. Spurlin*, 100 Ind. 380.

On appeal in proceedings to establish a drain, the Supreme Court cannot reverse the judgment establishing the drain because the evidence establishes the fact that a portion of

the drain was located upon the line of the old drain, and that such fact was not shown by the report of the commissioners, especially where it is not shown that specific objection was made on this ground to the court below.—Id.

Where, on appeal in proceedings to establish a drain, it appears that leave was granted to amend the report of the commissioners, and that they filed an amended report, but only the amended report is in the record, the Supreme Court cannot know what amendment was made, and it must therefore presume in favor of the correctness of the action of the court below in allowing it.—Id.

Where, in proceedings to establish a drain, the remonstrant appeared to a motion for a nunc pro tunc entry, he cannot object on appeal because a notice of that motion was not served on others against whom benefits were assessed.—Id.

[hhh] (Sup. 1885)

On appeal by Stephen R. Hosmer and Charles C. Hildreth from proceedings for the establishment of a ditch, where these parties signed a remonstrance as "Hosmer and Hildreth," and were afterwards assessed, it will be presumed that appellants were, or represented, the same parties as those assessed.—Munson v. Blake, 101 Ind. 78.

[i] (Sup. 1885)

When appeal is taken from the refusal of the board of commissioners to establish a ditch no summons is required to be issued, under the act of 1881, §§ 17, 18, making special provision for appeals.—Johnson v. Mullinix, 102 Ind. 164, 1 N. E. 553.

[ii] (Sup. 1885)

The statute provides, in express terms, that amendments to a petition for a ditch may be made after the report of the commissioners has been filed; and, if the record does not show what amendment was allowed, the supreme court cannot presume, on appeal, that it was not a proper one.—Williams v. Stevenson, 103 Ind. 243, 2 N. E. 728.

Where no motion to dismiss or written objection appears in the record, an assignment of error, "that the court erred in overruling appellant's motion to dismiss appellee's petition for drainage, and the report of the commissioners of drainage," presents no question that can be considered on appeal.—Id.

To be available, on appeal, objections to the amendment of a petition for a ditch must be filed at the time the amendments are made.—Id.

[iii] (Sup. 1886)

An appeal in drainage proceedings will not be dismissed on the ground that all persons against whom benefits were assessed were not notified of the appeal; this not being necessary.—Morgan Civil Tp. v. Hunt, 4 N. E. 299, 104 Ind. 590.

[j] (Sup. 1886)

Where no exceptions are taken to the submission of the cause to a jury, in drainage proceedings under Rev. St. 1881, § 4274, it cannot be complained of on appeal.—Drebert v. Trier, 106 Ind. 510, 7 N. E. 223.

[jj] (Sup. 1886)

Rev. St. 1881, § 5778, relating to appeals from commissioners, provides that the court may make a final determination of a proceeding thus appealed, cause the same to be executed, or send the same down to the board with an order how to proceed, and may require the board to comply with the final determination made by the court in the premises. *Held*, that a judgment remanding the proceedings to the board of commissioners in the county, "who are hereby ordered to take such steps as by law may be required in the construction of the ditch subsequently to the time that proceedings before the board in this proceeding were arrested by appeal," is not a final determination of the proceeding within the statute, nor "an order how to proceed."—Hardy v. McKinney, 8 N. E. 232, 107 Ind. 364.

On appeal to the circuit court in proceedings to establish ditches, the court or jury trying the same succeeds to all the duties which devolve on the viewers and reviewers of the board of commissioners as to matters which stand for trial de novo, and the finding of a verdict in detail on all the matters in issue between the parties is contemplated, including the assessment of benefits and the allowance of damages in cases in which damages ought to be allowed.—Id.

On appeal in a proceeding for the establishment of a ditch, the remonstrants should appear on the circuit court docket as the defendants and the petitioners as plaintiffs.—Id.

Under Rev. St. 1881, § 5777, an appeal from the drainage commissioners to the circuit court in a proceeding to establish a drain is triable de novo, and not as a case on review; and the finding or verdict must be specific as to all matters in issue.—Id.

[jjj] (Sup. 1887)

An appeal to the circuit court from the board of commissioners in proceedings for the establishment of a drain, under the statute, suspends all proceedings before the board.—Ford v. Ford, 110 Ind. 89, 10 N. E. 648.

[k] (Sup. 1888)

Where there is an entry in drainage proceedings before the county commissioners, reciting that all of the notices required by 1 Rev. St. 1876, p. 428, § 2, had been given, it will be assumed that the statute was fully complied with, in the absence of a showing to the contrary.—Montgomery v. Wasem, 15 N. E. 795, 19 N. E. 184, 116 Ind. 343.

[kk] (Sup. 1889)

To review the action of the lower court in the dismissal of a drainage proceeding upon

the refusal of the petitioner to give further notice of the filing of the petition, it was necessary to preserve the question by bill of exception.—*Sites v. Miller*, 22 N. E. 82, 120 Ind. 19.

[kkk] (*Sup.* 1889)

On a petition for the construction of a ditch to drain the lands of the petitioners and others, where the jury find that the proposed ditch is practicable, and will be a public benefit, such finding is conclusive, and cannot be reviewed on appeal.—*Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357.

[l] (*Sup.* 1890)

By section 2 of the act of 1883 (*Elliott's Supp.* § 1176), providing that the petition for a ditch shall be docketed as an action pending, it was intended by the legislature that after the docketing of the petition it be subject to all the rules of procedure which govern in the trial of ordinary actions, except as specially otherwise provided; hence the necessity of a motion for new trial to preserve questions for appeal in drainage proceedings is the same as in ordinary actions.—*Baltimore & O. & C. R. Co. v. Ketrang*, 122 Ind. 5, 23 N. E. 527.

[ll] (*Sup.* 1890)

In proceedings for the establishment of a drain, under Rev. St. 1881, §§ 4273-4317, petitioned for by defendants, plaintiffs' remonstrance was erroneously rejected, on the ground that they were not within the class entitled to remonstrate, and, pending their appeal, there being no supersedeas, the drain was regularly established and completed. *Held* that, the judgment in favor of the drain being regular and unassailed, defendants could not be held liable for damages for the overflowing of plaintiffs' land, though it was finally decided, on their remonstrance, that the proceeding should be dismissed.—*Thompson v. Reasoner*, 122 Ind. 454, 24 N. E. 223, 7 L. R. A. 495.

[lll] (*Sup.* 1890)

Under Rev. St. 1881, § 4295, which provides that any interested person may file with the county commissioners a remonstrance against a proposed ditch, and section 4301, which allows an appeal to the circuit court from final orders of the commissioners regarding ditches, the circuit court may refuse to allow remonstrances to be filed in that court on the appeal.—*Metty v. Marsh*, 124 Ind. 18, 23 N. E. 702.

It is within the discretion of the circuit court to allow the petition to be amended on appeal.—*Id.*

Where, on appeal, there is no issue presented for trial, it is proper for the court, after the question of the jurisdiction of the commissioners has been determined, to render judgment, on motion, affirming the decision of the commissioners upon the petition and report.—*Id.*

[m] (*Sup.* 1890)

Pending proceedings before county commissioners to establish a ditch, an application to remove the cause to the United States circuit court was made, and was ordered to be stricken from the files; and an appeal from the order to the circuit court of the state was dismissed. *Held*, that although, under the statutes regulating such proceedings, an appeal from the final order of the commissioners and a dismissal of the cause in the circuit court would end the jurisdiction of the commissioners as to the party appealing, as the appeal taken was unauthorized, it did not affect the jurisdiction of the commissioners, at least as to parties other than the appellant.—*Donalson v. Lawson*, 126 Ind. 169, 25 N. E. 903.

[mm] (*Sup.* 1891)

In proceedings for the construction of a public ditch, where viewers were appointed, and reported first adversely to the petitioner, and subsequently, by order of the commissioners' court, met and reported in his favor, an objection not raised before the board of commissioners will not be heard on appeal in the circuit court.—*Budd v. Reidelbach*, 128 Ind. 145, 27 N. E. 349.

[mmm] (*Sup.* 1892)

The question of the practicability of a route to be selected for a public ditch is in the discretion of the inferior tribunal or its officers, and cannot be reviewed on appeal.—*Sample v. Carroll*, 32 N. E. 220, 132 Ind. 496.

[n] (*Sup.* 1892)

The question as to what is the most available route for the location of a ditch is one for the judgment of the drainage commissioners, and their action in making such location is not subject to review on appeal, in the absence of fraud.—*Chandler v. Beal*, 132 Ind. 596, 32 N. E. 597.

[nn] (*Sup.* 1893)

On appeal by landowners from an order of the court on their exceptions to the report of the commissioners in drainage proceedings, the supreme court will not review the subsequent independent action of the court in establishing a branch ditch, though that may have been suggested by the exceptions to the report.—*Bowman v. Ely*, 135 Ind. 494, 35 N. E. 123.

[nnn] (*Sup.* 1893)

The burden of proof is on the remonstrants appealing from an order of the board of commissioners establishing a ditch to show errors, if any, in the reports made to the commissioners, and an objection to the reports as made to the commissioners is insufficient.—*Denton v. Thompson*, 35 N. E. 264, 136 Ind. 446.

A ditch starting in White county was established in White and Jasper counties by the joint boards of commissioners, and remonstrants in both counties appealed to the circuit court, but the remonstrants in Jasper county subsequently separated themselves from the others, and appealed to the Jasper circuit court.

*Held*, that the refusal of the Jasper circuit court to dismiss the appeal or to permit the Jasper county remonstrants to file a supplemental transcript showing their appeal to the White circuit court was harmless error where, on change of venue from White to Jasper county, it consolidated the appeals, and again brought all the remonstrants together.—*Id.*

On appeal from an order of boards of commissioners establishing a ditch the order is presumably correct where the findings in the reports of the viewers and reviewers show a substantial compliance with the statutory requirements, and are not controverted by any evidence adduced by the remonstrants before either the boards or the court.—*Id.*

Where an appeal from the decision of drainage commissioners was filed in time, but the auditor did not file his transcript of proceedings as required by Rev. St. 1881, § 4301, the appeal will not be dismissed for such failure.—*Id.*

Rev. St. 1881, § 4308, relates to the construction of public ditches extending into two or more counties under the authority of the boards of county commissioners, and provides that the petition shall be filed with the auditor of the county containing the head or source of the ditch, and that the board of commissioners of such county shall appoint the time and place of the viewers' meeting. *Held* that, though the statute does not expressly state the court to which appeal lies, it must be to the court of the county whose board of commissioners is given original jurisdiction.—*Id.*

[o] (Sup. 1895)

Under Rev. St. 1894, § 7865 (Rev. St. 1881, § 5778), providing that in appeals from their decision in proceedings before a board of commissioners the circuit court "may make final determination \* \* \* and cause the same to be executed, or may send the same down to such board with an order how to proceed," that court may, after final judgment on the issue between the parties, remand the cause for further proceedings.—*Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56.

The determination of the circuit court, on appeal from the board of commissioners with reference to the construction of a public ditch, as to whether the facts set forth by the objectors in their plea are sufficient to abate the action, is final.—*Id.*

[oo] (Sup. 1895)

Rev. St. 1894, § 5671 (Rev. St. 1881, § 4301), provides for appeals from orders of the board of commissioners determining that a drain will be conducive to the public welfare, that the route thereof is practicable, that assessments made for the construction are in proportion to the benefits to be derived, and allowing damages. *Held* that, where a verdict specially found that a ditch would be for the benefit of the public, that

the route was practicable, that the assessments were in proportion to the benefits derived, and found generally with the commissioners for the construction of the ditch as specified in the report of viewers, a venire de novo was properly refused.—*Steele v. Empson*, 142 Ind. 397, 41 N. E. 822.

Objections to a report of a board of viewers for a public drain not affecting the jurisdiction of the commissioners cannot be urged for the first time in the circuit court.—*Id.*

Where, in proceedings to establish a public drain, before any evidence had been introduced on an issue raised by a remonstrance, a motion was made that the court indicate what items of the remonstrance evidence would be submitted to the jury upon, and, over appellant's objection, the court indicated that he would permit evidence to be introduced to support certain specified items but the other items were not stricken out and remained a part of the remonstrance the same as before, the statement of the court did not constitute a ruling to which an available exception could be taken, but it was incumbent on appellant to have offered evidence on the excluded items and excepted to the court's adverse ruling thereon.—*Id.*

[ooo] (Sup. 1896)

On petition for a public drain an appeal was taken to the circuit court, where a motion to dismiss the petition was made and overruled. The appellant prevailed on such appeal, and the cause was returned to the county board. The second decision of the board was for petitioner also, from which an appeal was again taken to the circuit court, where judgment for petitioner was rendered. *Held*, on appeal from such judgment, that the ruling on the first appeal to the circuit court, refusing to dismiss the petition, could not be reviewed.—*Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009.

Rev. St. 1894, § 5671 (Rev. St. 1881, § 4301), provides for an appeal from the decision of the board of commissioners on a petition for a public drain on the matters (1) whether the ditch will be conducive to the public health, convenience, or welfare; (2) whether the route is practicable; (3) whether the assessments made for the ditch are in proportion to the benefits; (4) on the amount of damages allowed to any person. *Held*, that a verdict on appeal to the circuit court that "we, the jury, find for petitioners, and that the proposed ditch \* \* \* will be of practicable utility, will be conducive to public health, and the assessments made \* \* \* are in proportion to the benefits derived; \* \* \* that the defendant should be allowed no damages,"—is responsive to the issues allowed by the statute.—*Id.*

On petition for a public drain on appeal to the circuit court from a decision of the board of commissioners in favor of petitioners, where the case is tried de novo, the petitioners are en-

titled to the opening and closing of the case, though they bring from the commissioners' court a prima facie case in their favor.—Id.

On appeal from a judgment of the circuit court on the trial de novo of a petition for a public ditch, erroneous rulings of the board of commissioners on the hearing before them cannot be considered.—Id.

On appeal from a decision establishing a public drain, it is not an abuse of discretion to refuse to strike out the testimony of one of the viewers, who was also county assessor, as to the value of the land.—Id.

[p] (Sup. 1896)

Under Act March 7, 1891, p. 455, § 6 (Rev. St. 1894, § 5695), providing that any person aggrieved by the decision of the board of county commissioners on petition for a drain may appeal from their order, and on such appeal have determined "any of the following matters," only the matters therein specified can be tried on the appeal.—*Thompson v. Board of Com'rs of Jasper County*, 45 N. E. 519, 148 Ind. 136.

The overruling by the circuit court of motion to dismiss appeal from order of county commissioners on petition for a drain does not prevent its thereafter sustaining the motion before final determination of the proceedings.—Id.

[pp] (Sup. 1898)

Acts 1877, p. 43, § 10, fixing jurisdiction of the superior court of Allen county, provides that it shall have jurisdiction concurrent with the circuit court in all cases of appeals from the county commissioners in civil cases; and Rev. St. 1881, § 4301 (Rev. St. 1894, § 5671), provides for an appeal from the board of commissioners establishing a drainage ditch to the circuit court, but does not give exclusive jurisdiction to the circuit court of such appeals. *Held*, that an appeal, whether allowed to one court exclusively, or to either of two courts, is the same remedy, and the rule that when a new right is created by statute, and a remedy provided, such remedy is exclusive of all others, does not prevent said superior court from entertaining appeals from the commissioners in drainage proceedings.—*Hockenmeyer v. Thompson*, 48 N. E. 1029, 49 N. E. 1059, 150 Ind. 170.

The words "civil cases" and "civil causes," as used in Acts 1877, p. 43, § 10, defining the jurisdiction of the superior court of Allen county, are used in contradistinction to "criminal cases," and include drainage proceedings had before the county commissioners.—Id.

[ppp] (Sup. 1900)

Where, on appeal from a judgment on a petition for drainage, the petitioners, who appeared from the record to have been parties to the judgment, and adverse to appellants, were not named as appellees in the assignment of errors, the appeal will be dismissed.—*Ex parte Sullivan*, 56 N. E. 911, 154 Ind. 440.

[q] (Sup. 1900)

Where a ditch is ordered to be established by the board of commissioners, under Rev. St. 1881, §§ 4285, 4294 (Horner's Rev. St. 1897, §§ 4285, 4294; Burns' Rev. St. 1894, §§ 5655, 5664), authorizing the board of commissioners to establish a ditch, where the same is conducive to the public health, convenience, and welfare, though a remonstrance denying that it is conducive to public health, convenience, and welfare is filed, and an appeal is taken to the circuit court, it is error to charge that the burden of proof is on the remonstrator to establish the allegations in the remonstrance.—*Trittipo v. Beaver*, 58 N. E. 1034, 155 Ind. 652.

Under Rev. St. 1881, § 4301 (Horner's Rev. St. 1897, § 4301; Burns' Rev. St. 1894, § 5671), authorizing an appeal from any final order of the board of commissioners, relative to the establishment of a ditch, which determines whether such ditch will be conducive to public health, convenience, and welfare, etc., the circuit court, on an appeal from a decision establishing a ditch, may consider the defense that the cost of construction of the proposed ditch will exceed its benefits.—Id.

[qq] (Sup. 1901)

Under Burns' Rev. St. 1894, §§ 5690-5717 (Horner's Rev. St. 1897, §§ 4317c-4317dd), relating to drainage, and providing for the appointment of an engineer, who shall see that the work is fully completed as ordered by the board, and give bond for the faithful discharge of his duties, an abutting owner cannot appeal from the refusal of the board of county commissioners to appoint a commissioner to complete a ditch, where it orders the engineer to report on the construction of the work.—*Studa-baker v. Board of Com'rs of Wells County*, 60 N. E. 453, 156 Ind. 588.

[qqq] (Sup. 1901)

Where, on proceedings to establish a drain, a motion was filed to strike out the viewers' report, but no cost bond was filed with the motion, an appeal to the circuit court was properly dismissed, inasmuch as the motion presented no question.—*Makeever v. Martindale*, 60 N. E. 341, 156 Ind. 655.

[r] (Sup. 1901)

Where a remonstrance and bond filed to the report of viewers appointed by the county commissioners in proceedings to establish a drain raise the question of the validity of the utility of the ditch, and of damages and benefits to the remonstrant, and re-viewers, are then appointed, as authorized by Burns' Rev. St. 1894, § 5665, whose report confirms the report of the original viewers, the failure of the remonstrant to object to their report does not prevent an appeal to the circuit court from the action of the commissioners in establishing a drain in accordance with the report.—*Inwood v. Smith*, 60 N. E. 703, 156 Ind. 687.

[rr] (Sup. 1902)

Where all the petitioners for a drain were parties to a judgment from which an appeal was taken, but in the assignment of errors one of the petitioners was not made a party, the appeal will be dismissed.—*North v. Davisson*, 62 N. E. 447, 157 Ind. 610.

[rrr] (Sup. 1902)

The record showed that a notice "setting forth the route of the drain as described in the petition, the fact of the filing and pendency of such petition, and when the same shall be docketed," addressed to all persons who appeared by the petition to be the owners of land affected, was served personally on some and posted as against all at the proper places. *Held*, that the court would presume, in favor of jurisdiction, that all parties not personally served were nonresidents of the county.—*Pittsburgh, C., C. & St. L. R. Co. v. Machler*, 63 N. E. 210, 158 Ind. 159.

[s] (Sup. 1902)

*Burns' Rev. St. 1901, § 5671* (*Horner's Rev. St. 1901, § 4307*), requires that, if an appeal is taken in drainage proceedings, a complete transcript of the proceedings, and of the appeal bond, together with all the papers filed in the auditor's office pertaining to the proposed work, shall be filed with the clerk of the circuit court. On an appeal taken September 3, 1900, from a final order of the board of commissioners establishing a drain, the auditor's transcript did not show that any petition for drainage or remonstrance against the same was ever filed, or that any viewers were appointed or made any report, and it did not appear that the original papers were filed with the auditor's transcript. It appeared that remonstrants had also appealed in December, 1899, from a prior order of the board, and that on that appeal the cause had been remanded to the board with certain directions, and the transcript on the subsequent appeal only contained the proceedings after the remand. *Held*, that the appeal was properly dismissed.—*Toy v. Craig*, 63 N. E. 796, 158 Ind. 444.

[ss] (Sup. 1902)

Where, on the final accounting of a drain construction commissioner, he presented an item for a sum paid the county surveyor for services in superintending additional work, and the court found against the allowance, it would be presumed on appeal that the surveyor's services were uncalled for.—*Carter v. Buller*, 64 N. E. 667, 159 Ind. 52.

[sss] (Sup. 1902)

Under *Burns' Rev. St. 1901, § 5655*, providing that the board of county commissioners shall have power to construct a drainage ditch when it will be of public benefit, and section 5658, providing that, if the reviewers find the proposed work is not of public benefit, the costs shall be taxed against the petitioners, the commissioners, on such a finding by the reviewers, have jurisdiction only to dismiss the pro-

ceeding, and the circuit court, having no greater jurisdiction, cannot entertain an appeal therefrom.—*Oathout v. Seabrooke*, 65 N. E. 521, 159 Ind. 529.

[t] (Sup. 1903)

Where the amounts of the respective bonds of those who had made application for leave to appeal from drain proceedings had not been fixed, the board of commissioners still retained jurisdiction, and had power to dismiss the proceedings.—*Spriggs v. State ex rel. Board of Com'rs of Jasper County*, 66 N. E. 693, 67 N. E. 902, 161 Ind. 225.

[tt] (Sup. 1903)

Where, after exceptions had been filed to the report of an engineer appointed to examine the construction of a public ditch, the board of county commissioners, after examining and considering the report and the exceptions, filed an order overruling the exceptions and accepting and approving the report, such order was not a final order or judgment from which the appellant was entitled to appeal.—*Studebaker v. Board of Com'rs of Wells County*, 69 N. E. 256, 161 Ind. 533.

[ttt] (Sup. 1903)

Under *Burns' Rev. St. 1894, § 5623*, providing that the petition for drainage is sufficient to give the court jurisdiction over all the lands described and to fix the lien, if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer, it cannot be presumed that no land belonging to a petitioner and appellant was assessed with benefits merely because his name was not given in the report of the drainage commissioners as the owner of land benefited by the ditch.—*Keiser v. Mills*, 69 N. E. 142, 162 Ind. 366.

Though *Sup. Ct. rule 6* (55 N. E. iv), requiring the assignment of errors to contain the full names of the parties, does not apply in proceedings under the drainage law, the giving in the assignment of the full name is not ground for dismissing the appeal.—*Id.*

[u] (Sup. 1903)

*Burns' Rev. St. 1901, § 5678*, relating to the construction of drainage ditches through more than one county, provides that the county commissioners of each county shall act in the establishment of a joint ditch, and that each board shall render separate judgments conforming to the one rendered by the county having original jurisdiction. *Held* that, where a ditch was to be constructed in several counties, the proceeding in the county or counties other than the one where the proceeding was commenced was of an administrative nature, and hence the failure of the commissioners of such counties to enter a final order for the establishment of the ditch was not fatal to the jurisdiction of the circuit court of the county of the origin of the ditch to entertain an appeal from an order overruling objections thereto.—*Strayer v. Taylor*, 69 N. E. 145, 163 Ind. 230.



On appeal by remonstrants in proceedings for the establishment of a drainage ditch no objections except those which go to the jurisdiction of the county commissioners over the subject-matter can be considered, unless they were raised in the commissioners' court.—Id.

[uu] (Sup. 1905)

Where property owners are fraudulently induced by petitioners, in proceedings before the board of commissioners to construct drains, to default, they are not restricted on appeal from the board to the litigation of questions presented before the board.—Kemp v. Adams, 73 N. E. 590, 164 Ind. 258.

[uuu] (Sup. 1905)

Though Burns' Ann. St. 1901, § 361 (Rev. St. 1881, § 358), requires each pleading in a court to be signed by the party or his attorney, a judgment establishing a drain will not be reversed on appeal on the ground that the petition for the drain at the time it was filed and acted on by the commissioners did not contain the signature of a freeholder where such defects could have been cured by amendment.—Plew v. Jones, 165 Ind. 21, 74 N. E. 618.

Where appellant's special bill of exceptions on appeal in a drainage proceeding does not set forth the petition as it stood when presented to the county commissioners, it will be presumed that it was properly signed at the time it was filed with the commissioners, and a motion to dismiss the cause on the ground that it was not signed by freeholders at the time the commissioners made the order establishing the drain will not be considered on appeal.—Id.

A verified motion to dismiss drainage proceedings after its certification to the circuit court on the ground that the petition for the drain had not been signed by any one at the time the commissioners made the order establishing the drain is properly overruled, where there was nothing to advise the circuit court as to when the petition had been changed; it having been properly signed at the date of certification to the circuit court.—Id.

[v] (Sup. 1905)

Where, on appeal from the board of commissioners in drainage proceedings, the court refused to confirm the report and referred the case back to the commissioners to proceed according to law, pending which the statute conferring jurisdiction was repealed without a saving clause, the order of the commissioners in dismissing the proceedings constituted "proceeding according to law" in accordance with the court's direction. Rehearing, 88 N. E. 509, denied.—Zintsmaster v. Aikin, 90 N. E. 82.

[vv] (Sup. 1906)

While ordinarily the circuit court on appeal in drainage proceedings can consider only those issues which are tried before the board, it was proper to permit and consider a plea to the jurisdiction filed on such appeal, based on a statute repealing a right to the drain.—Taylor v. Stray-

er, 167 Ind. 23, 78 N. E. 236, 119 Am. St. Rep. 469.

On appeal in drainage proceedings only such issues may ordinarily be tried as were tendered before the board.—Id.

[vvv] (Sup. 1907)

An appeal from drainage commissioners should be dismissed, where no appeal bond has been filed.—Smith v. Gustin, 169 Ind. 42, 80 N. E. 959, 81 N. E. 722.

The right of appeal from commissioners in a drainage proceeding is statutory, and the statute must be substantially pursued in order to perfect an appeal.—Id.

Where an appeal in ditch proceedings is taken in term time, as authorized by Burns' Ann. St. 1901, §§ 647a, 647b, the appellants were not required to make all parties against whom the judgment was rendered co-appellants.—Id.

An appeal in ditch-opening proceedings is not affected by the filing of an appeal bond pursuant to an order of court granting such appeal, but the transcript must be filed in the Appellate Court, together with an assignment of errors within the time prescribed by law.—Id.

Persons who were not remonstrators, who appealed to the circuit court in ditch-opening proceedings, and were not parties to the final judgment from which a further appeal was taken, were not necessarily parties to such appeal.—Id.

Burns' Ann. St. 1901, § 5671, authorizes an appeal in ditch proceedings from an order of county commissioners by the filing of an appeal bond with two sureties, to be approved by the auditor and clerk of the circuit court, etc., but section 1307 provides that such appeals shall not be dismissed for any defect in the substance or form of the bond filed with the auditor or his failure to approve the same, if the appellant, when required by the circuit court, shall file a sufficient bond to be accepted by such court, etc. Held, that the failure of the appellant to procure the appeal bonds to be approved by the auditor was not ground for dismissal of the appeal.—Id.

Burns' Ann. St. 1901, § 5671, authorizes appeals from final orders of boards of commissioners in ditch proceedings, and provides that the appellant shall file with the auditor an appeal bond to be approved by him and the clerk of the circuit court within 30 days after the order appealed from, and that the auditor within 20 days after the appeal bond is filed shall make a complete transcript of the proceedings, and certify the same to the clerk of the circuit court. Held, that under such section no prayer for an appeal entered on the order book of the board of commissioners is required.—Id.

Where the auditor's transcript on such appeal was certified to contain all the proceedings, but did not show that any bond whatever had

been filed, the defect was jurisdictional and ground for dismissal.—Id.

Where an appeal is taken to the circuit court in proceedings to establish a public drain, that court may hear oral evidence, and determine as a question of fact whether an appeal bond has been filed with the auditor.—Id.

A transcript on appeal from drainage commissioners imports verity, and, if it omits anything essential, the omission should be supplied by the interested party.—Id.

[w] (Sup. 1907)

Where petitioners appealed in a drainage proceeding, a notice of appeal signed by the living petitioners and the heirs at law of those dead was sufficient.—Kline v. Hagey, 169 Ind. 275, 81 N. E. 200.

[ww] (Sup. 1908)

Acts March 6, 1905 (Acts 1905, p. 456, c. 157), provide that the order confirming assessments and declaring the proposed drainage established shall be final unless an appeal therefrom is taken and an appeal bond filed within 30 days. A final judgment establishing a drain and confirming the assessments was made March 15th, and an appeal therefrom granted upon filing a bond within 30 days, and the bond was filed April 3d, and the record filed in this court June 15th. *Held*, that the appeal was taken within the time required by the statute, as only term time appeals are contemplated by the act, the time of filing appeal bonds being limited to 30 days.—Stevens v. Templeton, 170 Ind. 248, 84 N. E. 148.

On a term time appeal, the rule requiring persons affected by the proceedings and judgment to be named in the assignments of error or made parties on appeal does not apply, and even on vacation appeals in ditch proceedings it is only required that all parties to the judgment appealed from be made parties to the appeal.—Id.

[www] (Sup. 1908)

Where petition under Drainage Act March 16, 1905 (Acts 1905, p. 456 et seq., c. 157), is dismissed, on the ground that two-thirds of the landowners affected, as shown by the preliminary report, have seasonably and properly remonstrated, all persons remonstrating must be made parties to petitioner's appeal by being named in his assignment of errors, in order that the case may be reviewed on its merits; so that one of them having been omitted therefrom appeal will be dismissed.—Lauster v. Meyers, 170 Ind. 548, 84 N. E. 1087.

[x] (Sup. 1908)

Under the express provisions of Burns' Ann. St. 1908, § 1354, the want of approval of an appeal bond filed within the prescribed time with the county auditor on appeal from the board of county commissioners is not ground for a dismissal, if appellant, when required by the court to which appeal is taken, file in that court a sufficient bond with an acceptable surety.—

Miller v. Wabash R. Co., 171 Ind. 109, 85 N. E. 967.

Burns' Ann. St. 1908, § 6151, relating to proceedings for the establishment of drains, provides that the court to which an appeal is taken from the county board of commissioners shall have power to determine the matter as if it originated in that court. Section 6027 provides that the court on appeal may make a final determination of the proceeding, and cause it to be executed, or may send it to the board with an order how to proceed, and may require the board to comply with the final determination. *Held* that, when the appeal is taken from the board to the circuit court, it must proceed de novo and determine the case upon its merits and not upon a mere question of practice, the only discretion lodged in the court being either to execute its final judgment or to remand the cause with directions for its execution; and a remand to the board at an intermediate stage, with directions to permit the filing of a remonstrance which the board had stricken, was error.—Id.

[xx] (Sup. 1908)

Drainage Act 1905 (Acts 1905, p. 461, c. 157) § 3, authorizes an appeal to the Supreme Court on a decision on exceptions to the preliminary report, by praying for an appeal at the time of the decision, and by filing an appeal bond within 30 days. Section 9 (page 471) provides that, when a proposed drain will affect property wholly within one county, it may be constructed by the county commissioners instead of the court, and allows an appeal from the action of the board on the preliminary report to the court, to be taken as prescribed in section 3. *Held*, that appellants, having permitted their exceptions to the preliminary report to be overruled and the matter to be referred back to the drainage commissioners for final report and the final report to be filed before attempting to appeal, waived their right to appeal.—Renicker v. Davis, 171 Ind. 134, 85 N. E. 964.

[xxx] (Sup. 1908)

A judgment establishing a drain and approving the assessments therefor, under the circuit court drainage law of 1881 (Acts 1881, p. 399, c. 43, § 4; Rev. St. 1881, § 4276) and the circuit court drainage law of 1885 (Acts 1885, p. 134, c. 40, § 4; Burns' Ann. St. 1901, § 5625), being final, an appeal therefrom was authorized, in term time or vacation, by Rev. St. 1881, §§ 638, 640 (Burns' Ann. St. 1901, §§ 650, 652; Burns' Ann. St. 1908, §§ 679, 681).—Lake Shore Sand Co. v. Lake Shore & M. S. R. Co., 171 Ind. 457, 86 N. E. 754.

[y] (Sup. 1909)

Where, in proceedings to establish a drain under Acts 1885, p. 131, c. 40, § 3, as amended by Laws 1901, p. 163, c. 100, § 2, a remonstrance purporting to be a two-thirds remonstrance, and authorized by section 3 of the act as amended, was stricken out, the court on appeal, in the absence of anything showing the grounds for striking it out, must assume that

it was stricken out because of deficiency in form or execution or number of signers.—*Kaufman v. Alexander*, 88 N. E. 502.

[yy] (*Sup.* 1909)

Under the rule that the jurisdiction of the circuit court to dispose of a case, appealed thereto, by determining the same on its merits, depends on whether the tribunal from which the appeal was taken had jurisdiction thereof, the circuit court, on appeal from a judgment of a board of commissioners dismissing a proceeding to establish a drain on the ground that under Acts 1907, p. 508, c. 252, the board is without jurisdiction to establish drains extending into two or more counties, cannot proceed to construct the drain, though the act of 1907 gives the circuit court jurisdiction over proceedings to construct drains extending into two or more counties.—*Zintsmaster v. Aikin*, 88 N. E. 509.

[yyy] (*Sup.* 1909)

Denial of a motion of signers of a two-thirds remonstrance in proceedings for a drain, though error, was harmless, the only question involved being liability for costs, which could be presented by a motion to tax costs.—*Thorn v. Silver*, 89 N. E. 943.

[z] (*App.* 1909)

Laws 1905, p. 456, c. 157, relating to drains, provides (section 10, p. 476) that upon failure of the county surveyor to make repairs, after 10 days' notice, any interested person may file his petition for such repairs with the clerk of court in which the proceedings were had for the construction of the drain, and such court or judge shall have the right to determine such matter finally. *Held* that the controversy presented by the petition, and the showing of the county surveyor, must end as determined by the court or the judge having jurisdiction of the proceedings, and there is no appeal.—*Bear v. Reese*, 89 N. E. 522.

[zz] (*Sup.* 1910)

On appeal in a proceeding under Drainage Law 1907, § 4 (Acts 1907, c. 252; *Burns' Ann. St.* 1908, § 6143), where one of the persons in whose favor the judgment appealed from was rendered was not made an appellee in the assignment of errors, the court has no jurisdiction to render a judgment on the merits in the case, since the court has no jurisdiction over parties adverse to appellants not named in the assignment of errors, and cannot disturb a judgment without disturbing it as to all in whose favor it was rendered.—*Prough v. Prough*, 91 N. E. 337.

Under Acts 1907, c. 252, § 4 (*Burns' Ann. St.* 1908, § 6143), providing that an appeal from an order in drainage proceedings must be taken and bond filed within 30 days, and a transcript and bill of exceptions filed within 60 days after the filing of the appeal bond, the time for appealing and filing the bond does not begin to run until the overruling of the motion for new trial.—*Id.*

Under Acts 1907, c. 252, § 4 (*Burns' Ann. St.* 1908, § 6143), providing that an appeal from an order in drainage proceedings must be taken and bond filed within 30 days, and a transcript and bill of exceptions filed within 60 days after the filing of the appeal bond, an application to amend the assignment of errors by making a party in the court below an appellee cannot be granted where not made until after the expiration of the time limited for perfecting the appeal.—*Id.*

[zzz] (*Sup.* 1910)

Where, in drainage proceedings, the record did not disclose any exception to a charge that remonstrators had announced that no evidence would be offered on a specified cause of remonstrance, and no evidence was shown by the record in support of such remonstrance, the remonstrators could not complain of the instruction.—*Stevens v. Templeton*, 91 N. E. 563.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 44-50.

See, also, 14 Cyc. pp. 1044-1048.

### § 38. — Costs and expenses of proceedings.

Vested right to costs, see CONSTITUTIONAL LAW, § 112.

[a] (*Sup.* 1870)

Upon appeal to the court of common pleas from the proceedings of appraisers appointed under Sess. Acts 1867, § 186, which provides that "any person aggrieved by the proceedings of the appraisers may appeal to the court of common pleas of the county, upon giving bond, and within the time, as in cases of appeal from justice of the peace, except that said bond shall be filed with the clerk of said court," if the appellee recovers judgment, he is entitled to recover the costs in such court, though on such appeal the appellant has been reduced the amount allowed against him by the appraisers five dollars or more.—*Dearinger v. Ridgeway*, 34 Ind. 54.

[b] (*Sup.* 1884)

Where there is nothing in the record showing that the judgment on appeal was not the same as that rendered by the board of commissioners, it cannot be determined that any error was committed by the court in taxing a claimant for services rendered as a surveyor in proceedings to establish a ditch with the costs.—*Moon v. Board of Com'rs of Howard County*, 97 Ind. 176.

[c] (*Sup.* 1884)

Under the drainage law of 1881 (*Rev. St.* §§ 4273-4317), the attorney's fees in the proceedings for a drain cannot be made part of the cost of construction, and charged either against the landowners affected or the county.—*Higbee v. Peed*, 98 Ind. 420; *Kersey v. Turner*, 99 Ind. 257.

[d] (*Sup.* 1888)

An assessment in drainage proceedings being set aside on appeal for disqualification of

the surveyor making the assessment, judgment against the surveyor for costs is proper.—*Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50.

[e] (Sup. 1889)

Where the remonstrant appeals from the decision of the board of commissioners, he is not entitled to have the costs of the appeal taxed against the petitioner, who succeeded on many of the issues raised.—*Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782, 16 Am. St. Rep. 357.

In a petition for the construction of a ditch, when one of the owners of land to be assessed remonstrates against the construction of the proposed ditch, he is not entitled to have his costs included in the cost of such construction.—*Id.*

[f] (Sup. 1892)

A finding and judgment against remonstrants establishing a ditch necessarily involves a judgment for costs; Rev. St. 1881, § 4276, providing that, "when the finding of the court is against the remonstrance for any cause, \* \* \* he shall pay the cost occasioned by the remonstrance."—*Perkins v. Hayward*, 132 Ind. 95, 31 N. E. 670.

[g] (Sup. 1894)

Where a land owner remonstrates against the construction of a ditch on several grounds, on part of which, only, he is successful, the taxation of costs against him will not be disturbed, where it does not affirmatively appear that he was taxed with any costs, except such as were made on grounds of remonstrance on which he failed.—*Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[h] (Sup. 1895)

Where one appealing from the report of a board of viewers under Rev. St. 1894, § 5671 (Rev. St. 1881, § 4301), which provides four grounds of appeal, succeeds only on one ground, she is entitled to judgment only for one-quarter of her costs.—*Steele v. Empson*, 142 Ind. 397, 41 N. E. 822.

[i] (Sup. 1899)

Remonstrants to a proposed drain, who testify in their own behalf, must do so without being subpoenaed, and unnecessary costs incurred by them in having subpoenas served upon themselves are properly charged to them.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

[j] (App. 1899)

Act March 7, 1891 (Horner's Rev. St. 1897, § 4317c et seq.; Burns' Rev. St. 1894, § 5690 et seq.), requires petitioners for a drain to give a bond for costs, and that a dismissal of the petition shall be had, at the cost of petitioners, including the costs of the viewers and engineers. If it be granted, the viewers are required to make a second report, on which there is a final hearing, at which exceptions must be heard, and, if sustained, the cost of the hearing shall be paid out of the county treasury, and, if overruled, taxed against the parties excepting. All fees under the act are to be

paid out of the county treasury, and the general county fund shall be reimbursed out of the money realized from the sale of bonds or collection of assessments. A petition for a drain having been granted, viewers and an engineer were appointed, and, before a hearing on their final report, the proceedings were enjoined. *Held*, that the county was liable for the fees of the engineer, with the right to reimburse itself from the proceeds of the sale of bonds or the collection of assessments, or, in lieu thereof, out of the bond of the petitioners.—*Watts v. Board of Com'rs of Gibson County*, 52 N. E. 825, 22 Ind. App. 309.

An engineer may recover for services performed in proceedings to open a drain before such proceedings are terminated.—*Id.*

[k] (Sup. 1901)

Where three or four remonstrants in proceedings for the establishment of a drain succeed in reducing their assessments more than 10 per cent., but the assessment of the fourth is not reduced, a joint motion to tax all the costs of the trial against the petitioners will be refused.—*Bolt v. Ward*, 59 N. E. 1053, 156 Ind. 382.

[l] (Sup. 1902)

On the presentation of the final account of a drain construction commissioner, he claimed compensation for 144 days' services. It appeared that, within 6 months after the ditch was assigned to him for construction, it was represented to the court by a landowner that he was about to accept it, whereby, if the work had been commenced at the expiration of the time required for notice, he had not been engaged on it 144 secular days. *Held* not error to allow a moiety of the claim, instead of the whole, as presented.—*Carter v. Buller*, 64 N. E. 667, 159 Ind. 52.

A petition was filed, reciting that the construction commissioner of a drain was about to accept a ditch as complete, while in fact it was not. The commissioner filed an answer setting up that the drain was complete, and special engineers were appointed by the court to determine the question, and reported it incomplete, and a completion was then ordered. On his final accounting he presented claims for amounts paid the engineers, which were disallowed. *Held*, that a contention that the amounts paid the engineers should have been allowed because they were appointed by the court, and their claims approved before payment, was of no merit; their prior approval by the court being immaterial, as the expenditures were necessary to enable the court to determine the controversy precipitated by the commissioner.—*Id.*

A petition was filed, reciting that the construction commissioner of a drain was about to accept a ditch as complete, while in fact it was not. The commissioner filed an answer setting up that the drain was complete, and, on his final accounting, presented a claim for clerk's

costs on the trial of the issue, which was disallowed. *Held*, that a contention that the claim should be allowed because no costs were adjudged against the commissioner was of no merit; the costs being simply taxed by the clerk without a judgment against any one, and being paid by the commissioner without any action authorizing him to do so.—*Id.*

A petition was filed, reciting that the construction commissioner of a drain was about to accept it as completed, when it was not, and the commissioner answered, claiming that the drain was complete. On his final account he claimed items for sums paid the engineer for superintending additional work done after the trial of the issue raised by his answer, for clerk's costs on the trial, and for sums paid the engineer appointed by the court. *Held*, that his payments without first obtaining the approval of the court, as required by Burns' Rev. St. 1901, § 5626, were unauthorized, and the propriety thereof was left an open question.—*Id.*

[m] (Sup. 1903)

On proceedings under a petition for the establishment of a drain, if the same is constructed the county is to be reimbursed from the proceeds of the sale of bonds; and, if the cause is dismissed, there is a liability on the bond for costs, as the statute does not contemplate the collection of costs by means of a fee bill.—*Spriggs v. State ex rel. Board of Com'rs of Jasper County*, 161 Ind. 225, 66 N. E. 693, rehearing denied 67 N. E. 992.

Where, on proceedings under a petition for the establishment of a drain, no motion was filed to strike out certain items of costs which had been paid by the county, in an action on the bond given by the petitioners the principals in the bond could not raise the question as to whether the items allowed were properly taxed as costs.—*Id.*

In such an action the sureties on the bond were also concluded.—*Id.*

Burns' Rev. St. 1901, § 5601 (Acts 1891, p. 455, § 2), relative to drains, provides that on a petition for the establishment of a drain a bond shall be given for costs, in an amount not less than \$50 per mile, as a prerequisite to a consideration of the petition. *Held* that, where a bond is given for the sum of \$20,000, the recovery thereon is not limited to \$50 per mile.—*Id.*

[n] (Sup. 1905)

Burns' Ann. St. 1894, § 5622, provided for the appointment of a drainage commissioner, and the following section authorized persons whose lands would be benefited by drainage to petition the court for the construction of a public ditch. Sections 5624, 5625, authorized the filing of remonstrances, and provided that, if judgment was in favor of the remonstrants, the petitioner should pay the cost of the proceeding; while section 5626 provided that, if judgment was in favor of the petitioners, the com-

missioner should proceed with the work and pay all costs not otherwise adjudged and all expenses of the construction. Section 5644 provided that the commissioners, engineer, and certain other employes should be paid out of the county treasury, which should be reimbursed by assessments otherwise provided for. Certain landowners petitioned for a public drain. A remonstrance was filed, the petition was sustained, and a commissioner appointed to carry on the work. After an appeal to the state Supreme Court had been dismissed, an action was commenced in the federal court to enjoin the commissioner from proceeding, a temporary injunction was granted, and thereafter all proceedings in behalf of the proposed work were abandoned. *Held*, that the petitioners were not liable to the county for the expenses of the proceeding leading up to the appointment of the commissioner.—*Board of Com'rs of Lake County v. Jarnecke*, 74 N. E. 520, 164 Ind. 658.

[o] (Sup. 1910)

In drainage proceedings, a judgment for costs in favor of remonstrant as to all the issues on which he succeeded, and in favor of petitioners as to issues on which they were successful, and charging certain general items as expense incident to the establishment and construction of the drain, was proper.—*Smith v. Biesaida*, 90 N. E. 1009.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 52.

See, also, 14 Cyc. pp. 1048, 1049.

§ 39. Collateral attack on proceedings.

On judgment for violating statute against obstruction, see JUDGMENT, § 478.

Restraining construction of drain, as constituting collateral attack, see post, § 40.

[a] Proceedings under the statutes for the establishment of a ditch cannot be collaterally attacked for mere informalities.—(Sup. 1879) *Chambers v. Kyle*, 67 Ind. 206; (1881) *Marshall v. Gill*, 77 Ind. 402; (1890) *Donalson v. Lawson*, 126 Ind. 169, 25 N. E. 903.

[b] (Sup. 1880)

One who is not a member of an association organized under Act March 10, 1873, concerning ditches and drains, cannot, on appeal from an assessment of benefits, etc., attack the validity of said assessment, on the ground that the requisite number of landowners did not sign the petition presented to the board of commissioners, asking for the appointment of appraisers.—*Hume v. Little Flat Rock Drainage Ass'n*, 72 Ind. 499.

[c] (Sup. 1881)

Notice of the pendency of a petition to open a ditch, published 27 days, instead of the full 4 weeks required by Act March 9, 1875, is irregular and voidable, but, as the question of the sufficiency of the notice is jurisdictional and to be determined by the commissioners, their finding is not open to collateral attack, unless

it appeared affirmatively from the record that no notice whatever was given.—*Muncey v. Joest*, 74 Ind. 409.

[d] (Sup. 1881)

The proceedings of a board of commissioners establishing a ditch cannot be collaterally attacked for mere errors or irregularities not effecting the jurisdiction of the board.—*Featherston v. Small*, 77 Ind. 143.

[e] (Sup. 1881)

Proceedings to establish a drain cannot be collaterally attacked by suit to enjoin collection of assessments, if the defects in the proceedings are not jurisdictional.—*Argo v. Barthand*, 80 Ind. 63.

[f] (Sup. 1882)

Where lands have been sold for delinquent taxes on account of making a ditch, the landowner cannot in a collateral action against the purchaser at the sale question the decision of the board of commissioners on the ground that the work was not done according to contract.—*Simonton v. Hays*, 88 Ind. 70.

Under 1 Rev. St. 1876, p. 428, empowering commissioners to build a ditch if found "necessary, and conducive to public health, convenience, or of public benefit or utility," their decision cannot be attacked in a suit to set aside a sale of land for nonpayment of a drainage charge, on the ground that the drain was not "necessary."—*Id.*

[g] (Sup. 1884)

Whether viewers in ditch proceedings are or are not properly qualified to act is not a jurisdictional question, but merely affects the regularity of the proceedings.—*Cauldwell v. Curry*, 93 Ind. 363.

A petition for the construction of a drain having been properly filed, irregularities in the subsequent proceedings cannot be attacked in a suit to enjoin the assessment for the drain.—*Id.*

[h] (Sup. 1884)

In proceedings for drainage, the reference of the petition by the circuit court to the commissioners is conclusive that proper notices were posted as against collateral attack by persons whose lands are mentioned in the petition.—*Young v. Wells*, 97 Ind. 410.

[i] (Sup. 1884)

Where the county board had jurisdiction of proceedings for the establishment of a ditch, mere irregularities before the board were waived by not appealing from their judgment establishing the ditch and their judgment cannot be attacked collaterally.—*Smith v. Clifford*, 99 Ind. 113.

[j] (Sup. 1885)

Defects in the petition for a drain, relative to its recitals of the public utility of the ditch, cannot be taken advantage of by collateral attack in an action to enforce the ditch assess-

ments.—*State ex rel. Mayfield v. Myers*, 100 Ind. 487.

[k] (Sup. 1885)

A decree confirming drainage assessments is conclusive of the delivery by the clerk to the commissioner of a copy of the petition and order of reference, so that the delivery cannot be attacked in a proceeding to enforce the assessment.—*McKinney v. State*, 101 Ind. 355.

[l] (Sup. 1885)

Though the court may in drainage proceedings have committed error in allowing the commissioner compensation for his services to be paid out of the county treasury, such order, not having been questioned by complaint for review or an appeal, was impervious to a collateral attack by a relator who was a party to such order.—*State ex rel. Morrison v. Morris*, 2 N. E. 355, 103 Ind. 161.

[m] (Sup. 1885)

In a complaint collaterally attacking the judgment of the circuit court in a proceeding to establish a ditch, and praying an injunction, to sustain the complaint on demurrer, it must be averred that no notice was given to the proceeding, and it is not sufficient to overcome the presumption of jurisdiction to aver that the plaintiff never had any notice thereof.—*Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

Where a party makes a collateral attack on the proceedings of the court in the location of a ditch or drain, every presumption is indulged in favor of the validity of the proceedings; and it was incumbent on the party making such attack to allege such facts as would overcome or exclude all reasonable presumptions in favor of validity.—*Id.*

[n] Where there is some notice, although defective, in drainage proceedings, their validity cannot be overthrown in a collateral attack.—(Sup. 1886) *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; (1886) *McMullen v. State ex rel. Kendle*, 105 Ind. 334, 4 N. E. 903; (1886) *Pickering v. Same*, 106 Ind. 228, 6 N. E. 611; (1886) *Deegan v. Same*, 108 Ind. 155, 9 N. E. 148.

[mm] (Sup. 1886)

It is no defense to an action to enforce the payment of a drainage assessment that the commissioner of drainage has not constructed the ditch properly, but has abandoned it at a point where it will damage, rather than benefit, the defendant, there being another remedy to compel the commissioner to perform the work, given by statute.—*Indianapolis & O. Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316.

The provisions of the Indiana drainage act, in regard to notice to landowners, apply also to owners of easements in lands, and it will be presumed, as against a collateral attack, that proper notice was given.—*Id.*

[n] (Sup. 1886)

Where commissioners, under the drainage act, have been directed to report at a certain

term of court, and do not report until a subsequent term, and there is no extension given them by the court, the proceedings are irregular, but not void; a remedy by appeal is provided, and the proceedings cannot be attacked collaterally.—*McMullen v. State ex rel. Kendle*, 105 Ind. 334, 4 N. E. 903.

The giving of the statutory notice to landowners in proceedings under the drainage act is a jurisdictional question which the court is required to determine before ordering the petition to be docketed, and not open to collateral attack.—*Id.*

[nn] (*Sup.* 1886)

If no objection to the notice in proceedings for the establishment of a drainage ditch is made, its validity cannot be assailed collaterally in a suit enforcing an assessment levied for the construction of the ditch.—*Sunier v. Miller*, 4 N. E. 867, 105 Ind. 303.

[o] (*Sup.* 1886)

Under the act of March, 1883, requiring the petition in a drainage proceeding to be filed before the notices are posted, the fact that there was no petition on file when the notices were posted was at most but an irregularity; and, the judgment not being void, it cannot be assailed collaterally for such irregularity.—*Deegan v. State*, 9 N. E. 148, 108 Ind. 155.

[oo] (*Sup.* 1887)

The judgment in the drainage proceedings, assessing benefits against the township, is conclusive, and the township trustee cannot, in resisting an application for mandate, be heard to question the regularity of the proceedings.—*State ex rel. Howall v. Thompson*, 109 Ind. 533, 10 N. E. 305.

[p] (*Sup.* 1887)

Where it appears that a petition for the establishment of a drain was filed, invoking the jurisdiction of the court over the subject-matter; that notice was given as prescribed by the statute; that the court referred the matter to the commissioners of drainage, whose report and assessment were confirmed by the court,—such proceedings are valid as against a collateral attack.—*Wishmier v. State ex rel. Wilcox*, 110 Ind. 523, 11 N. E. 291.

[pp] (*Sup.* 1888)

Misconduct of the commissioner and of the contractor having charge of the construction of a drain, not affecting the order of court establishing the drain, is no defense to an action for an assessment for such construction.—*Hackett v. State*, 113 Ind. 532, 15 N. E. 799.

[q] (*Sup.* 1888)

A landowner, with knowledge of proceedings as to the construction of a ditch and its acceptance by the commissioners, who does not object thereto, cannot attack the validity of such acceptance, by enjoining the collection of his assessment.—*Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184.

The notice required of the pendency and prayer of the petition for the establishment of a drain under Act 1875 (1 Rev. St. 1876, p. 428), was not given exactly as the statute prescribed, but recited that the report of the viewers would be heard on a certain day. The board of commissioners, after the day set for hearing, found that notice had been given according to law, and ordered the drain established. *Held*, that the order of the board was conclusive in a proceeding by a landowner to enjoin the collection of the assessment for the construction of such drain.—*Id.*

[qq] (*Sup.* 1888)

Upon a complaint by a drainage commissioner to enforce an assessment, where the court has, in the proceedings making the assessment, adjudged the notices posted to be sufficient, the question cannot be inquired into.—*Johnson v. State*, 116 Ind. 374, 19 N. E. 298.

[r] (*Sup.* 1889)

The board of commissioners of the county in which drainage proceedings are had, in acting upon the petition, and subsequently upon the assessment, impliedly decide that the notices to landowners are sufficient, and their conclusions cannot be collaterally attacked.—*Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317.

[rr] (*Sup.* 1889)

Where the circuit court has entertained a petition for the construction of a ditch, filed under the drainage act of 1881, conferring exclusive jurisdiction on such court in such proceedings, and the court has constructed the ditch and confirmed the assessments therefor, its jurisdiction cannot be afterwards collaterally attacked in an action brought to collect the assessments.—*State ex rel. Wilcox v. Jackson*, 118 Ind. 553, 21 N. E. 321.

[s] (*Sup.* 1891)

Since the notice required by 1 Rev. St. 1876, p. 428, § 2, requiring the giving of notice for the establishment of a ditch is a jurisdictional fact, it will be presumed on a collateral attack, in the absence of express averment to the contrary, that notice was given.—*McCullum v. Uhl*, 27 N. E. 152, 725, 128 Ind. 304.

[ss] (*Sup.* 1891)

Where proceedings under Acts 1875, p. 97, for the construction of a ditch, are appealed from the board of commissioners to the circuit court for trial de novo, the judgment of that court in the matter is binding on all persons who were before the commissioners as interested parties, though they neither petitioned for its construction nor remonstrated against it; hence they cannot collaterally attack such judgment.—*Mills v. Hardy*, 128 Ind. 311, 27 N. E. 618.

[t] (*Sup.* 1892)

Where the court acquired jurisdiction over the subject-matter by the filing of the petition, and jurisdiction over the person of the landowners by giving the statutory notice, the fact that 10 days did not intervene between the time the

proceedings were docketed and the time at which the court referred the petition to the drainage commissioner, will not render such proceedings void as against a collateral attack.—*McBride v. State*, 130 Ind. 525, 30 N. E. 600.

[u] (Sup. 1892)

Where the work of building the ditch is not being done in accordance with the terms of the contract, the failure of the commissioner to perform his duty in compelling a substantial compliance therewith will not constitute a defense in a suit against a landowner to enforce the payment of an assessment; such landowner's remedy being, as provided by the statute, an application to the court to compel performance of duty by the contractor and commissioner.—*Racer v. State*, 131 Ind. 393, 31 N. E. 81; *Buckles v. Same*, 131 Ind. 600, 31 N. E. 86.

[u] (Sup. 1892)

The circuit court has jurisdiction of the construction of drains, and objections to its assumption thereof in a specific case must be made directly by appeal, and a party cannot, after judgment, make collateral objection to its authority to direct the construction of a particular drain, which it has assumed, by holding the petition sufficient to give the jurisdiction.—*Perkins v. Hayward*, 31 N. E. 670, 132 Ind. 95.

[un] It is no defense to an action to collect a ditch assessment that the work is not completed according to the plans and specifications and the order of the court, nor that the commissioner and contractor are not prosecuting the work according to such plans.—(App. 1894) *Lock v. State*, 9 Ind. App. 695, 36 N. E. 547; *Vance v. Same, Id.*; *Wilson v. State ex rel. Rhine*, 9 Ind. App. 696, 36 N. E. 546; *Barnes v. State*, 9 Ind. App. 696, 36 N. E. 547; *Vance v. Same, Id.*; *Klugh v. Same*, 9 Ind. App. 697, 36 N. E. 547; *Vance v. Same, Id.*; *Janagin v. Same*, 9 Ind. App. 698, 36 N. E. 547; *Vance v. Same, Id.*; *Shrack v. Same, Id.*; *Constant v. Same*, 9 Ind. App. 699, 36 N. E. 547; *Vance v. Same, Id.*; *Wilcoxson v. Same, Id.*; *Davis v. Same, Id.*

[v] (App. 1895)

It is no defense to an action to collect drainage assessments that the contractor, who was not to be paid till the work was completed according to plans and specifications, has, with the commissioner's consent, done it differently; the remedy in such case is by direct proceeding against the contractor and commissioner.—*Stafford v. State*, 12 Ind. App. 540, 40 N. E. 701.

[rv] (Sup. 1896)

A judgment of foreclosure of a ditch lien will not be enjoined on the ground that the work on the drain was not in fact done according to the plans and specifications.—*Shrack v. Covault*, 144 Ind. 260, 43 N. E. 229; *Janagin v. Same*, 144 Ind. 700, 43 N. E. 231; *Wilcoxson v. Same, Id.*; *Klugh v. Same, Id.*; *Barnes v. Same, Id.*; *Vance v. Same, Id.*; *Davis v. Same, Id.*; *Lock v. Same, Id.*; *Constant v. Same, Id.*; *Wilson v. Same, Id.*

[w] (Sup. 1898)

Since Rev. St. 1894, § 5632 (Acts 1889, p. 53, §§ 2-5), provide for an appeal from an allotment of a drain to tributary landowners for repairing, a landowner who does not appeal from an allotment cannot afterwards attack it collaterally by refusing to repair the portion so allotted to him.—*Cochran v. White*, 51 N. E. 723, 151 Ind. 435.

[ww] (Sup. 1900)

Under Burns' Rev. St. 1894, §§ 5655, 5656, 5658-5661, vesting the county board with jurisdiction to establish and construct public drains, and providing that the board shall appoint viewers to locate the proposed drain and apportion to each parcel of land a share of the work in proportion to the benefits resulting from the improvement, and authorizing the assessment of benefits and damages, the mere location of a portion of the route of the proposed drain over a railway company's right of way will not ipso facto divest the board of its jurisdiction over the subject-matter, and therefore render its final order void and open to collateral attack.—*Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson County*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

[x] (Sup. 1902)

As against collateral attack, a finding by the court in drainage proceedings that notice has been given is conclusive unless the record affirmatively shows that the contrary is true.—*Pittsburgh, C., O. & St. L. R. Co. v. Machler*, 63 N. E. 210, 158 Ind. 159.

[xx] (App. 1904)

In proceedings pursuant to Acts 1889, p. 53, c. 38 (Burns' Rev. St. 1894, §§ 5632-5634; Horner's Rev. St. 1897, § 4284a et seq.), to allot a drainage ditch among landowners for cleaning and repairs, the county surveyor did not attempt to give any notice of the time and place for hearing objections to the allotments, nor provide any such time and place, nor enter of record an order confirming the allotment, as required by sections 3 and 4. Held, that the allotment was void and subject to collateral attack.—*Hille v. Neale*, 69 N. E. 713, 32 Ind. App. 341.

[y] (Sup. 1906)

The law does not require that the proceedings of an inferior board or tribunal shall be perfect technically, and, if the proceedings of a board of drainage commissioners are substantially correct, they cannot be collaterally attacked.—*Todd v. Crail*, 167 Ind. 48, 77 N. E. 402.

[yy] (Sup. 1908)

A complaint attacking drainage proceedings collaterally for want of notice to plaintiff county is insufficient, where it fails to show what the record in such proceeding shows concerning matters which might confer jurisdiction, it being presumed that the record showed an appearance by the county, and a consent to the judgment, which would authorize the making of



an order upon the subject, though the county was not mentioned in the petition or report in such proceeding—(1908) *Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

[z] (Sup. 1909)

The act of commissioners in the location and construction of drains cannot be questioned collaterally.—*Southern Indiana R. Co. v. Railroad Commission of Indiana*, 87 N. E. 966.

[zz] (App. 1909)

In order to succeed in a collateral attack on drainage proceedings, complainant must show the proceedings void.—*Smith v. Pyle*, 88 N. E. 733.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 54, 60; 30 CENT. DIG. Judgm. § 934.

See, also, 14 Cyc. p. 1050.

§ 40. Restraining construction.

[a] (Sup. 1881)

A party who has observed, without objection, the construction of a ditch, has no ground for claiming an injunction against the same for the reason that proper notice of the letting of the contract was not given.—*Muncey v. Joest*, 74 Ind. 409.

[b] (Sup. 1881)

In an action to enjoin the letting of a contract for the construction of a ditch, an allegation, in the complaint, that the viewers "did not report the cost of cutting the ditch per cubic yard or lineal rod or foot of earth required to be excavated," was not equivalent to an allegation that no report was made, but must be construed as meaning simply that the report was defective and insufficient, nor was the averment equivalent to an allegation that there was no estimate of the cost "per lineal rod, cubic yard or foot" as required by the statute; and hence the averment is to be construed as complaining of mere errors or irregularities in the report not open to attack in a collateral proceeding.—*Featherston v. Small*, 77 Ind. 143.

[c] (App. 1905)

A suit to enjoin the construction of a drain which has been ordered by the board of county commissioners is a collateral attack on their action, and cannot be maintained unless the order of the commissioners was void for want of jurisdiction.—*Brooks v. Morgan*, 76 N. E. 331, 36 Ind. App. 672.

Under *Burns' Ann. St. 1901*, §§ 5655, 5660, 5663, relative to proceedings for the establishment of drains and providing for notice by publication, a statement, in a complaint seeking to enjoin the construction of a drain ordered by the board of county commissioners, that the plaintiff had no notice or knowledge of any kind of the proposed drain and no notice of the filing of the petition or of any of the proceedings in the matter was insufficient to show that the notice required by statute was not given, and

hence did not show that the board acted without jurisdiction.—Id.

[d] (Sup. 1908)

The right to enjoin a threatened injury to public highway bridges, caused by the establishment of a public drain, cannot be in both the county and a township, and does not depend upon such varying circumstances as the size of the bridge, the importance of the highway, the ability of the township, and the taking of steps by the township to cause the county to make appropriation for the undertaking.—(1908) *Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 59; 27 CENT. DIG. Inj. § 150.

§ 41. Location.

[a] The fact that a proposed ditch is to be over the line of a ditch previously constructed is not a bar to the proceeding.—(Sup. 1884) *Meranda v. Spurlin*, 100 Ind. 380; (1893) *Denton v. Thompson*, 136 Ind. 446, 35 N. E. 264; (1894) *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

[b] (Sup. 1885)

In the absence of statutory authority, a ditch cannot be ordered to be constructed longitudinally on the right of way of a railroad, and Act April 8, 1881, does not confer such authority.—*Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

[c] (Sup. 1886)

Rev. St. 1881, § 4275, expressly provides that natural streams may be straightened, widened, and deepened; hence, upon petition to the circuit court for the establishment of a ditch, such petition may not be opposed on the ground that the effect would be to deepen and straighten a river.—*Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

[d] (Sup. 1892)

The discretion of commissioners as to the route of a public ditch, and the practicability of such route, is not abused by selecting the route of a former ditch.—*Sample v. Carroll*, 132 Ind. 496, 32 N. E. 220.

[e] (Sup. 1895)

Where a tile drain is, by agreement of adjacent landowners, laid across their lands for the benefit thereof, one of them may lower the tile on his land, no water being thus carried over the land of the other, through the drain, which would not have flowed through the ground along the line of the drains.—*Henderson v. McAllister*, 141 Ind. 436, 40 N. E. 1071.

[f] (Sup. 1896)

Rev. St. 1894, § 5659 (Rev. St. 1881, § 4289), providing, in regard to the location of a public drain, that, when it will not be detrimental to the work, the viewers shall, as far as practicable, locate the ditch on division lines, and avoid, as far as practicable, laying the same

diagonally across lands, but they must not sacrifice the general utility of the drain to avoid diagonal lines, places the location of the drain in the discretion of the viewers.—*Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1000.

[g] (Sup. 1897)

When the line of a ditch established under Burns' Rev. St. 1894, §§ 5655, 5688 (Rev. St. 1881, §§ 4283, 4317), is changed on the lands of any one or more persons by agreement with the county surveyor, those owning land on the line of the ditch above the point where the change is made cannot complain, if their lands receive as good drainage as the ditch completed on the established line would give.—*Cooper v. Shaw*, 47 N. E. 679, 148 Ind. 313.

[h] (Sup. 1899)

A petition for the construction of a ditch having its source in K. county and its terminus in M. county, and for an arm having its source in J. county and its terminus in M. county, filed with the auditor of K. county, which county contained the head and source of the proposed ditch, as required by Burns' Rev. St. 1894, § 5677, was properly dismissed so far as it related to the construction of the arm along its source in J. county.—*Bondurant v. Armev*, 53 N. E. 169, 152 Ind. 244.

[i] (Sup. 1899)

No proceeding for the establishment of a drain under Drainage Act 1885, as amended by Act 1880, § 2, providing for drainage of country lands through the corporate limits of a city or town where drainage cannot be accomplished in the best and cheapest manner without passing through such limits without extraordinary labor and expense can be sustained, unless the court finds that the drainage in question cannot be accomplished without extraordinary labor and expense and in the best and cheapest manner, except by passing through the city.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, § 55.

See, also, 14 Cyc. pp. 1051, 1052.

§ 42. Mode and plan of construction.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, § 55.

See, also, 14 Cyc. pp. 1051, 1052.

§ 43. — In general.

[a] (App. 1904)

An agreement made between all the petitioners for a drainage ditch and a landowner that a private ditch then constructed and in operation on a certain portion of his lands should not be entered or affected between certain dates was valid, in the absence of any mistake or fraud.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

[b] (Sup. 1907)

A natural or prescriptive water course may be made available as a conduit for the dis-

charge of the waters of a public drain, at least where the augmented flow would not tax the stream beyond its capacity.—*Hart v. Scott*, 168 Ind. 530, 81 N. E. 481.

[c] (Sup. 1908)

A judgment establishing a public drain is not invalid because the construction of the drain will result in seriously injuring or in destroying a highway bridge.—(1908) *Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, § 55.

See, also, 14 Cyc. p. 1051.

§ 44. — Improvement of water course.

[a] (Sup. 1886)

The Legislature had power to enact Rev. St. 1881, § 4275, providing that natural streams might be straightened, widened, and deepened.—*Lipes v. Hand*, 1 N. E. 871, 4 N. E. 160, 104 Ind. 503.

FOR CASES FROM OTHER STATES.

See 14 Cyc. p. 1052.

§ 45. Right of way and other interests in land.

[a] (Sup. 1887)

A drainage commissioner is liable in trespass for opening a ditch across a turnpike road, under a judgment to which the road company was not a party.—*Cottingham v. Fortville & N. Turnpike Co.*, 112 Ind. 522, 14 N. E. 479.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, § 56.

§ 46. Construction.

Mandamus to compel removal of bridge so as to allow, see *MANDAMUS*, § 90.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 57-59.

See, also, 14 Cyc. pp. 1052, 1053.

§ 47. — In general.

[a] (Sup. 1881)

It was no ground for enjoining the collection of a ditch assessment at the instance of a landowner, that the ditch was not completed according to the contract therefor.—*Muncey v. Joest*, 74 Ind. 400.

[b] (Sup. 1894)

The plans and specifications and the order of court required a ditch to be constructed with banks sloping one foot to each foot in depth, and required the excavated dirt to be placed at least two feet from the top of each bank, and to be given the same slope as the bank of the ditch. *Held*, that the court would take judicial notice that the purpose of such requirements was to prevent water from cutting into the banks, and causing them to cave in and obstruct the ditch, and to prevent the ex-

cavated dirt from falling back.—*Racer v. Wingate*, 138 Ind. 114, 36 N. E. 538.

The construction of a ditch with perpendicular banks was not a substantial compliance with the plans and specifications, and those assessed for its construction were entitled to object to the confirmation of the drainage commissioner's report, where the banks of the ditch and the excavated dirt were not given the required slope, and the value of the ditch was lessened thereby. *Howard, C. J., and McCabe, J., dissenting.*—Id.

The fact that the ditch was larger, as constructed with perpendicular banks, would not warrant the inference that it was more beneficial than if constructed with the sloping banks. *Howard, C. J., and McCabe, J., dissenting.*—Id.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 57.

#### § 48. — Allotment of work among landowners.

[a] (App. 1895)

Under Rev. St. 1894, § 5633, it is the duty of the surveyor to make the allotments of a public ditch, and, if this has been done under color of the statute, and the surveyor had jurisdiction, the allotments are as binding upon the parties as long as they stand as the judgment of a court, and are no more subject to a collateral attack. The only mode of calling in question the validity of such allotments is by appeal to the circuit court from the action of the surveyor.—*Beatty v. Pruden*, 41 N. E. 961, 13 Ind. App. 507.

[b] (Sup. 1897)

Violation of Burns' Rev. St. 1894, § 5673 (Rev. St. 1881, § 4303), forbidding the county auditor to sell any allotment of a ditch for construction until the section immediately below shall have been completed, can only be complained of by those whose allotments are thus sold.—*Cooper v. Shaw*, 47 N. E. 679, 148 Ind. 313.

[c] (Sup. 1897)

Burns' Rev. St. 1894, § 5656 (Rev. St. 1881, § 4286), provides that the county commissioners shall apportion to each parcel of land, etc., a share of the work of constructing a proposed drainage ditch; and Burns' Rev. St. 1894, § 5673 (Rev. St. 1881, § 4303), provides that, if the allotments of work are not completed within the time fixed, they shall be sold by the county auditor to the lowest bidder, commencing at the allotment including the outlet of the ditch, and thence in succession, upstream, to the allotment including the source. *Held*, in an action to restrain the auditor from selling an unfinished allotment, that the presumption was that such officer was properly discharging his duty, and that facts must hence be pleaded showing the contrary.—*Cooper v. Ray*, 47 N. E. 668, 148 Ind. 328.

The complaint alleged that the reason why plaintiff's allotment had not been completed was

that the sections of the ditch below said allotment had "not been constructed and completed as the law required they should be," and "that the sections of the ditch immediately below the one offered for sale [had] only been partly constructed." *Held*, that said allegations were mere conclusions, and that the complaint was hence insufficient, for want of an averment of facts showing that the section immediately below the allotment had not been completed according to the specifications and report on which the ditch was established.—Id.

An allegation "that no work [had] been done" on the ditch between certain sections, and that the same had "not been constructed at all," was of no effect, in the absence of an averment that work was necessary on that part of the ditch, or that such portion was immediately below plaintiff's allotment.—Id.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 58.

#### § 49. — Contracts.

Mandamus to compel acceptance of work done, see MANDAMUS, § 93.

Mandamus to compel certificates of work done, see MANDAMUS, § 87.

Mandamus to compel issuance of bond, see MANDAMUS, § 3.

[a] (Sup. 1881)

An engineer of a ditch is not such an interested party, within the meaning of Act March 9, 1875, relating to the establishment of ditches, as to prevent his becoming surety on the contractor's bond.—*Muncey v. Joest*, 74 Ind. 409.

[b] (Sup. 1888)

The board of commissioners may, under Drainage Act 1875, § 12 (1 Rev. St. 1876, p. 428), accept the work done under a contract, at a called session.—*Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184.

Letting the several allotments of work on a drain in one contract does not render the contract void, and a landowner who has full knowledge of the proceedings is estopped from questioning it in a collateral attack after the work is completed and accepted.—Id.

[c] (Sup. 1896)

A contractor employed under the drainage act of 1881 (Rev. St. 1894, § 5673 et seq.; Rev. St. 1881, § 4303 et seq.) cannot compel the surveyor to issue certificates for work done, unless he has completed the contract, according to its specifications, within the time agreed upon, or within 60 days thereafter, if such extension of time has been granted by the auditor.—*State ex rel. Roberts v. Bever*, 41 N. E. 802, 143 Ind. 488.

[d] (Sup. 1898)

Act March 7, 1891, concerning drainage, contemplates that a petition for a proposed ditch or other improvement shall remain on the docket of the board of commissioners until the

final completion of the work, and that, when the work is completed according to contract, the engineer who acts as superintendent is to make a final report to the board for its approval, on which the board shall determine whether the work has been completed according to the contract.—*Studabaker v. Studabaker*, 51 N. E. 933, 152 Ind. 89; *Markley v. Studabaker*, 51 N. E. 1095, 152 Ind. 701.

[e] (Sup. 1898)

Under Acts 1891, p. 455, § 9 (Burns' Rev. St. 1894, § 5698), providing for reports by the engineer appointed to superintend the construction of a public ditch, it is the duty of the engineer so appointed to see that the work of constructing the ditch is fully completed as provided in the specifications.—*Studabaker v. Studabaker*, 51 N. E. 933, 152 Ind. 89.

Notwithstanding the absence of any express provision in Acts 1891, p. 455 (Burns' Rev. St. 1894, § 5690 et seq.), providing for the construction of public ditches, requiring the board of commissioners to determine from the engineer's report when such ditch has been completed according to the plans and specifications, the law implies that the board shall perform that duty, and a landowner has a right to appear before the board and question such completion.—*Id.*

[f] (Sup. 1898)

Where a contractor has completed a public drain according to the terms and provisions of his contract, it is intended by Burns' Rev. St. 1894, § 5690, that he should notify the engineer of that fact, and that he should inspect the work, and, if he finds that it has been fully completed as provided in the contract, he should accept it and issue to the contractor a certificate to that effect, stating therein the amount due, and require the contractor to give a receipt for the certificate, which certificate, on being presented by the contractor to the county auditor, would authorize that officer to draw a warrant on the principal fund in the hands of the treasurer for the payment thereof.—*Conn v. Board of Com'rs of Cass County*, 51 N. E. 1062, 151 Ind. 517.

Under Horner's Rev. St. 1897, § 4317c (Burns' Rev. St. 1894, § 5690) et seq., authorizing the construction of drainage ditches, and providing that the county commissioners shall "direct the surveyor or engineer, who helped make the apportionment, or some other competent surveyor or engineer," to attend at the letting of the construction of the ditch, and receive bids therefor, and make contracts, and take bonds from the contractors, and empowering the board to approve or disapprove the contracts, and issue bonds to raise money to pay for the ditch, a contract for the construction of a section of the ditch, made with the engineer appointed by the board, is not a contract of the board, so as to render it liable to a suit for the breach thereof.—*Id.*

[g] (Sup. 1909)

By the original report of viewers, the outlet of the main ditch to be constructed was described as being at station 319, and the engineer's specifications so stated; but this report was referred back and was amended to show the outlet was to be at station 341; but the engineer's specifications failed to show any part of the ditch between stations 319 and 341. On discovering this fact, the record of the county board of commissioners was by a nunc pro tunc entry corrected to show that the ditch was ordered to be established to station 341, and then, by agreement between the contractor and engineer, the former, under his original contract, completed the construction to station 341 at the same price per cubic yard. *Held*, that the contract was properly corrected by the subsequent agreement, and it was unnecessary for the engineer to readvertise and relet such work between stations 319 and 341.—*Templeton v. Board of Com'rs of Newton County*, 89 N. E. 880, transferred from Appellate court, 89 N. E. 410.

[h] (App. 1909)

Under Acts 1891, p. 314, c. 115, § 2, the county auditor, having advertised once and failed to secure a bidder for the construction of a drainage allotment, may advertise, etc., a second time.—*Smith v. Pyle*, 88 N. E. 733.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 59.

See, also, 14 Cyc. pp. 1052, 1053.

§ 50. Improvement, extension, or alteration.

[a] (Sup. 1882)

When a new ditch has been established opening into an old ditch, and the water discharged by the new ditch cannot be carried off by the old without a too frequent overflow of the adjoining lands, the builders of the new ditch must widen and deepen the old ditch, so as to provide for the increased water flow, and, in case of failure or refusal to do so, they become liable under Act 1867, p. 186, § 12, to the owners of the land along the line of the old ditch for all damages they may sustain in consequence of such increased water flow, with 10 per cent. thereon and costs of suit.—*Powell v. Clelland*, 82 Ind. 24.

[b] (Sup. 1887)

The power of a county surveyor to repair drains is wholly statutory (Act April 6, 1885; Acts 1885, p. 129, § 10), and he cannot, under authority to keep "in repair to the full dimensions, as to width and depth, as required in the original specifications," enter upon a scheme of widening and deepening it.—*Fries v. Brier*, 111 Ind. 65, 11 N. E. 958.

A complaint to enjoin a county surveyor from proceeding to repair a certain ditch averring that the plans in accordance with which the repairs are about to be made will greatly enlarge the ditch as originally constructed, and

widen and deepen it, but not stating the original width or depth, nor the width nor depth contemplated under the new plan, is bad upon demurrer, especially where the contract set out with the complaint purports to be simply for the repair of the ditch.—Id.

[c] (Sup. 1887)

Under an authority to repair drains given by a statute (Acts 1883), there can be no enlargement and improvement, except in so far as the work of repairing necessarily enlarges and improves.—Weaver v. Templin, 14 N. E. 600, 113 Ind. 298.

Under Drainage Act 1883, § 7, township trustees have authority to repair drains and remove obstructions, but not to enlarge the drains, and, in determining whether a drain has been enlarged or improved, the original specifications must be taken as the guide.—Id.

[d] (Sup. 1895),

Under Rev. St. 1894, § 5648, authorizing a supplemental petition for the expenditure on new work on the ditch of the balance "of drainage funds collected on assessments" remaining after completion of the ditch according to original plans, and providing that before granting the petition "the court shall determine the amount of money on hand," such petition is not authorized where it appears that all the money assessed and collected has been expended on the original work, though the amount so assessed and collected is only a portion of the benefits assessed.—Reamer v. Hogg, 142 Ind. 138, 41 N. E. 353.

[e] (Sup. 1896)

In proceedings for the improvement of a drain, a landowner, as appellant, cannot complain of the fact that other landowners were not notified of the proceedings.—Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191.

Rev. St. 1894, §§ 5649–5653, requiring petitions for tiling open drains to be signed by a majority of the landowners along the line, and benefited by the tiling of such drain, do not require a petition under Rev. St. 1894, §§ 5622, 5629, to tile, straighten, and deepen an old drain, to be so signed.—Id.

[f] (Sup. 1898)

Under Rev. St. 1894, § 5632 (Acts 1889, p. 53, § 1), requiring a town trustee to see that public drains are kept cleaned and repaired, "so as to answer their purpose," he may cause a drain, built at a higher grade than specified, and accepted by the drainage commissioner as built according to specifications, to be lowered to the grade of the original specifications, whenever the grade at which it was constructed becomes too high to drain the lands assessed for its construction.—Cochran v. White, 51 N. E. 723, 151 Ind. 435.

[g] (Sup. 1905)

Under Burns' Ann. St. 1901, § 5653a, entitled "An act providing for the tiling of public open drains," etc., section 1 of which provides

that, upon the presentation to the county commissioners of a petition stating that it will be to the public welfare to tile any public drain heretofore constructed, the commissioners shall take certain steps, the power of the commissioners is restricted to the tiling of public open drains already constructed, and they have no power to direct the construction of a tiled drain in new territory.—Kemp v. Adams, 73 N. E. 590, 164 Ind. 258.

Under Burns' Ann. St. 1901, § 5653a, authorizing county commissioners to tile drains previously constructed, written objections, supported by affidavit, demanding that the proceedings be dismissed because part of the ditch described in the petition is not an open drain constructed under the laws of the state, but the construction of an entirely new ditch is proposed, when presented for the first time on appeal to the circuit court, raise the jurisdictional question in such manner as to require that court to determine it.—Id.

[h] (Sup. 1910)

Under Drainage Act (Acts 1907, c. 252) § 19, authorizing the tiling of existing open drains, and providing for the filing of a petition therefor with the court in which the proceedings were had for the original ditch, a petition filed with the clerk of the circuit court for the tiling of an open ditch, which alleges that the ditch was originally constructed through the circuit court, and which contains the formal and substantive allegations required under sections 17 and 19 of the act, is sufficient to confer jurisdiction on the court over the subject-matter.—Rinker v. Hahn, 91 N. E. 741.

Where, in proceedings under the drainage act (Acts 1907, c. 252) for tiling an open ditch for a distance less than two miles, and at a cost not over \$300, the matter was referred to the county surveyor without notice to parties likely to be affected, and the surveyor filed his report on May 12th, and the persons likely to be affected had no notice thereof until May 17th, when they were served with notice of a hearing on the report fixed for May 27th, a remonstrance, filed within 10 days after May 27th, was within the time fixed by statute, but a remonstrance filed 16 days after the day for hearing, exclusive of that day and Sundays, came too late, and was properly stricken.—Id.

Drainage Act (Acts 1907, c. 252) § 3, authorizing and regulating the filing of a two-thirds remonstrance to the establishment of drains, and section 17, conferring jurisdiction on boards of commissioners to establish drains, subject to the provisions made as to petitions, notice of hearing, remonstrances and exceptions, etc., and section 19, providing for the tiling of ditches, subject to the provisions as to notice and hearing of petition therefor or remonstrances thereto, etc., authorizes a two-thirds remonstrance in all ditch proceedings under the act, and the time within which a two-thirds remonstrance must be filed in proceedings for the tiling of an open ditch for a dis-

tance less than two miles in length and to cost less than \$300, begins to run from the first hearing on the petition after notice, and a remonstrance by two-thirds of the landowners affected, filed within 20 days from the first hearing in the proceeding after notice is valid.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drains, §§ 3, 62.

See, also, 14 Cyc. p. 1054.

**§ 51. Maintenance, cleaning, and repair.**

Constitutionality of statutes, see ante, § 2.

Retroactive operation of repealing acts, see STATUTES, § 275.

Retroactive operation of statutes, see STATUTES, § 266.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drains, §§ 63-65.

See, also, 14 Cyc. pp. 1054, 1055.

**§ 52. — In general.**

[a] (Sup. 1889)

Drainage Act, § 10 (Laws 1885, p. 141), providing that after the construction of a drain the surveyor of the county shall keep the drain in repair to the full dimensions, as required by the original specifications, commits the propriety of such repairs to the surveyor's discretion, and it is immaterial that the drain was not completed in the first instance according to the original specifications.—*Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

[b] (Sup. 1890)

Where a county surveyor has been served by a landowner with the statutory notice, provided for in Elliott, Supp. § 1193, requiring him to repair a ditch by cleaning it out to its full dimensions, and determines, in the exercise of the discretion committed to him in such matters, that it is his duty to clean the ditch out as requested, his judgment as to the expediency or necessity of the repairs is conclusive, and the courts will not control his action.—*Amoss v. Lassell*, 122 Ind. 36, 23 N. E. 525.

[c] (Sup. 1890)

In an action to enjoin a county surveyor from repairing a certain ditch seven years after it had been established, an allegation that the ditch was not completed according to the original specifications is not sufficient to rebut the presumption that it had been constructed and accepted, the statute providing that the surveyor has no authority to repair a public ditch until after it had been constructed.—*Bunnell v. Peet*, 123 Ind. 436, 24 N. E. 146.

[cc] (Sup. 1891)

Under Acts 1885, p. 141, § 10, which provides that the surveyor of the county in which proceedings have been had for the construction of a ditch shall keep the ditch in repair, and certify the cost to the county auditor, who shall draw his warrant therefor on the county treas-

urer to be paid from the county treasury, which shall be reimbursed therefor by assessment on the property benefited, an auditor to whom such certificate has been made should not draw his warrant for so much of the costs as was incurred in repairing that part of the ditch situated in another county.—*Crooks v. State ex rel. Ramsey*, 126 Ind. 572, 26 N. E. 193.

[d] (Sup. 1892)

Under Elliott's Supp. § 1193, authorizing the construction of drains, and making it the duty of and conferring jurisdiction on the county surveyor to keep them in repair, the decision of the surveyor as to the propriety of making repairs is final.—*Artman v. Wynkoop*, 31 N. E. 468, 132 Ind. 17.

Since drains constructed under act March 9, 1875, were not especially constructed under the supervision of the commissioners charged with their establishment, the county surveyor was not obliged to wait until such drains were entirely completed before having them repaired, as commanded by Elliott's Supp. 1889, § 1193, but might take possession, for that purpose, of the completed portions.—*Id.*

[e] (App. 1895)

If, in proceedings to repair a ditch, the surveyor proceed under color of the statute, and in good faith perform the work as nearly as may be according to the original plans and specifications, he has discharged his duty, and the only questions for the court to determine are whether the appellant's lands are subject to the assessment and the proportion of such assessment that should be placed upon them. The question of the propriety of the repairs can neither be reviewed nor taken into consideration, as upon this the surveyor's decision is final.—*Romack v. Hobbs*, 41 N. E. 391, 13 Ind. App. 138.

The Legislature had the right to dispense with the necessity for a complaint in an appeal in proceedings for the repairing of a ditch.—*Id.*

[f] (App. 1896)

Rev. St. 1894, § 5631 (Elliott's Supp. § 1193), provides that after the construction of a drain the county surveyor shall keep the same in repair to the full dimensions as required in the original specifications. *Held*, that the fact that a drain was not completed under an original petition therefor, but was finished under a second petition for a drain to be constructed over the course outlined in the original petition, did not deprive the county surveyor of the right to clean out at least the portion originally built.—(1895) *Morrow v. Geeting*, 41 N. E. 848, 15 Ind. App. 358; 44 N. E. 59.

[g] (Sup. 1898)

The "surveyor of the county in which the proceedings were had for the construction" of the ditch, on whom Rev. St. 1894, § 5631, imposes the duty of keeping in repair a drain in one or several counties, is the surveyor of the county in which the proceedings for the orig-

inal construction were begun.—*Watkins v. State ex rel. Van Anken*, 49 N. E. 169, 51 N. E. 79, 151 Ind. 123.

The cost of making copies of the assessment notices for repairs of a ditch is a proper charge against the repairs, and is not necessarily part of the official duties of the county surveyor, to be paid for in his per diem provided for by Rev. St. 1894, § 5631.—*Id.*

Rev. St. 1894, § 5631, provides, as to drainage secured by proceedings in the circuit court, that where a drain is completed the county surveyor shall keep it in repair, and that the section shall apply to all drainage works under any law now or heretofore in force. *Held*, that it applies to drainage secured by proceedings in commissioners' court.—*Id.*

[h] (Sup. 1902)

In *Burns' Rev. St. 1901, § 5636*, providing that the decision on appeal from an order of the surveyor to the circuit or superior court of the county in a proceeding for the repair of a public ditch shall be final and conclusive, the words "final and conclusive" are equivalent to declaring that the court's judgment shall not be subject to review on appeal.—*Pittsburgh, Ft. W. & C. R. Co. v. Gillespie*, 63 N. E. 845, 153 Ind. 454.

[i] (App. 1910)

Drainage Act (Acts 1907, c. 275) § 2, requires the county surveyor to determine the portion of a drainage ditch that the owner of each tract of land, each corporation, county, or township, assessed, shall annually clean out or keep in repair, and that any corporation or person aggrieved may appeal therefrom. It also makes it the duty of any corporation or person to whom such work is allotted to perform the allotment. General Drainage Law (Acts 1907, c. 252) § 9, provides for assessment of benefits to streets from the maintenance of a drainage ditch, and declares that such assessment shall be against the cities and towns in which the streets are located, and section 10 makes it the duty of the township trustee to see that the ditch is kept clean, open, and in proper repair. *Held* that, where a portion of a drainage ditch passed through a city and carried off surplus water from the streets thereof, and the city after due notice, did not appeal from the county surveyor's allotment of a portion of the ditch to the city to keep in repair, it could not collaterally attack its liability to pay for the maintenance of the part so allotted to it, but was estopped to deny such liability in an action by the township to recover the cost of cleaning the city's portion after it had refused to do so.—*City of Martinsville v. Washington Civil Tp., Morgan County*, 92 N. E. 191.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 63.

See, also, 14 Cyc. pp. 1054, 1055.

## § 53. — Allotment of work among landowners.

[a] (Sup. 1890)

Act March 9, 1875, and Rev. St. 1881, c. 49, for the establishment of ditches and drains, provide for the appointment of viewers, and, upon the filing of a remonstrance, of reviewers, who shall go over the work of the viewers, and, if necessary, make a reassessment of damages and benefits, and a reallocation of portions of the ditch for construction to the property owners interested. Acts 1889, p. 53, provides for the allotment by the county surveyor of portions of each ditch to the landowners, to be annually cleaned out and kept in repair. *Held*, that the proviso therein "that, where ditches were originally allotted for construction by reviewers, \* \* \* the allotment shall remain the same for repairs under this act," is a restriction which does not apply where the original allotment was made by viewers, but not by reviewers.—*Wheatley v. Romack*, 124 Ind. 430, 24 N. E. 1050.

[b] (App. 1895)

In an action by a township trustee for the enforcement of a lien growing out of the repairing of an allotment of a certain public drain assessed on real estate of defendant, it would be a complete defense if the allotment was completed to the satisfaction of the trustee in good faith before such trustee had the work done on it for which he brought the action.—*Norris v. Tice*, 39 N. E. 1046, 13 Ind. App. 17.

[c] (App. 1895)

An allotment of work on the repair of a public ditch is void and subject to collateral attack where the surveyor failed to give the notice to landowners required by Rev. St. 1894, § 5634.—*Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961.

Rev. St. 1894, § 5634, provides that the surveyor shall cause notices to be posted of the time when and place where objections to allotments of repair work on public ditches may be heard, and further provides for service of a copy of said notice "upon the trustee of the township in which an allotment is made to any highway, as summonses are served upon each resident, owner or occupant of land." *Held*, that the provision, when properly punctuated by placing a semicolon after the word "served" and removing the comma from between the words "resident" and "owner," requires a copy of the notice to be served on resident owners in the manner in which summonses are served.—*Id.*

[d] (Sup. 1896)

Even if an allotment of a part of a ditch to a person to clean and repair is void because including some of the ditch not in his allotment for construction, and not having been made on the petition of a majority of the persons assessed, still he, having failed to clean out even the part included in his allotment for construction, would, to the extent that the township trustee in good faith cleaned out such part,

be liable to pay therefor.—*Zimmerman v. Savage*, 145 Ind. 124, 44 N. E. 252.

An order of the county surveyor, making an allotment of a ditch for purposes of cleaning and repairs, different from that for construction, cannot be collaterally attacked on the ground that it was not on petition of a majority of the persons assessed, as required by Rev. St. 1894, § 5633, it not being alleged that the surveyor did not give notice of time and place of hearing objections to the allotment, as section 5634 requires him to do, and the presumption being that he did, and relief from his order, in case he gives notice, being obtainable, under section 5635, only by appeal.—*Id.*

[e] (Sup. 1898)

Under Acts 1889, p. 53 (Burns' Rev. St. 1894, § 5633), providing for the repair of public ditches, and requiring that the surveyor, whenever practicable, should locate each allotment on the tract of land assessed for its repair, the trustee of the township in which the allotment is located has jurisdiction of such repairs, though the land assessed therefor is situated in another township.—*Fletcher v. White*, 51 N. E. 482, 151 Ind. 401.

[f] (Sup. 1898)

Rev. St. 1894, § 5637 (Acts 1889, p. 53, § 6, as amended by Acts 1893, p. 271), exempting the owner of drained lands from repairing a public drain whenever he converts the portion running through his lands into a covered tile drain of dimensions sufficient to serve the purpose of drainage, and avoid the necessity of repair, does not so exempt him where, because of its altitude, it does not drain the lands assessed for its construction.—*Cochran v. White*, 51 N. E. 723, 151 Ind. 435.

Rev. St. 1894, § 5632 (Acts 1889, p. 53), authorizing the county surveyor to allot public drains among the owners of the lands assessed for their construction, to be by them kept in repair, and placing such drains under the supervision of the township trustee, includes a public tile drain.—*Id.*

[g] (App. 1898)

The county surveyor is not entitled to compensation for services rendered in connection with allotments which were valid under the previous allotment.—*Board of Com'rs of Hendricks County v. Trotter*, 49 N. E. 976, 19 Ind. App. 626.

Where, in allotting portions of ditches to the various landowners for repairs, notice by personal service is required to be given them of a time and place where objections to such allotment may be heard, the failure to give such notice to some of the landowners will not invalidate the allotment as to others properly served.—*Id.*

Where, under 2 Burns' Rev. St. 1894, § 5632 et seq. (Horner's Rev. St. 1897, § 4284a et seq.), the county surveyor is required, after allotting to the various landowners portions of

ditches to be kept in repair by them, to give each landowner notice by personal service of a time and place where they could make objections to such allotment, the failure to give such notice invalidated the allotment, and a mere voluntary acquiescence therein for the time being could not bind the landowners for the future.—*Id.*

Under 2 Burns' Rev. St. 1894, § 5634 (Horner's Rev. St. 1897, § 4317e), which authorizes the county surveyor to give notice, to the various landowners to whom have been allotted portions of a ditch to be kept in repair, of a time and place to make objections to such allotment where there had been failure to give such notice previously when the allotment was made, applies only where the former allotment was invalid.—*Id.*

The allotment of a portion of a ditch to a landowner, to be by him kept in repair, is valid, although no personal notice was given him of the time and place to hear objections thereto, where he voluntarily appeared and presented his objections.—*Id.*

[h] (Sup. 1900)

Under Burns' Rev. St. 1894, § 5633, providing that the work of keeping a drain in repair shall be allotted to each tract of land assessed for the construction thereof, "and also to each parcel of land \* \* \* according to benefits to be received thereby," the fact that lands in the vicinity of a public drain were not assessed for its original construction, it having been adjudged when the work was projected that they would not be benefited thereby, does not exempt them from liability for its maintenance, when it is shown that they will derive benefit therefrom by reason of natural or artificial changes in their condition since the drain was constructed.—*Roundenbush v. Mitchell*, 57 N. E. 510, 154 Ind. 616.

[i] (Sup. 1902)

Burns' Rev. St. 1894, §§ 5633-5635, provides that the county surveyor shall allot to the owner of each tract of land assessed for the construction of a ditch the portion which such owner shall keep in repair, and that he shall give notice thereof to the landowners, and hear all objections to such allotment, which he may confirm or change as justice may require. Section 5636 authorizes an appeal from the determination of the surveyor to the circuit court, and provides that its decision shall be final. *Held*, that an appeal would not lie from the decision of the circuit court in such case.—*Pittsburgh, Ft. W. & C. R. Co. v. Gillespie*, 63 N. E. 845, 158 Ind. 454.

[j] (App. 1902)

By Burns' Rev. St. 1894, §§ 5637, 5638, a landowner must make repairs on his allotment of a public ditch within the time fixed in the notice given him, and if the work is not done within the time fixed in the notice it is made the duty of the trustee to complete such work and certify the costs thereof, including his own



per diem, to the auditor of the county, who must place the same upon the tax duplicate, as other taxes, to be collected. *Held*, that when a landowner failed to complete his work on his allotment, and the trustee completed the same, the landowner was liable for the tax, though the trustee had agreed with the owner that the latter might himself finish the work.—*Davison v. Campbell*, 63 N. E. 779, 28 Ind. App. 688.

[k] (App. 1904)

An allotment of a drainage ditch for cleaning and repairs had been made by a county surveyor without notice, and was therefore invalid, and in a notice of subsequent proceedings they were called an "allotment," whereas they were recorded as a "reallotment," and a landowner attacking the latter proceedings by a subsequent suit objected to such notice, but claimed that the prior allotment was so far regular that it might have been perfected by a subsequent notice under Acts 1897, p. 157, c. 90. *Held*, that it was immaterial whether the notice spoke of an allotment or a reallotment, as on his theory of the case he would be bound by a change in the previous allotment on such a notice, and, besides, the surveyor could not invalidate his acts by a wrong name.—*Hille v. Neale*, 69 N. E. 713, 32 Ind. App. 341.

*Burns' Rev. St. 1894*, § 5643 (*Horner's Rev. St. 1901*, § 42841), providing for a new allotment of a drainage ditch for cleaning and repairs, has no application where no legal allotment is in existence.—*Id.*

Voluntary acquiescence by landowners for the time being in invalid requirements as to cleaning and repairing a drainage ditch cannot bind them for the future as to void allotments.—*Id.*

Acts 1897, p. 157, c. 90, after a preamble reciting that whereas county surveyors fail, under *Burns' Rev. St. 1894*, § 5634, to give "personal notice" of the hearing of objections to allotments for repairing and cleaning drainage ditches, and whereas the Supreme Court have decided that "such personal notice" is necessary, provides for establishing by a "personal notice" allotments as previously determined in counties where surveyors failed to give the required "personal notice." *Held* to apply only where attempt was made to give the required statutory notice, and not to cases where there was no attempt whatever.—*Id.*

An allotment for the cleaning and repair of a ditch on due notice in accordance with the statute is not invalid because of an attempted allotment without notice within two years prior thereto; such prior allotment being wholly void.—*Id.*

[l] (Sup. 1906)

*Burns' Ann. St. 1901*, § 5637, provides that after allotments for repairs of public drains have been made it shall be the duty of the owner of each tract of land to clean out and repair the portion allotted to such tract between certain dates in each and every year. Section

5638 makes it the duty of the township trustee to fix the exact limits for such work after August 1st and before November 1st of each year; and section 5639 provides that, if the portion so allotted to the land of an owner becomes filled or obstructed by the negligence of the owner or occupant of the land, etc., it shall be his duty to remove all obstructions before August 31st of each year. *Held*, that the owners of land against which allotments for the repair of a public drain have been made are bound to clean out the same annually, independent of any action on the part of the township trustee.—*Beery v. Driver*, 76 N. E. 967, 167 Ind. 127.

Such landowners could not negligently suffer or cause the drain to become filled up and obstructed, and, under the guise of constructing a new work, compel other landowners to contribute to the expense of removing such obstructions, where the existing ditch, if properly cleaned and repaired, would effectually drain their lands and dispense with the necessity for the proposed improvement.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 64.

See, also, 14 Cyc. p. 1035.

§ 54. — Contracts.

Power of city to contract, see MUNICIPAL CORPORATIONS, §§ 277, 286.

[a] (Sup. 1890)

In the absence of statutory directions, the surveyor need not give notice of the letting of the contract for repairing a ditch.—*Bunnell v. Peet*, 123 Ind. 436, 24 N. E. 146.

[b] (Sup. 1892)

Under *Elliott, Sup.* § 1193, which requires the county surveyor to keep the ditches in his county in repair, the surveyor is the judge of the means to be employed to accomplish the work, and the landowners cannot escape liability on assessments because the workmen employed were paid by the day, and no competition was invited.—*Scott v. Stringley*, 31 N. E. 953, 132 Ind. 378.

[c] (Sup. 1906)

*Burns' Ann. St. 1901*, § 5638, provides that, if a landowner fails to clean his allotment of a public ditch, the township trustee shall have the same cleaned and certify the cost to the county auditor, who shall place it on the tax duplicate, and also provides that the trustee may recover such expense and his fees by action. *Held*, that neither a township nor its trustee, as such official, is liable for the work performed in cleaning out any allotment of a public ditch under a contract of employment made by the trustee under the statute.—*Quick v. Parratt*, 78 N. E. 232, 167 Ind. 31.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 65.

See, also, 14 Cyc. p. 1035.

### § 55. Construction and maintenance of bridges and crossings.

[a] (Sup. 1888)

Mandamus will not lie at the suit of a township trustee to compel a drainage commissioner to bridge the crossing of a highway by a large drain constructed by him under order of court, where he has no fund except the assessments made for the specific purpose of constructing the drain.—*Rigney v. Fischer*, 113 Ind. 313, 15 N. E. 594.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 61.

See, also, 14 Cyc. p. 1053.

### § 56. Damages from construction or maintenance.

Action of debt by landowner against county for damages from construction, see DEBT, ACTION OF, § 3.

Opinion evidence as to, see EVIDENCE, § 497.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 67-69.

See, also, 14 Cyc. pp. 1056, 1057.

### § 57. — In general.

[a] (Sup. 1851)

Where the report of persons appointed to assess damages sustained for draining a creek was set aside, and the application for the second assessment was not made until the lapse of about seven years thereafter, it was held that the second application was made too late.—*Brake v. Board of Com'rs of Vigo County*, 2 Ind. 606.

[b] (Sup. 1896)

If the cost of temporary changes in a railroad bridge, to admit of improvements to a stream for drainage purposes, do not arise from the railroad company's continuing duty to so maintain its bridges as to admit public rights accruing subsequent to the construction of the bridge, such changes are proper subjects for consideration in the ditch proceedings, and the cost thereof should be deducted from the company's assessment of benefits.—*Lake Erie & W. R. Co. v. Cluggish*, 42 N. E. 743, 143 Ind. 347.

As the drainage act (Rev. St. 1894, § 5625) provides, as a cause of remonstrance, that the land assessed "will not be benefited to the extent of the assessment," and that the lands "will be damaged by the construction of the proposed work," a railroad company cannot object to the temporary removal of its bridge over a stream, which was to be dredged, on the ground that the cost thereof is not within the statutory cause for remonstrance, and that the contractor had not made compensation to it therefor, after it has obtained an allowance, by the reduction of its assessment, for the cost of making a proper passageway under its tracks for such improvement.—*Id.*

[c] (Sup. 1897)

Under statutory proceedings in the circuit court, a drain was completed nearly three years after its establishment, whereupon an intervening petition was filed, seeking allowance for damages resulting to land by reason of the drain which it was alleged could not have been foreseen at the time the petitioner was notified to appear, and make any remonstrance she saw fit to the damages or benefits assessed. *Held*, that the petition was properly stricken from the files in view of Rev. St. 1894, § 5625, which provides that, where the finding of the court is against remonstrances made, the confirmation of assessments made by the commissioners should be final and conclusive.—*Hoefgen v. Harness*, 148 Ind. 224, 47 N. E. 470.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 67, 69.

See, also, 14 Cyc. p. 1056.

### § 58. — Deduction or set-off of benefits.

[a] (Sup. 1896)

The damages referred to in Rev. St. 1894, § 5660 (Rev. St. 1881, § 4290), in relation to drainage, which shall be assessed "to the parties owning the lands benefited, in proportion as each tract of land is assessed for benefits," mean the actual damages, if any, after deducting the benefits.—*Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009.

[b] (Sup. 1902)

Testimony of a civil engineer, experienced in railroad construction in the vicinity, as to the relative cost of the maintenance of a railroad bed made of muck soil when saturated by seepage from standing water and when dry, and as to the relative value of the property under the two conditions, tended to establish benefits, and was admissible.—*Pittsburgh, C., C. & St. L. R. Co. v. Machler*, 63 N. E. 210, 158 Ind. 150.

Where a railroad company filed a remonstrance, testimony that the proposed drain would carry off the water from the side ditches of the railroad that then had no outlet, and as to the general sufficiency of the drain to convey the water away from the vicinity of the road, and thus make another culvert or bridge in the neighborhood, then being maintained by the company, unnecessary, tended to show benefits, and was competent.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 69.

See, also, 14 Cyc. p. 1057.

### § 62. Use of drain.

[a] (Sup. 1883)

A private drain may be connected on a person's own land with a public one, provided the utility of the latter is not destroyed.—*Toops v. State*, 92 Ind. 13.

[b] (*Sup.* 1884)

Owners of land drained by a statutory drain may obtain an injunction against another landowner, not affected by said drain, who has begun to dig a ditch on his land with a view to directing the water thereon into said drain, and thereby overtaxing its capacity.—*Pence v. Garrison*, 93 Ind. 345.

[c] (*App.* 1893)

A complaint which alleges that a public ditch had been established, bordering on plaintiff's land; that thereafter defendants had connected with such public ditch another ditch, diverting large quantities of water which had theretofore been accustomed to flow off in another course; that by reason thereof the public ditch was overtaxed, and plaintiff's land was overflowed; that defendants had also wrongfully cut a third ditch partially across plaintiff's land, also connecting with the public ditch, causing large quantities of water to flow on plaintiff's land, partially submerging it,—is not based on Rev. St. 1881, § 2154, relating to the obstruction of public ditches, but on the common-law doctrine that one has no right to collect surface water on his own premises, and by means of a ditch discharge such water on the land of another, where it was not accustomed to flow by nature, nor to divert the flow of a water course from its rightful channel.—*Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796.

Water flowing by natural means on lands assessed for the construction of a public ditch may be conducted into such ditch by means of lateral aqueducts, but this right does not extend to lands not so assessed. Nor may one whose land has been assessed collect thereon by artificial means waters from land not assessed, and discharge such waters into a public ditch in such quantities as to cause an overflow and injury to adjoining land.—*Id.*

[d] (*Sup.* 1897)

Where a drainage pipe is constructed by the board of commissioners, with capacity to drain only a part of a tract of land, the owner of such tract cannot divert water from another portion of such tract into the ditch, where to do so would injure other land drained by said ditch, although the tract could not otherwise be drained at all, and although the benefit accruing to the portion drained was assessed to the amount of such benefit against the entire tract.—*Drake v. Schoenstedt*, 48 N. E. 629, 149 Ind. 90.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 66.

See, also, 14 Cyc. p. 1055; note, 41 L. R. A. 751.

#### § 63. Injuries from defects or obstructions.

[a] (*Sup.* 1878)

An obstruction of a ditch running through pasture lands, caused by the natural washing of the banks of the ditch, and to which the ob-

structing party contributed only by properly using and pasturing the adjacent land, does not render him liable in damages, under Act March 11, 1867 (Acts 1867, p. 186), to another person injured by such obstruction.—*Ayres v. Laughlin*, 62 Ind. 327.

A person obstructing a ditch, under the drainage act of March 11, 1867 (Acts 1867, p. 186), was liable for damages to any one injured thereby in the sum of one dollar for each day the obstruction continued, and not merely for compensatory damages.—*Id.*

[b] (*Sup.* 1879)

A complaint for obstructing a ditch, based on section 13 of the drainage act of March 11, 1876, prescribing a penalty for any drain or ditch constructed under that act, is insufficient, since that section was repealed and superseded by section 20 of the drainage act of March 9, 1875 (1 Rev. St. 1876, p. 428).—*Chambers v. Kyle*, 67 Ind. 206.

A complaint alleging that defendant unlawfully, negligently, and willfully obstructed a ditch draining defendant's land by throwing a large number of rails into the ditch, and also allowing hogs to wallow in it, whereby the water was caused to back upon plaintiff's land, stated a cause of action either at common law or under 1 Rev. St. 1876, p. 428, making it an offense to obstruct drains, and allowing the recovery of damages therefor.—*Id.*

[c] (*Sup.* 1882)

In an action for the obstruction of a drain, where there was evidence that the defendant had caused logs to be placed in the ditch to make a wagon way across, which had been removed shortly afterwards, and that there were other logs and chunks in the ditch which looked as if they had been rolled in, an instruction that there was no evidence tending to show any obstruction in the ditch was not prejudicial to the plaintiff where it was not shown that the logs and chunks left in the ditch constituted a material impediment to the flow of water, and where nominal damages were awarded.—*Chambers v. Kyle*, 87 Ind. 83.

An owner of land is not liable for obstructing a ditch thereon unless it is willfully done, and a person who has stood by and allowed his crops to be spoiled by reason of such obstruction, which he might easily have removed, has no remedy.—*Id.*

In an action for damages for obstructing a drain on defendant's land, the complaint should show that the drain was properly constructed under the statute, and the order of the county board for the construction of the drain is admissible to show the legality of such drain.—*Id.*

The mere fact that defendant suffered his hogs to feed in his field, where they wallowed in the ditch, by which plaintiff's lands were drained, and obstructed it to the damage of plaintiff, is not "willful" injury for which alone he is liable under the statute.—*Id.*

Where the drain by which plaintiff's land was drained is inadvertently obstructed by defendant on defendant's land, plaintiff, in case he fails to remove the obstructions, can only recover for such damages to his crops as would have accrued before he could have reasonably effected the removal of the obstruction.—Id.

[d] (Sup. 1893)

In a suit by one adjoining landowner to restrain another from obstructing a ditch, the answer alleged that the owners of the adjoining farms, by agreement, constructed a tile ditch to drain the water which would naturally flow into it from the farms; that plaintiff without defendant's knowledge, lowered the ditch on his land, and made lateral drains, and thereby caused water to flow into the ditch which did not naturally belong there; that thereby defendant's land was flooded and, in order to stop the flow, defendant dug up a part of the ditch. *Held*, that plaintiff was entitled only to such right as the original construction of the drain, in accordance with the arrangement or agreement in relation thereto, gave to him, and such right might have been enforced had he remained in a position to do so.—*McAllister v. Henderson*, 34 N. E. 221, 134 Ind. 453.

[e] (App. 1908)

Burns' Ann. St. 1901, § 5645, provides that "Any person who shall obstruct, injure or destroy any work constructed in pursuance of any law of this state for the drainage of lands shall, on conviction, be fined," etc., "and shall be liable for damages to such person or persons as may have suffered damages thereby." *Held*, that it is not necessary to aver or prove, in an action under this statute, that the destruction of the drain was negligently done, or that the plaintiff did not contribute to it, since it is the act itself which is unlawful.—*Kelsay v. Chicago, C. & L. R. R.*, 41 Ind. App. 128, 81 N. E. 522.

Burns' Ann. St. 1901, § 5645, provides that "any person who shall obstruct, injure or destroy any work constructed in pursuance of any law in this state for the drainage of lands, shall, on conviction, be fined," etc., "and shall also be liable for damages to such person or persons as may have suffered damages thereby." *Held*, that a railroad company which destroyed a drain constructed under a state law was liable to the owner of lands rendered untillable by such act.—Id.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 70, 71.

See, also, 14 Cyc. p. 1037; note, 39 L. R. A. 69.

#### § 64. Offenses incident to construction, maintenance, or use.

[a] (Sup. 1883)

Where, in a prosecution for obstructing a public ditch, the evidence shows that the ditch was constructed under the order of the board of county commissioners, it entitled the state

to treat it as having been established in accordance with law, and it was not necessary for the state to prove that all the requirements of the statute providing for the construction of ditches have been complied with.—*Toops v. State*, 92 Ind. 13.

In a prosecution for obstructing a public ditch, a verdict finding defendant guilty of obstructing a work constructed in pursuance of the law of the state for the drainage of lands as charged in the affidavit and information, and that he be fined a certain sum, is sufficient, for it finds defendant guilty as charged in the affidavit and information, and such statement was enough without the others.—Id.

In a prosecution under Rev. St. 1881, § 2153, making it a penal offense to unlawfully obstruct and injure a public ditch, malice need not be shown.—Id.

An information, under Rev. St. 1881, § 2153, making it a penal offense to unlawfully obstruct and injure a public ditch, which alleges that the ditch was constructed under an order of the county board, sufficiently shows that it was a public ditch, though it is not alleged that, in establishing it, the requirements of the drainage laws were complied with.—Id.

An information, under Rev. St. 1881, § 2153, making it a penal offense to unlawfully obstruct or injure a public ditch, which so describes the ditch as to inform defendant with reasonable certainty of the character and the place of the alleged obstruction, sufficiently identifies the ditch.—Id.

An information charging the obstruction of a drain "by unlawfully removing a tile therefrom, thereby causing said ditch to fill up with mud, dirt, and other substances, and did then and there, and thereby, unlawfully divert the water in said ditch from its proper channel, and did unlawfully injure, obstruct, and destroy said ditch," sufficiently charges an offense under Rev. St. 1881, § 2153, making it a penal offense to obstruct, injure, or destroy any work constructed for the drainage of land.—Id.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 71.

#### II. ASSESSMENTS AND SPECIAL TAXES.

As breach of covenant against incumbrances, see COVENANTS, § 96.

Collateral attack on judgment for violating statute against obstruction, see JUDGMENT, § 478. Determination of benefits as legislative question, see CONSTITUTIONAL LAW, § 70.

Effect of failure to appoint guardian ad litem for infant, see INFANTS, § 87.

Liability of township for assessment, see TOWNS, § 16.

Lis pendens, see LIS PENDENS, § 24.

Parol evidence to explain abbreviation in assessment, see EVIDENCE, § 455.

Power of Legislature to require township to pay drainage assessment, see **TOWNS**, § 16.  
 Rights and liabilities as between parties to mortgages, see **MORTGAGES**, § 200.  
 Schedule of assessments as property subject to execution, see **EXECUTION**, § 20.

### § 66. Power to levy in general.

[a] (Sup. 1860)

A drainage company has no right to levy assessments or taxes for drains that do not promote public health or welfare, but merely render farms more productive.—*Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63.

Under the constitution, the legislature may, by a general law, if for the public good, provide for the construction of drains when necessary, and for the assessment of those benefited thereby.—*Id.*

[b] (Sup. 1868)

Procuring an assessment to be made upon lands to aid in the construction of a drain is a corporate act, and cannot be legally done until after the articles of association have been recorded.—*New Eel River Draining Ass'n v. Durbin*, 30 Ind. 173.

[c] (Sup. 1884)

Rev. St. 1881, §§ 4274–75, authorizing the drainage of lands by assessments on land benefited by the work where the public health will be improved, public highways benefited or where the work is of public utility is not repugnant to the Constitution, and the Legislature has the power to authorize the drainage of wet and overflowed lands at the expense of those whose real estate is benefited by the work.—*Wishmier v. State*, 97 Ind. 160.

[d] (Sup. 1910)

The Legislature, in enacting laws for the construction of drains payable by assessments on the lands benefited, exercises the sovereign power of taxation.—*Baldwin v. Moroney*, 91 N. E. 3.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 72.

### § 67. Constitutional and statutory provisions.

Denial of due process of law, see **CONSTITUTIONAL LAW**, § 289.

Deprivation of property without due process of law, see **CONSTITUTIONAL LAW**, § 290.

[a] (Sup. 1874)

Act March 11, 1867, to enable the owners of wet lands to drain and reclaim them, etc., operated to repeal Act June 4, 1861, and Act March 7, 1863, on the same subject, taking away all rights of action under such acts upon any assessment of benefits.—*Roush v. Morrison*, 47 Ind. 414.

[b] Act March 8, 1883, § 7, authorizing township trustees to repair public drains, and remove obstructions, and to assess the cost on the

lands benefited, is constitutional and valid.—(Sup. 1887) *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600; (1888) *Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12.

[c] (Sup. 1889)

Section 13 of the drainage act of April 6, 1885, repealing the drainage law of March 8, 1883, provides that where application has been made, or proceedings are pending, or works are in process of construction under the repealed act, the same may be completed, and assessments collected according to the provisions of the act. *Held*, that for repairs made on a ditch under the act of 1883 a township trustee could make an assessment according to the provisions of such act after the passage of the act of 1885.—*Geiger v. Bradley*, 117 Ind. 120, 19 N. E. 760.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, §§ 73, 76, 91.

See, also, 14 Cyc. p. 1058.

### § 68. Purposes of levy or assessment.

[a] (Sup. 1887)

Under an act (Acts 1883) giving township trustees authority to repair drains and providing for assessments therefor, a trustee has the burden of showing that the assessment is one he had authority to make, and, if there is a special finding showing that the trustee enlarged and improved a ditch instead of restoring it to the condition it was in when first completed, the assessment cannot be enforced.—*Weaver v. Templin*, 14 N. E. 600, 113 Ind. 298.

[b] (Sup. 1892)

Under *Elliott's Supp.* § 1178, in relation to drainage assessments and the making thereof by the drainage commissioner, and providing that there may be included in the assessment expenses such as shall be deemed a proper charge on the funds in the hands of the commissioner, an assessment may be made and enforced to pay other expenses than those directly incurred in constructing the ditch.—*Racer v. State*, 31 N. E. 81, 131 Ind. 393; *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 72.

### § 69. Amount of tax or assessment.

[a] (Sup. 1871)

The omission to assess a portion of the lands subject to assessment under the provisions of the law for the construction of drains renders the entire assessment made invalid.—*Nevins & O. C. Tp. Draining Co. v. Alkire*, 36 Ind. 189.

[b] Rev. St. 1894, § 5631 (*Elliott's Supp.* § 1193), provides that the cost of repairs shall be apportioned on the land adjudged benefited by the construction of the drain "in like proportion" as benefits were assessed against the land for the construction of the work. *Held*, that assessments for repairs are to be assessed in proportion to the benefits received therefrom,

and not merely in proportion to the amount assessed for the construction of the drain.—(Sup. 1893) *Parke County Coal Co. v. Campbell*, 140 Ind. 28, 39 N. E. 149, 558; (1896) *Morrow v. Geeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59.

[c] (Sup. 1896)

A railroad company's property may be benefited by the drainage afforded its right of way, and at the same time may be damaged by a requirement to remove or alter the construction of its bridge across the proposed drain.—*Lake Erie & W. R. Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743.

[d] (App. 1897)

It is presumed that all the amount assessed against the land is needed to pay expenses and cost of construction.—*Hoefgen v. State*, 17 Ind. App. 537, 47 N. E. 28.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 75.

## § 70. Property liable.

[a] (Sup. 1883)

Rev. St. 1881, § 4282, in so far as it requires township trustees to keep public drains already constructed in repair at the expense of the townships, is constitutional.—*Ingerman v. Noblesville Tp.*, 90 Ind. 393.

[b] (Sup. 1884)

A turnpike which is private property is subject to ditch assessments.—*Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 360.

[c] (Sup. 1884)

Rev. St. 1881, §§ 4274, 4275, 4281, relating to the establishment of drains, and requiring that the petitioner shall give in his petition a description of the lands, with the names of the owners and state that the public health will be improved, or that one or more highways will be benefited, directing that the commissioners of drainage shall make a personal inspection of the lands described in the petition and assess the benefits to each separate tract of land to be affected and to easements therein held by railroads or other corporations, and requiring that any benefits assessed to any highway shall be assessed against the proper township and be paid by the trustee—authorize the assessment of townships for benefits to highways.—*Young v. Wells*, 97 Ind. 410.

[d] (Sup. 1890)

Under St. April 8, 1881, as amended by Act March 8, 1883 (*Elliott*, Supp. § 1175), the easement or right of way of a railroad company is properly assessed for a drain.—*Baltimore & O. & C. R. Co. v. Ketrang*, 122 Ind. 5, 23 N. E. 527.

[e] (Sup. 1890)

Congressional township lands, which, under acts of congress and provisions of the state constitution, are appropriated to the support of common schools, and are not subject to taxation

by the state, are not liable to assessment for the expenses of constructing public ditches, under Rev. St. 1881, § 4305, although they may be benefited to an amount equal to the assessment; it being the intent of the statutes relating to public ditches that assessments should be made only against such lands as are subject to taxation.—*Edgerton v. Huntington School Tp.*, 126 Ind. 261, 26 N. E. 156.

[f] (Sup. 1892)

Land not assessed for the construction of a ditch cannot be assessed for repairs, under the express provisions of *Elliott*, Supp. § 1193.—*Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

[g] (Sup. 1895)

Under *Elliott's* Supp. § 1193, where a ditch is required, assessments are to be made against lands benefited by the repairs, and the assessment is not to be predicated on the original assessment.—*Parke County Coal Co. v. Campbell*, 39 N. E. 149, 558, 140 Ind. 28.

[h] (Sup. 1899)

Under *Burns' Rev. St. 1894*, §§ 5655-5658 (*Rev. St. 1881*, §§ 4285-4288), authorizing the construction of drains whenever conducive to public health or of public benefit, and requiring lands benefited thereby to be assessed for their construction, whether passing through the same or not, lands already sufficiently drained, whose value, for tillage or for residence purposes, or for the market, is enhanced by a drain which does not reach them, are subject to assessment for the cost of its construction.—*Culbertson v. Knight*, 52 N. E. 700, 152 Ind. 121.

[i] (App. 1908)

Acts 1905, p. 407, c. 129, § 267, gives to every city and town in the state exclusive jurisdiction over the water courses, sewers, and drains within its boundaries, and Acts 1905, p. 474, c. 157, § 10, concerning drains, declares that such parts of public drains as are within the corporate limits of any city or town shall be kept in repair by the city or town. The act also provides for the assessment of all lands benefited, whether within or without any city or town, to pay the cost of such improvements which are to be made by the county surveyor. *Held*, that where a drainage ditch is only partly within the corporate limits of a town, the county surveyor had jurisdiction to make repairs in the drain only outside the town, and that, for these repairs, property alleged to have been benefited, located wholly within the town, was not subject to assessment.—*Quick v. Tempelin*, 42 Ind. App. 151, 85 N. E. 121.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 74.

See, also, 14 Cyc. p. 1060.

## § 71. Benefit to property.

Validity of statutory provisions, see ante, § 67.

[a] (Sup. 1885)

Under Rev. St. c. 49, relating to drainage proceedings, an assessment for benefits may be

made against a township when the benefit is apparent.—*Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735.

[b] (Sup. 1886)

Where the construction of a large ditch enables property owners to carry their lateral ditches into it and to thus secure good draining without encroaching upon the rights of others, there is a special benefit.—*Lipes v. Hand*, 1 N. E. 871, 4 N. E. 160, 104 Ind. 503.

For the purpose of assessing benefits in drainage proceedings, anything which gives an additional value to a particular parcel of land is a special, and not general, benefit.—*Id.*

In drainage proceedings, the landowner cannot be assessed for general benefits which accrue to him as a member of the community.—*Id.*

Land affected by the construction of a drain may be benefited, so as to be assessable, although its drainage facilities may not be increased; and the drainage act does not restrict the assessment of benefits to any one kind of benefit.—*Id.*

[c] (Sup. 1889)

In a proceeding for the construction of a ditch, it is not necessary to supplement proof of the fact that the drainage of the marsh or pond will conduce to public health or welfare by evidence of the number of persons who will be benefited, but it is necessary, in order to authorize the levying of an assessment, to show that the landowner will receive a special benefit.—*Zigler v. Menges*, 22 N. E. 782, 121 Ind. 99, 16 Am. St. Rep. 357.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRAINS, § 74.

See, also, 14 Cyc. pp. 1059, 1060.

§ 73. Grounds of objection.

[a] (Sup. 1876)

The validity of an assessment upon land for the construction of a drain is not impaired by the fact that the drain was improperly commenced before an estimate of the cost of construction, and an assessment of the benefits thereof, were made.—*Smith v. Duck Pond Ditching Ass'n*, 54 Ind. 235.

[b] (Sup. 1892)

The fact that a county surveyor, in repairing a ditch, exceeded the jurisdiction conferred on him by *Elliott*, Supp. § 1193, in that he widened the bottom of the ditch beyond the original specifications, does not relieve the landowners from paying for benefits received by the performance of such work as was within the jurisdiction of the surveyor; and where the assessments levied are short of the amount actually paid by the county for the repairs, the supreme court on appeal will presume, in the absence of evidence to the contrary, and in favor of the findings of the lower court sustaining the assessments, that appellants' lands were not assessed in an amount greater than their just pro-

portion of legitimate costs of repairing the ditch.—*Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953.

[c] (Sup. 1896)

In proceeding for construction of a drain under Act 1883, p. 173, § 1, providing that it shall be sufficient to give the court jurisdiction to fix a lien on land benefited if the land is described as belonging to the persons who appear to be the owners according to the last tax duplicate, an assessment in case the land is so described is valid, as against the actual owner, though he does not so appear on the tax duplicate.—*Reed v. Kalfsbeck*, 45 N. E. 476, 46 N. E. 466, 147 Ind. 148.

[d] (App. 1904)

The fact that the board of county commissioners, after the filing and confirmation of the viewers' report, made an unauthorized order allowing credit for the utilization of a previously constructed private ditch, did not affect the validity of the final order as a whole.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

FOR CASES FROM OTHER STATES,

See note, 56 L. R. A. 919.

§ 74. Estoppel or waiver as to objections.

[a] (Sup. 1872)

An appeal may be taken from an assessment to the circuit court or court of common pleas, but a failure to appeal will not deprive a party whose land has been assessed from objecting to the legality of an assessment on account of a double assessment of lands.—*Etchison Ditching Ass'n v. Hillis*, 40 Ind. 408.

[b] (Sup. 1873)

Where there is no legal incorporation of a draining association, owners of lands assessed are not estopped from resisting the collection of the assessments because a part of the contemplated ditching has been completed at great expense, thus benefiting the lands of such owners, with their knowledge, and without objection.—*Newton County Draining Co. v. Nofsinger*, 43 Ind. 566.

[c] (Sup. 1882)

In an action to set aside a sheriff's deed made upon a decree of the circuit court for the enforcement of a ditch assessment on the ground that the land was sold without appraisal, an answer alleging that plaintiff's intestate received the excess of the money made by the sale over and above the sum due on the judgment does not show an estoppel because it does not appear thereby that she knew whence the money came, or that the sale was made without an appraisal.—*Cox v. Bird*, 88 Ind. 142.

[d] (Sup. 1885)

Where an owner of land subject to drainage assessment was duly notified and was bound by the proceedings, he was not entitled to contest such assessment on the ground that additional township property was included therein.—*Grimes v. Coe*, 1 N. E. 735, 102 Ind. 406.

## [e] (Sup. 1886)

Where parties appear at proceedings to assess benefits and damages, resulting from the laying of a drain or ditch under the law of 1881, and make no objection to the notice, all defects are waived.—*Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353.

## [f] (Sup. 1888)

An irregularity in an assessment for the construction of a ditch is not available to restrain an assessment for its repair.—*Davis v. Lake Shore & M. S. R. Co.*, 114 Ind. 364, 16 N. E. 639.

## [g] (Sup. 1888)

One who, having notice of proceedings to establish a system of drainage, stands by, and receives a benefit to his land therefrom, cannot have his title quieted, as against the purchaser of the land at a sale for the drainage tax assessed against it, on the ground that the names of the owners of some of the lands affected were defectively stated in the petitions, notice, and other proceedings for the establishment of the drains.—*Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *Same v. Fording*, 114 Ind. 599, 16 N. E. 490.

## [h] (Sup. 1888)

The landowner who stands by without objection till the drainage is completed, and who does not tender the amount he admits to be due for the work, or offer to do equity, is estopped from questioning the validity of the proceedings.—*Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184.

## [i] (Sup. 1892)

Where a ditch was constructed, of no benefit to appellant, under proceedings adjudged void after the time for appeal from the decision of the surveyor, if appellant knew of the worthlessness of the ditch before the expiration of the time for appeal, he could not enjoin the collection of an assessment for its construction.—*Millikan v. Wall*, 32 N. E. 828, 133 Ind. 51.

## [j] (Sup. 1893)

A landowner who has full knowledge that officers and parties are in good faith acting on the assumption that proceedings in which a special ditch assessment was made are valid is estopped to deny the effectiveness of such proceedings on the ground that he had no notice, if he lies silently by without objection until the improvement is completed or considerable sums of money are expended on it.—*Scudder v. Jones*, 32 N. E. 221, 134 Ind. 547.

## [k] (Sup. 1895)

The fact that a landowner pays an assessment against his land for the construction of a drain does not estop him to assert, in case of a subsequent assessment for repairing the drain, that his land was not in fact benefited thereby.—*Parke County Coal Co. v. Campbell*, 39 N. E. 149, 558, 140 Ind. 28.

## [l] (Sup. 1897)

Where the owner of the property subject to a drainage assessment stands by and makes no objections to such improvements, which benefit his property, he may not deny the authority by which the improvements are made, or defeat the assessment made against his property for the benefit derived, whether the proceedings for the improvements are attacked for irregularity, or the validity is denied, but color of law exists for the proceedings.—*Board of Com'rs of Cass County v. Plotner*, 48 N. E. 635, 149 Ind. 116.

## [m] (Sup. 1898)

Where the trustee of the township in which plaintiff's land was situated, mistaking his duty under Acts 1889, p. 53 (Burns' Rev. St. 1894, § 5633), relating to the repair of public ditches, notified plaintiff to repair his allotment of a ditch running through his land and extending into another township, which allotment was located in such other township, and, on failure of plaintiff to do so, repaired such allotment, and certified the expense thereof to the county auditor for collection on the tax duplicate, an action to enjoin the collection of such expense could not be maintained, for want of equity, as plaintiff was estopped by his conduct in standing by and permitting such work to be done for his benefit, by such officer, without objection.—*Fletcher v. White*, 51 N. E. 482, 151 Ind. 401.

## [n] (Sup. 1909)

Property owners, who silently stood by until a ditch was completed and their lands benefited thereby, are estopped to object to the contractor being paid for the work.—*Templeton v. Board of Com'rs of Newton County*, 89 N. E. 880, transferred from Appellate Court, 89 N. E. 410.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 53, 82.

See, also, 14 Cyc. p. 1064.

## § 76. Proceedings for assessment.

## [a] (Sup. 1861)

The description in an assessment for benefit to land by drainage should be as certain as is necessary in a mortgage, or notice of a mechanic's lien.—*Eel River Draining Ass'n v. Topp*, 16 Ind. 242.

The land benefited must be described in the assessment with such reasonable certainty as will make the record of it notice, and in the complaint and decree of sale with such certainty as will enable the sheriff to identify it.—Id.

A description of land in the drainage appraisers' assessment as "the S. E. quarter N. W. quarter, section 15, Town. 18, R. 1 west; also part of west part of N. W. quarter, section 14, Town. 18, number of acres, 50,"—is too vague, and is not sufficient.—Id.



## [b] (Sup. 1867)

In a suit by a draining association to enforce a lien for an assessment against lands benefited it is sufficient if the assessment was made by two of three persons appointed for that purpose.—*Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274.

## [c] (Sup. 1870)

Suit by a ditching association to enforce a lien for benefits assessed to the defendant's land, the assessment on which the suit was found commencing thus: "A schedule of lands and assessments of benefits to same caused by the construction of the ditch contemplated to be constructed by," etc. Appended to the assessment was an affidavit of the appraisers that the "foregoing is a true and correct assessment of wet lands," etc. *Held*, that this sufficiently appeared to be an assessment of benefits.—*Jordan Ditching & Draining Ass'n v. Wagoner*, 33 Ind. 50.

In an assessment for drainage benefits, a description of land by abbreviation and figures as follows: "M. W., S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Sec. 18, T. 21, N. R. 7 E., 40 acres"—was sufficient.—*Id.*

## [d] (Sup. 1870)

A report of the appraisers on lands under the ditching law, which does not state whether the assessment was of benefits or of injuries, is insufficient.—*Etchison Ditching Ass'n v. Jarrell*, 33 Ind. 131.

An assessment returned by appraisers under the ditching law, which describes the land assessed, as "S.  $\frac{1}{2}$  S. E., Sec. 27, T. 27, R. 6 E., 20 acres," is sufficient upon which to base a judgment for the amount of the assessment.—*Id.*

## [e] (Sup. 1872)

The amount of the assessment is not "clearly set forth in the appraisers' schedule" when it appears upon the face of such schedule that four tracts of land have been twice assessed, being assessed to different persons and at different sums.—*Etchison Ditching Ass'n v. Hillis*, 40 Ind. 408.

When it appears upon the face of the schedule of assessments filed with such complaint that certain tracts of land have been twice assessed to different persons, and at different sums, the double assessments cannot be regarded as an "informality, irregularity, or omission," within the meaning of section 15 of the act providing for the making of such assessments.—*Id.*

## [f] (Sup. 1872)

If a notice of the time and place when and where appraisers appointed on the laying out of a drain will begin the examination of the land be informal or irregular, it does not invalidate the assessment when the amount thereof is clearly set forth in the appraisers' schedule which is properly recorded; due no-

tice thereof being given.—*Pigeon Creek Draining Ass'n v. Lagrange*, 41 Ind. 272.

## [g] (Sup. 1872)

Lands not liable to be affected at all, either beneficially or injuriously, along the line of a proposed drain, are not required to be returned by the appraisers appointed to make a schedule; and if no lands are injured the appraisers may so declare in their return, and if in such case the schedule returned contain all the lands benefited it will be sufficient.—*Pigeon Creek Draining Ass'n v. Lagrange*, 41 Ind. 272; *Same v. Woods*, *Id.* 275.

## [h] (Sup. 1873)

An order of the county commissioners appointing appraisers to view a proposed ditch or drain and assess benefits need not show affirmatively that the persons so appointed are "disinterested freeholders of the county in which the application is made, and not of kin to any of the parties" as the statute requires them to be.—*Kellogg v. Price*, 42 Ind. 360.

## [i] (Sup. 1873)

An assessment schedule under the draining law was made under the name of the "Arctic Ditchers' Association." It was shown that the corporate name was the "Arctic Ditchers." *Held*, that the variance was not fatal to the assessment.—*Chase v. Arctic Ditchers*, 43 Ind. 74.

## [j] (Sup. 1875)

In a schedule of ditch assessments made by appraisers, the assessment against the land of Josiah Bate was as follows: "The southwest quarter of the northeast quarter of said section seven (7), Josiah Bate, will be benefited," etc. *Held* that, though the description was incomplete, yet it undoubtedly referred, by the word "said," to the description in the petition for the establishment of the drain, and a complete description in the petition would be sufficient.—*Bate v. Sheets*, 50 Ind. 329.

## [k] (Sup. 1875)

A landowner who is not a member of a drainage association need not be given actual notice of the time and place of making an assessment; notice by publication being sufficient.—*Bannister v. Grassy Fork Ditching Ass'n*, 52 Ind. 178.

## [l] (Sup. 1875)

The appraisers of benefits and injuries to lands occasioned by the construction of a drainage ditch, under the law of 1869, should, in their schedule and appraisal, show that they have included therein all lands the intrinsic or market value of which will in their judgment be liable to be affected by the construction of the proposed work; and where, in their schedule and appraisal, the appraisers included merely certain lands which they alleged would be benefited, without showing that they were all the lands that would be benefited, and without showing whether any lands would be injured or not, such appraisal was invalid.

—Bannister v. Grassy Fork Ditching Ass'n, 52 Ind. 178; Rich v. Same, Id. 187.

[m] (Sup. 1878)

The assessment for a drainage ditch under Act March 11, 1867, should be recorded in the mortgage record of the county; and, if recorded in the miscellaneous record, a copy thereof cannot be used as evidence.—Gossett v. Tolen, 61 Ind. 388; Beck v. Same, 62 Ind. 460.

[n] (Sup. 1878)

In a ditch assessment, a statement that the appraisers, "upon examination of the following described lands, did assess to each tract the following amount of benefits," then naming the several tracts and the amount as assessed upon each, was a sufficient statement that all the lands liable to be affected by the construction of the ditch were examined and assessed.—Beck v. Tolen, 62 Ind. 460.

A ditch assessment under Act March 11, 1867 (Sess. Acts 1867, p. 186), sufficiently shows that all the lands liable to be affected by the construction of the ditch were examined and assessed, where it states that the appraisers examined "all lands liable to be affected by such construction," describing such lands, and assessed all the tracts therein described.—Id.

[o] (Sup. 1882)

A party to proceedings under the act of 1867 for establishing drains, who is assessed accordingly, is bound by the proceedings, and cannot attack them collaterally by an action for injury to his land.—Powell v. Clelland, 82 Ind. 24.

[p] (Sup. 1882)

A ditch assessment must describe the land with such certainty that it may be definitely ascertained and located; "a part" of certain land being an insufficient description.—Boatman v. Macy, 82 Ind. 490.

[q] (Sup. 1882)

The appraisers of benefits and damages for the construction of a ditch must embody a statement of the division of the cost of the ditch in the sworn report which the law requires them to make.—Bogart v. Castor, 87 Ind. 244.

[r] (Sup. 1882)

A valid decree for the sale of land for the enforcement of a ditch assessment is, on collateral attack, conclusive as to the validity of the assessment.—Cox v. Bird, 88 Ind. 142.

[s] (Sup. 1883)

Where a petition under the act of 1867 relating to ditches is sufficient to give the county board jurisdiction of the subject-matter, the remedy of persons assessed for mere irregularity in the assessment by the board is by appeal, and such assessment cannot be collaterally attacked.—Foster v. Paxton, 90 Ind. 122.

[t] (Sup. 1884)

The notice of a drainage assessment under Rev. St. 1881, § 4277, being required to be pub-

lished once 30 days before date of payment, a publication of the notice six times, the first being more than 30 days before the date of payment, is sufficient.—Hayes v. State ex rel. Murray, 96 Ind. 284.

To prove that personal notice of a ditch assessment was given to a landowner, it is not sufficient to show merely that "a notice" was sent by mail, without showing what the notice was, or when it was sent, or to what post office it was addressed.—Id.

[u] (Sup. 1885)

Under section 4275, Rev. St., relating to drainage proceedings, the failure to notify a party interested in an assessment for public improvements does not affect the situation of other parties properly notified.—Grimes v. Coe, 102 Ind. 406, 1 N. E. 735.

[uu] (Sup. 1886)

The following description of property assessed for drainage in the schedule of assessments of benefits and damages is sufficient: "S. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  S. 8, T. 19, R. 5, 40 A.; and S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  S. 8, T. 19, R. 5, 40 A."—Frazer v. State, 106 Ind. 471, 7 N. E. 203.

[v] (Sup. 1887)

In the case of assessment for repair of drains, the Legislature may prescribe what notice shall be given, and in what manner it shall be given, and, if a statute provides for notice and gives an aggrieved landowner an opportunity of securing a judicial hearing, it would be valid even if it did not provide for notice prior to appeal.—Weaver v. Templin, 14 N. E. 600, 113 Ind. 298.

[vv] (Sup. 1888)

An assessment for repairing a ditch levied by the county surveyor under the provisions of Act April 6, 1885, § 10, is void, in the absence of notice by the surveyor having been posted in three public places in the township where the lands assessed are located and near the work done.—Davis v. Lake Shore & M. S. R. Co., 16 N. E. 639, 114 Ind. 364.

[w] (Sup. 1889)

The fact that the trustee delayed for 18 months after making repairs on a ditch before making assessments will not defeat the same, if it does not appear that the rights of any of the parties concerned, or of third parties, have been affected, and the statute does not provide within what time the assessment shall be made.—Geiger v. Bradley, 117 Ind. 120, 19 N. E. 760.

[ww] (Sup. 1892)

Under the drainage act of April 8, 1881, as amended by act of March 8, 1883, providing that a drainage commissioner may levy and enforce assessments from time to time as the work of building a drain progresses, such commissioner has authority to exercise a reasonable discretion in levying assessments to secure money to pay for work in progress; the statute, considered as an entirety, not inhibiting the

exercise of such authority until the money is required to pay for work actually done.—*Racer v. State*, 31 N. E. 81, 131 Ind. 393; *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600.

Even though the contract entered into between a drainage commissioner and the contractor who undertakes to build the ditch provides that no part of the work shall be accepted as completed until all the ditch shall have been completed according to specifications, yet the commissioner has the right to provide in advance, by levying and enforcing assessments, the means of paying the contractor when the latter's claim matures.—Id.

[x] (*Sup.* 1894)

To render an assessment for the construction of a public drain through land valid, it is necessary that notice of the proceedings shall have been given to the actual owner of the land.—*Uhl v. Moorhous*, 37 N. E. 366, 137 Ind. 445.

[xx] (*Sup.* 1900)

As there was nothing in the statute which required that supplemental petitions be filed in term time, the filing of one in vacation was not improper.—*Osborn v. Maxinkuckee Lake Ice Co.*, 56 N. E. 33, 154 Ind. 101.

Defendant had secured the vacation of certain assessments levied against his lands for drainage purposes, for want of notice. Petitioner thereupon, and after the work had been established and assessments approved, filed a supplemental petition, asking to have the benefits resulting to defendant's land assessed thereon. *Burns' Rev. St.* 1894, § 5629, provides that any one interested in drainage proceedings may file a supplemental petition, showing that lands not mentioned in the original assessment are affected, etc. *Held*, that the filing of the supplemental petition was authorized, since the previous vacation of the assessment was not an adjudication that the land was not benefited, but left defendant's land the same as if it had never been mentioned in the original assessment.—Id.

[y] (*App.* 1904)

Though a drainage ditch is all in one county, in which proceedings to establish it originated, the circuit court of that county has jurisdiction to assess benefits to lands in an adjoining county benefited thereby.—*State v. Elliott*, 70 N. E. 397, 32 Ind. App. 605.

[yy] (*App.* 1907)

Under the statute regulating the establishment of drains, the filing of the petition and the report of the commissioners is notice to all whose lands are named therein that their lands are to be assessed in the amounts named in the report to pay for the drain.—*Pierse v. Bronnenberg*, 40 Ind. App. 662, 81 N. E. 739, 82 N. E. 126.

[z] (*App.* 1909)

A ditch assessment, made without notice to the owner, is void.—*Pumphrey v. Hollis*, 43 Ind. App. 319, 87 N. E. 255.

Under Act March 6, 1905 (Acts 1905, p. 458, c. 157) § 3, requiring petitioners in drainage proceedings to note thereon the date of hearing and to themselves give notice, or serve it through the sheriff, of the filing of the petition to the owner of each tract who is a resident of the county and is not a petitioner, a landowner who was a petitioner and gave the notice required, but was dismissed before proof of notice was made, was not entitled to any additional notice, being charged with notice of the proceedings which he instituted.—Id.

[zz] (*Sup.* 1910)

Under *Burns' Ann. St.* 1901, § 5692, requiring the viewers in proceedings for the construction of drains to make a schedule of the lands that will be benefited or damaged by the improvement, and the damage or benefit to each tract, giving the name of the owner of each tract as the same appears on the tax duplicate at the time, and *Burns' Ann. St.* 1908, §§ 10-170, 10,176, 10,189, 10,255, 10,265, 10,279, providing that real property shall be assessed to the owner, if known, and that the mortgagor shall, for the purposes of taxation, be deemed the owner until the mortgagee shall take possession, etc., and providing for notice to the owner concerning assessments for general taxation, etc., notice in drain proceedings need only be given to the person owning the land, as shown by the tax duplicate at the time, and a notice need not be given to a mortgagee.—*Baldwin v. Moroney*, 91 N. E. 3.

Where a notice in proceedings for a drainage assessment is necessary, the Legislature may provide the mode and manner of such notice.—Id.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 76-81.

See, also, 14 Cyc. pp. 1061-1064.

§ 77. Mode of assessment.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 76.

§ 78. — In general.

[a] (*Sup.* 1897)

Under *Rev. St.* 1894, § 5656 (*Rev. St.* 1881, § 4286), which provides that the drainage authorities shall accurately describe each parcel of land, giving the number of acres assessed and the number benefited, it is proper, when only two acres of a 40-acre tract are benefited by a drainage ditch, to assess such benefit against the whole tract.—*Drake v. Schoenstedt*, 48 N. E. 629, 149 Ind. 90.

[b] (*App.* 1900)

In an action to foreclose a ditch assessment lien on a 40-acre tract an answer showed that a valid assessment was not made where it alleged that at the time of the proceedings 5 acres of the tract belonged to other persons, and that it never had belonged to defendants, nor was ever on the tax books in their names; that the owners and occupants of the 5 acres

were not parties, nor had been named in any of the reports or petitions; and it was error to sustain a demurrer to such answer.—*Hunt v. State*, 58 N. E. 537, 28 Ind. App. 518.

[c] (App. 1904)

Burns' Ann. St. 1901, § 5657, provides, in relation to public ditches, that, if a ditch is located in the bed of a private ditch already or partially constructed, the viewers shall make an estimate of the number of yards of earth already excavated, and the cost of the same, and deduct the same from the assessment thereon. *Held*, that the board of county commissioners has no authority, after the viewers' report has been filed and confirmed, to make an order allowing a credit because of the utilization of a previously constructed private ditch.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

FOR CASES FROM OTHER STATES,

See 14 Cyc. pp. 1059, 1060.

### § 79. — Apportionment of benefits and expenses.

[a] (Sup. 1899)

Where the lower end of a drain overflows the adjacent lands with water collected by it from the upper lands, the viewers, in assessing the cost of a new drain to carry off the waters so collected by the old drain, can consider that the upper landowners are liable to be enjoined from discharging on the lower lands the waters collected by them by artificial drainage.—*Culbertson v. Knight*, 52 N. E. 700, 152 Ind. 121.

Where the lower end of a drain overflows the adjacent lands with water collected by it from the upper lands, which it sufficiently drains, the cost of enlarging the lower end, or of constructing a new drain, to carry off the waters collected by the old, may be assessed against the upper lands, since their owners had no right to flood the lower lands by artificial drainage.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, § 76.

See, also, 14 Cyc. pp. 1059, 1060.

### § 82. Review, correction, or setting aside of assessment.

Appellate jurisdiction as between particular courts, see COURTS, § 220 (2).

Right to open and close at trial, see TRIAL, § 25.

[a] On appeal by a landowner from an assessment upon his lands to aid in the construction of a ditch of a draining association, there should be neither demurrer, answer, nor reply.—(Sup. 1873) *Kellogg v. Price*, 42 Ind. 360; (1874) *Arctic Ditchers v. Coon*, 47 Ind. 201.

[b] (Sup. 1873)

Under the drainage law (Act March 11, 1867; *Davis' Rev. St. Supp.* 1870, p. 228), providing that any person aggrieved by the proceedings of the appraisers may appeal to the

common pleas of the county on giving bond and within the time, as in cases of appeal from the justice of the peace, except that the bond shall be filed with the clerk of the court, it was not intended that there should of necessity be a reassessment of the benefits and damages, though the common pleas would, when necessary, have the power to appoint new appraisers or reappoint the former ones to make a reappraisal in whole or in part of the lands benefited or damaged.—*Kellogg v. Price*, 42 Ind. 360.

[c] (Sup. 1873)

Upon an appeal to the circuit court from an assessment of benefits made against lands, under the acts authorizing the construction of levees and drains, no issues can be made by pleading; and an answer, alleging that the company in whose behalf the assessment was made never was a corporation, should be struck out.—*Foster's Branch Ditching Co. v. Makepeace*, 45 Ind. 226.

[d] (Sup. 1874)

In an action by a draining association to recover an assessment of benefits accruing to the defendant's land from the construction of the ditch, evidence that its construction did not benefit his land, but injured it, is inadmissible. The landowner so aggrieved must seek his remedy by appeal from the assessment under the statute.—*Moffit v. Medsker Draining Ass'n*, 48 Ind. 107.

[e] (Sup. 1875)

In a proceeding to recover the amount of an assessment against lands for the construction of a ditch, the appraisers having in their hands, the petition and the proceedings thereunder of the board of commissioners may, by reference thereto, complete their otherwise incomplete description of the land in their schedule.—*Bate v. Sheets*, 50 Ind. 329.

[f] (Sup. 1876)

From the assessment of benefits on lands affected by a proposed ditch or drain to be constructed by a ditching company, any person aggrieved thereby may appeal to the circuit court, and on filing in that court a duly certified copy of the assessment appealed from, on that alone the cause should be tried without further pleadings; all defenses being admissible in evidence without filing any pleadings.—*Baker v. Arctic Ditchers*, 54 Ind. 310.

Pleadings need not be filed, on an appeal to the circuit court from an assessment of lands for expenses of constructing a drain.—*Id.*

[g] (Sup. 1879)

On an appeal to the circuit court in a proceeding to assess benefits for the construction of a ditch, the report of the appraisers is not admissible.—*Beck v. Pavey*, 60 Ind. 304.

[h] (Sup. 1880)

A mortgagee in a mortgage antedating drainage proceedings, in which a lien was declared on the mortgaged premises, is not estopped, in his own foreclosure suit, as against

one seeking to have the lien declared superior to that of the mortgage, to question the validity of the drainage proceedings and judgment; he not having been a party thereto.—*Deisner v. Simpson*, 72 Ind. 435.

[l] (*Sup.* 1882)

In appeals to the circuit court from the appraisal in ditch proceedings, the burden of proof is on the appellant.—*Campbell v. Parker*, 83 Ind. 449.

[l] (*Sup.* 1882)

Rev. St. 1881, §§ 4282, 4307, providing for the ex parte assessment and apportionment of the cost of drainage repairs upon the lands benefited, without any right of appeal or hearing to the landowner, are unconstitutional.—*Campbell v. Diggins*, 83 Ind. 473; *Tyler v. State ex rel. Wilson*, Id. 563.

[k] (*Sup.* 1885)

Estoppel must be especially pleaded, and strictness in pleading is essential. So, where the answer, in a suit to set aside an assessment for a ditch under the drainage act, stated that plaintiff knew of the construction of the ditch, but failed to state that he knew of the assessment, it was held not good.—*Troyer v. Dyar*, 102 Ind. 306, 1 N. E. 728.

[l] (*Sup.* 1886)

As against collateral attack, the court will presume that the interest in a company's right of way was properly described in the petition for assessments of benefits growing out of the establishment of a ditch; and, as the law provides for notice to all whose lands or interest therein are thus described, the court must further presume that proper notice was given.—*Indianapolis & C. Gravel Road Co. v. State ex rel. Flack*, 4 N. E. 316, 105 Ind. 37.

[m] (*Sup.* 1886)

The statute respecting proceedings before the board of commissioners and referring to appeals from the decisions of the boards relating to the construction of drainage ditches authorizes the circuit court to remand a case arising under the ditch law.—*Sunier v. Miller*, 4 N. E. 807, 105 Ind. 303.

Where assessments for the construction of a drainage ditch are adjudged erroneous by the circuit court on appeal, and the other findings of the board of commissioners are approved, the entire proceeding is not vacated, and all that the judgment does is to annul the assessment.—*Id.*

In a drainage proceeding, the landowner cannot, by a suit for an injunction, have a review of the assessment of benefits and damages. Questions respecting the assessment of benefits and damages must be litigated in the commissioners' court, or on appeal.—*Id.*

[n] (*Sup.* 1886)

Although reviewers modify the assessments and allotments for building a ditch as ordered

by the court, by taking from one and adding to another, one who is in no way affected thereby cannot complain.—*Young v. Sellers*, 106 Ind. 101, 5 N. E. 686.

Drainage proceedings cannot be attacked collaterally for mere irregularities.—*Id.*

[o] (*Sup.* 1887)

An assessment made by the court in drainage proceedings is conclusively established, as against a collateral attack, by the judgment in the proceedings; hence, if the assessment is against a township, the township trustee has no discretion in the matter, but must pay it.—*State ex rel. Harrall v. Thompson*, 109 Ind. 533, 10 N. E. 305.

[p] (*Sup.* 1887)

Under the act of 1883, giving township trustees authority to repair drains, the authority conferred on the circuit court on appeal to determine the "cost of such repairs and the removal of obstructions" includes the authority to determine whether the assessment which the appeal assails was made to defray the cost of the repairs and removal of obstructions.—*Weaver v. Templin*, 14 N. E. 600, 113 Ind. 298.

[q] (*Sup.* 1888)

Failure of a surveyor to give notice of an assessment for the repair of a public ditch, as required by law, is ground for an injunction; but his failure to make out a certified copy of the assessment is not, such failure not invalidating his proceedings.—*Davis v. Lake Shore & M. S. R. Co.*, 114 Ind. 364, 16 N. E. 639.

[r] (*Sup.* 1888)

One who has not appealed from the assessment of benefits under the statute allowing an appeal to the circuit court cannot bring separate suit in equity for relief from such assessments.—*Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12.

[s] (*Sup.* 1888)

Drainage Act 1885, § 10, providing that, on appeal from an assessment made by a surveyor for the repair of a ditch, the only questions tried shall be the cost of the repair and the amount to be assessed on appellant's land, does not prevent an issue being raised as to disqualification of the surveyor by reason of personal interest or relationship.—*Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50.

Under Act 1885, § 10, owners in severalty of lands assessed may appeal separately.—*Id.*

[t] (*Sup.* 1889)

Under the provision of Drainage Act, § 10 (Laws 1885, p. 141), relative to repairs, that on appeal "the only question tried shall be to determine the costs of such repairs, and what amount thereof should be assessed against the appellant's lands," the question as to whether appellant's lands are subject to any assessment for the repairs may be inquired into.—*Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20.

[u] (Sup. 1891)

Under Elliott's Supp. St. 1889, § 1193, providing that the county surveyor shall clear out and keep in repair ditches to their full dimensions, as required by the original specifications, and shall certify the costs to the county auditor, to be assessed on the lands benefited, and that on appeal to the circuit court the only question to be tried shall be the cost of such repairs and the amount to be assessed against appellant's land, the circuit court can hear evidence showing that the ditch was not repaired on the line designated in the original specifications, but on a different one.—Taylor v. Brown, 127 Ind. 293, 26 N. E. 822.

[uu] (Sup. 1891)

Where a railroad company, whose right of way crosses a previously established public ditch several times, fills it up in some places, and restores it to its full size and usefulness, by constructing it along its right of way a certain distance, and the county surveyor, under Drainage Act 1885, § 10 (Elliott's Supp. § 1193), authorizing him to clean out and restore ditches, and assess the cost against the land originally assessed for the construction of the ditch, cleaned out the ditch, and assessed a portion of the expense against the company, the only remedy of the latter is by appeal, provided for by the statute, and an injunction will not lie to restrain the collection thereof, unless it be affirmatively shown that the acts of the surveyor are not merely erroneous, but absolutely void.—Terre Haute & L. R. Co. v. Soice, 128 Ind. 105, 27 N. E. 429.

[v] (Sup. 1891)

Under Elliott's Supp. St. 1889, § 1193, providing that, after the construction of a drain, the county surveyor shall keep the same in repair, assessing the cost upon lands adjudged to be benefited, and that upon appeal "the only question tried shall be to determine the costs of such repairs, and what amount thereof should be assessed against the appellant's lands," the question whether such lands are subject to any assessment may be inquired into.—Goff v. McGee, 128 Ind. 394, 27 N. E. 754.

[vv] (Sup. 1892)

Though the laws provide that ditch assessments shall be made by the county surveyor, and appeals therefrom prosecuted against him, the county only is financially interested in the collection of the assessment, and is entitled to defend in the name of the county surveyor, or to employ attorneys to appear for the county surveyor and resist the appeal.—Stingley v. Nichols, Shepard & Co., 131 Ind. 214, 30 N. E. 34.

A county surveyor cleaned out a public ditch and its arm, and warrants were drawn on the county treasurer to pay therefor. An assessment was afterwards made on the landowners along the ditch to reimburse the county, from which assessment they appealed. The ap-

peal bonds were made payable to the county surveyor, instead of the deputy surveyor, who made the assessment. The lands assessed were not described therein, nor was it stated whether the repairs were to the main ditch or its arm. Held immaterial.—Id.

[w] (Sup. 1892)

On appeal to the circuit court from assessments levied by the county surveyor for the repair of a ditch, appellants cannot escape liability on the ground that no additional assessments had been levied against other landowners, who had permitted their cattle to obstruct the ditch, where appellants made no effort to prove the additional cost of removing such obstruction so as to enable the court to adjust the assessments.—Scott v. Stringley, 132 Ind. 378, 31 N. E. 953.

Where assessments levied for repairs on drainage ditches are less than the amounts actually paid for the repairs, the supreme court, on appeal, will presume, in the absence of evidence to the contrary, and in favor of the decision of the lower court sustaining the assessments, that appellant's lands were not assessed in an amount greater than their just proportion for such repairs.—Id.

[ww] (App. 1895)

Under Rev. St. 1894, § 5631, providing that one aggrieved at a drainage assessment may appeal by filing an appeal bond; that the clerk shall then issue a notice to the county surveyor, who shall file with such clerk a copy of the record of the assessment, and the notices thereof; and that these shall be all the pleadings necessary on such appeal,—one appealing from an assessment need not file a complaint.—Romack v. Hobbs, 13 Ind. App. 138, 41 N. E. 391.

Under Rev. St. 1894, § 5631, providing that, on an appeal by one aggrieved at an assessment for the repair of a ditch, the only question triable shall be the costs of such repair, and what amount thereof should be assessed against appellant's lands, it is error, on such appeal, to declare the whole assessment void because the repairs made the ditch larger than the original specification required.—Id.

[x] (Sup. 1896)

A judgment of the circuit court, confirming an assessment of benefits in a ditch proceeding, cannot be attacked in a collateral action to enjoin collection of a portion of such assessment.—Duncan v. Lankford, 145 Ind. 145, 44 N. E. 12.

[xx] To quiet one's title as against a purchaser at a sale to enforce a drainage assessment, who, by reason of his purchase, was subrogated in part to the state's lien, one must tender the amount of the purchaser's lien.—(Sup. 1896) Reed v. Kalfsbeck, 45 N. E. 476, 46 N. E. 466, 147 Ind. 148; (1897) Id., 46 N. E. 466, 147 Ind. 148.

[y] (Sup. 1897)

A motion in a drainage proceeding to set aside a judgment entered on the report of the commissioners assessing benefits, on the ground that no notice was given to the moving parties, must show that the judgment record does not state facts giving jurisdiction of their persons, as such recitals would be conclusive in a collateral proceeding, and the circuit court is presumed to have had jurisdiction.—*Long v. Ruch*, 47 N. E. 156, 148 Ind. 74.

[yy] (App. 1904)

Burns' Ann. St. 1901, § 5657, provides, in relation to public ditches, that, if a ditch is located in the bed of a private ditch already or partially constructed, the viewers shall make an estimate of the number of yards of earth already excavated, and the cost of the same, and deduct the same from the assessment thereon. *Held*, that the board of county commissioners has no authority, after the viewers' report has been filed and confirmed, to make an order allowing a credit because of the utilization of a previously constructed private ditch.—*Tolin v. Jones*, 71 N. E. 678, 33 Ind. App. 423.

[z] (Sup. 1910)

Under Burns' Ann. St. 1908, § 6143, providing that the order of the court approving and confirming the assessments, and declaring the proposed work of drainage established shall be final and conclusive, unless an appeal therefrom be taken and an appeal bond be filed within 30 days, a motion for a new trial is allowable.—*Smith v. Biesaida*, 90 N. E. 1009.

Under Burns' Ann. St. 1908, § 6143, the time for appealing and filing the bond does not begin to run until the date of overruling of a motion for new trial, and the court on overruling such motion may fix a time not exceeding 30 days from that date within which the bond may be filed.—*Id.*

[zz] (Sup. 1910)

Under the drainage act (Laws 1907, c. 252), providing that "the order of the court \* \* \* confirming the assessment and declaring the proposed work of drainage established shall be final and conclusive, unless an appeal therefrom to the Supreme Court be taken and an appeal bond filed within 30 days," a motion to quash the notice and service in drainage proceedings for defects therein must be made within 30 days from the confirmation of the assessment.—*Shaum v. Harrington*, 91 N. E. 226.

Burns' Ann. St. 1908, § 405, authorizing courts in civil cases to allow parties to file pleadings after the time limited therefor, to relieve from judgments taken through mistake, inadvertence, surprise, or excusable neglect, and to supply any omission in the proceedings on motion or complaint, has no application to drainage proceedings.—*Id.*

The court has no authority to vacate on motion a judgment in drainage proceedings confirming the establishment of a drain and the assessment therefor.—*Id.*

A landowner having failed to appeal from the final order establishing a drain within the 30 days provided by Laws 1907, c. 252, the time cannot be extended by afterward resorting to a motion to vacate the order and appeal from the ruling thereon.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 81, 83-87;  
30 CENT. DIG. Judgm. §§ 82, 941, 950.

See, also, 14 Cyc. pp. 1064-1066.

### § 83. Reassessment or additional assessment.

[a] (Sup. 1872)

A double assessment may be corrected by a reassessment; and it will not be necessary to make an entirely new assessment, but only so far as may be necessary to correct mistakes.—*Etchison Ditching Ass'n v. Hillis*, 40 Ind. 408.

[b] (Sup. 1886)

The drainage act of March 9, 1875, forbids the assessment of parties under certain circumstances the second time for drainage of the same land.—*Hardy v. McKinney*, 8 N. E. 232, 107 Ind. 364.

[c] (Sup. 1890)

Drainage proceedings instituted under Act April 6, 1885, being under control of the court until the work is completed according to the plans and specifications on file, the court, where the original assessment proves insufficient, on due petition and notice, may refer the matter to the commissioners for the purpose of a reassessment.—*Rogers v. Voorhees*, 124 Ind. 469, 24 N. E. 374.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 76-81.

See, also, 14 Cyc. p. 1062.

### § 84. Lien.

Collateral attack on judgment enforcing, see JUDGMENT, § 479.

Default decree in proceedings to foreclose as res judicata, see JUDGMENT, § 735.

Deprivation of property without due process of law, see CONSTITUTIONAL LAW, § 290.

Effect of sale of land for state taxes, see TAXATION, § 733.

Superiority of tax title to lien of part owner of land redeeming from sale for ditch assessment, see TAXATION, § 784.

[a] (Sup. 1873)

From the date of filing an assessment under the draining law in the recorder's office, it is a lien on the land assessed.—*Chase v. Arctic Ditchers*, 43 Ind. 74.

[b] (Sup. 1885)

A mortgage executed by a person not a party to and having no notice of drainage proceedings before the approval of the assessments by the court will take precedence thereof, even though on approval the lien is made by Act March 8, 1883, to relate back to the filing of the petition.—*Cook v. State*, 101 Ind. 446.

[c] (*Sup.* 1885)

Under 1 Rev. St. 1876, p. 431, § 12, providing that if any of the persons interested in the opening and construction of a proposed drainage ditch or work shall fail to procure the excavation or construction thereof, or that portion set off and apportioned to them, respectively, by the viewers or reviewers in the manner and time specified, it shall be the duty of the county auditor to let such work at public sale to the lowest and best responsible bidder, and take a bond payable to the person or persons for whom such work shall be let for the faithful performance of the work, and on completion thereof, and acceptance by the board, the auditor shall issue a certificate to the persons doing the work for the sum due them, and shall enter the amount of the certificate on a tax duplicate against the tract or lot benefited, and the amount so entered shall be collected by the treasurer of such county as other taxes, the fact that the land sought to be taxed for such work was misdescribed on the tax duplicate was no defense to the liability of the owner and did not defeat the lien thereon of the ditch certificate; the land being clearly liable for its proportionate share of the construction of the ditch.—*Baker v. Clem*, 26 N. E. 215, 102 Ind. 109.

[d] (*Sup.* 1886)

When allotments of work on ditches are apportioned to land, and are not performed by the owner, and are let to another who performs the work and thereby acquires the right to have the cost assessed against the land upon the tax duplicate, the lien thereby acquired upon the land accrues to the state as well as to the one doing the work. Hence, if the land is sold for taxes, but the deed is ineffectual for some reason to convey title, the purchaser acquires the lien of the state for the purpose of reimbursing himself for the purchase price, the same as if the sale were for state and county taxes.—*Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 509.

[e] (*Sup.* 1889)

Drainage Act March 7, 1883, which merely provides that the assessments for construction of ditches shall be a lien on the lands benefited, from the date of filing the commissioner's report, does not make such lien superior to a prior mortgage.—*State ex rel. Ely v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144.

[f] (*Sup.* 1889)

Acts 1883, p. 179, § 5, makes the assessments for the construction of a drainage ditch liens from the date at which the petition was filed and one purchasing land assessed subsequent to the filing of the petition is charged with constructive notice of the liens.—*Chaney v. State ex rel. Ely*, 21 N. E. 45, 118 Ind. 494.

[g] (*Sup.* 1890)

When lands are mentioned in a petition for a drain, the assessment of such lands, approved and confirmed by the court, as provided by the

act of 1883, becomes a lien on such lands from the date of the filing of the petition; hence it does not affect the validity of such lien that subsequently the commissioner charged with the construction of the work did not make out the notice required by Act 1883, § 5, as soon as possible after his appointment.—*Kennedy v. State ex rel. Dorsett*, 124 Ind. 239, 24 N. E. 748.

[h] (*Sup.* 1890)

Where, by reason of defects in the proceedings, a sale was held to be ineffectual to convey title, the court, under Rev. St. § 6488, properly declared a lien upon the lands in favor of the purchaser for the amount paid at the sale, and the amount of taxes subsequently paid, with statutory interest and penalties, and ordered the land to be sold for the collection thereof.—*Cullen v. Strauz*, 124 Ind. 340, 24 N. E. 883.

[i] (*Sup.* 1891)

The foreclosure of a tax lien on land upon which a ditch assessment has been made does not extinguish the lien of such assessment, where the persons who are beneficially interested in the ditch are not made parties to the foreclosure.—*McCullum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725.

[j] (*Sup.* 1892)

The lien of a drainage assessment is subordinate to the lien of a pre-existing mortgage.—*Killian v. Andrews*, 30 N. E. 700, 130 Ind. 579.

[k] (*Sup.* 1892)

Under Act March 9, 1875 (Acts 1875, p. 97), providing that assessments for the construction of ditches should be placed on the tax duplicate and collected as "other taxes," but not providing that they should have the lien of taxes, a mortgage executed prior to such assessments takes precedence over them.—*Pierce v. Aetna Life Ins. Co.*, 131 Ind. 284, 31 N. E. 68.

[l] (*Sup.* 1893)

Under Rev. St. § 4278, providing that the amount of an assessment for the construction of a ditch shall be a lien on the land so assessed from the time of filing the petition for the construction of the ditch, such lien does not take precedence over the lien created by a mortgage executed prior to the filing of the petition, and the mortgagor, upon the foreclosure of the mortgage, acquired title free from such ditch lien. *Cook v. State*, 101 Ind. 446; *State ex rel. Ely v. Aetna Life Ins. Co.*, 20 N. E. 144, 117 Ind. 251; *Pierce v. Aetna Life Ins. Co.*, 131 Ind. 284, 31 N. E. 68,—followed.—*State ex rel. Vawter v. Loveless*, 133 Ind. 600, 33 N. E. 622.

[m] (*Sup.* 1893)

Where, in proceedings to enforce a ditch assessment, the land was erroneously described, a purchaser under the foreclosure proceedings was entitled to be subrogated to the rights of the lienholder.—*Klinger v. Lemler*, 34 N. E. 698, 135 Ind. 77.



[n] (App. 1893)

Elliott, Supp. §§ 1207, 1208, create a lien on the land, enforceable by action, for the expenses of the trustee in cleaning out and repairing a ditch on the owner's failure to do so.—Daggy v. Ball, 7 Ind. App. 64, 34 N. E. 246.

[o] (App. 1895)

Under Rev. St. 1894, § 5638, providing that on failure of a landowner to perform his allotment of work on the repair of a public ditch, the township trustee shall perform the work, and shall certify the costs to the county auditor, "who shall place the same on the tax duplicate as other taxes," the claim becomes a lien on its entry on the tax duplicate, though not expressly so declared by statute.—Beatty v. Pruden, 13 Ind. App. 507, 41 N. E. 961.

[p] (Sup. 1896)

A purchaser at a sale to enforce the state's lien for a drainage assessment is, in case the sale is invalid, subrogated to the lien of the state to the extent of the amount thereof discharged by the money paid by him.—Reed v. Kalfsbeck, 45 N. E. 476, 46 N. E. 466, 147 Ind. 148.

[q] (App. 1897)

The lien of a drainage assessment is created by the judgment confirming the report of the commissioners, and not by filing the notice of the assessment.—Hoefgen v. State ex rel. Brown, 17 Ind. App. 537, 47 N. E. 28.

[r] (App. 1907)

The lien of an assessment for the construction of a drainage ditch becomes fixed on the filing of the report of the commissioners, though the lien may be released by the court's action.—Pierse v. Bronnenberg, 40 Ind. App. 662, 81 N. E. 739, 82 N. E. 126.

[s] (Sup. 1910)

The Legislature may declare that an assessment lien for the construction of a drain has priority over other liens, and an assessment lien may be given priority over pre-existing mortgages, as is done by Acts 1891, c. 196 (Burns' Ann. St. 1901, §§ 5690-5717), providing for the construction of drains.—Baldwin v. Moroney, 91 N. E. 3.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, § 88.

See, also, 14 Cyc. p. 1066.

#### § 85. Payment, and recovery of assessment paid.

[a] (Sup. 1888)

Under Rev. St. 1881, § 4277, providing that a commissioner of drainage charged with the construction of a drain may require assessments made in aid of it to be paid in installments not exceeding 20 per cent. per month, at such times as he may fix, after 30 days' notice, it is no objection to the assessment that a full month does not elapse between most of the

times fixed for payment of the installments.—Hackett v. State, 113 Ind. 532, 15 N. E. 790.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, § 89.

See, also, 14 Cyc. p. 1067.

#### § 87. Collection and enforcement.

##### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 91-103.

See, also, 14 Cyc. pp. 1066-1073.

#### § 88. — In general.

[a] (Sup. 1879)

In an action by a draining association against one of its members to collect an assessment upon his lands for the benefit of the association, under 1 Rev. St. 1876, p. 424, § 21, the defendant could not set up as a defense that a complete survey of the line of works, or an estimate of its cost, had not been made before the assessment, or that a proper description and specification of the drains had not been made.—Liberty Tp. Draining Ass'n v. Brumback, 68 Ind. 93.

[b] (Sup. 1892)

An assessment made against lands for benefits resulting from the construction of a ditch under drainage proceedings is strictly in rem, and gives no right of action against landowners assessed as individuals.—Killian v. Andrews, 30 N. E. 700, 130 Ind. 579.

[c] (App. 1895)

Rev. St. 1894, relating to allotment for public ditches, provides, among other things, that the claim when placed on the tax duplicate shall be collected as other taxes, and section 5638 provides that the trustee may recover the outlay and his own fees in an action before a justice of the peace of the township in which the owner resides. *Held*, that the statute intended to create a personal liability against every resident landowner whose property had been benefited by the improvement.—Beatty v. Pruden, 41 N. E. 961, 13 Ind. App. 507.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Drains, §§ 91, 92.

#### § 89. — Summary remedies.

[a] (Sup. 1878)

Drainage Act March 11, 1867, § 9, provides that an applicant shall have a personal judgment against the owners of the lands assessed, if residents, as well as a lien on the land. *Held*, that this provision was not changed by Act March 9, 1875.—Bate v. Sheets, 64 Ind. 200.

[b] (Sup. 1882)

A complaint to enforce a ditch assessment which does not aver that defendant requested the work done, or promised to pay for it, is not sufficient as a complaint in assumpsit, though it alleges that defendant acquiesced in the work.—Boatman v. Macy, 82 Ind. 490.

[c] (Sup. 1882)

Under Acts 1877, p. 156, a complaint to recover an assessment made for the construction of a ditch must show that the appraisers made "a division of the costs of the construction of the ditch among the owners of the lands affected."—*Bogart v. Castor*, 87 Ind. 244.

[d] (Sup. 1882)

A sale without appraisal upon a judgment for the enforcement of a ditch assessment is illegal, under Rev. St. 1881, § 732, providing that no property shall be sold on execution for less than two-thirds of its appraised value, except when otherwise provided by law.—*Cox v. Bird*, 88 Ind. 142.

[e] (Sup. 1883)

Where a lien for drain assessments does not attach until a certain notice has been recorded, a complaint to enforce the lien which fails to aver the recording of the notice is defective.—*Scott v. State*, 89 Ind. 368.

[f] (Sup. 1884)

In an action for a ditch assessment a complaint which alleges "that three days had elapsed since the filing of the report, and, no remonstrance being filed, the court approved said report and appointed the relator as ditch commissioner to construct," sufficiently shows that the assessment for the ditch was approved by the court.—*Albertson v. State ex rel. Wells*, 95 Ind. 370; *Id.*, 432.

A complaint to collect assessments for the construction of a ditch need not allege that the petition was verified, that notice had been given, that the commissioners were not of kin to the parties interested, nor set out a copy of the judgment approving the ditch commissioners' report.—*Id.*

[g] (Sup. 1884)

Under Rev. St. 1881, § 4277, providing that assessments for drainage may be required to be paid "after 30 days' notice thereof, to be given by personal notice, \* \* \* or by one publication in a newspaper, \* \* \* stating when and where such payment shall be made," proof that "a notice was sent by mail," without evidence of its contents, or when or where it was sent, was insufficient.—*Hayes v. State ex rel. Murray*, 96 Ind. 284.

[h] (Sup. 1884)

A complaint to collect a ditch assessment founded upon the assessment by the appraisers, and not upon the judgment establishing the work, is not bad because it does not show that the county board adjudged that the contemplated work was of public utility.—*Smith v. Clifford*, 99 Ind. 113.

[i] (Sup. 1885)

Under Acts 1883, p. 179, amending Rev. St. 1881, §§ 4273-4284, and providing that "the filing of the report of the commissioners locating the drain and fixing the amount of

assessments shall be deemed notice of the pendency of the proceedings to all persons whose lands are named therein, \* \* \* and the amount of the assessment, as made or approved and confirmed by the court, shall be a lien upon the lands so assessed," held, that a complaint to collect an assessment must exhibit an approved report of the commissioners.—*Moss v. State ex rel. Mann*, 101 Ind. 321.

[j] (Sup. 1885)

A default in a suit to enforce a ditch assessment does not admit the amount claimed to be due, under Rev. St. 1881, p. 355, § 383.—*McKinney v. State*, 101 Ind. 355.

Under Acts 1883, p. 178, § 4, providing that the drainage commissioner "may, if he so determine, bring suit in the name of the state of Indiana for his use \* \* \* to enforce" an assessment lien, the complaint need not aver that the commissioner had determined to bring suit, and was not invalidated by the fact that the commissioner was frequently referred to as "relator."—*Id.*

[k] Where a copy of the county surveyor's certificate of acceptance of a ditching job was placed upon the tax duplicate, as provided in Rev. St. 1881, § 4305, in August, such tax became delinquent on the failure of the landowner to pay it on or before the first Monday of November, as required by section 6426; and it was the duty of those charged with its collection to cause the land to be sold to enforce payment.—(Sup. 1890) *Cullen v. Strausz*, 124 Ind. 340, 24 N. E. 883; (1891) *White v. McGrew*, 129 Ind. 83, 28 N. E. 322.

[l] (Sup. 1893)

Though in proceedings to enforce a ditch assessment the land in question was erroneously described, nevertheless the proceedings created a lien against the land, such as could have been enforced by a proper proceeding.—*Klinger v. Lemler*, 34 N. E. 698, 135 Ind. 77.

[m] (App. 1897)

In a proceeding to enforce a lien for assessments, under Drainage Act April 6, 1885, a complaint which states that the commissioners, pursuant to law, reported their action, and found that defendant's property, describing it, would be benefited in a certain sum, which report was confirmed by the court, and the work ordered and done, and the lien established, and refers to all the proceedings in the assessment case, sufficiently sets out the assessment.—*Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28.

Conceding an averment of completion according to plans and specifications necessary, when the work has in fact been done, allegations that the drain has been completed and accepted by the county surveyor and the commissioner, and that the contractors fully completed the work are sufficient.—*Id.*

[a] (**App.** 1905)

In proceedings to foreclose a drainage lien on lands, it will be presumed that the proceeding for the construction of the drain was valid.—*Ellison v. Branstrator*, 34 Ind. App. 410, 73 N. E. 146.

Where decree for the sale of lands of different owners has been rendered in proceedings to foreclose a drainage lien, and sale made thereunder of the land, one of the owners has the right to redeem from the sale, and he has a lien upon the lands not owned by him for the proportionate part of such costs as against the owners thereof and junior incumbrancers.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 91-101.

See, also, 14 Cyc. pp. 1067-1071.

#### § 90. — Actions.

Admissions, as evidence, see **EVIDENCE**, § 207.  
Filing written instruments with pleading, see **PLEADING**, § 308.

Necessity for verification of pleading, see **PLEADING**, § 291.

Pleading matters of fact or conclusions, see **PLEADING**, § 8.

Scope and extent of demurrer to pleading, see **PLEADING**, § 203.

Written instruments or copies thereof filed with pleading, see **PLEADING**, § 308.

[a] (**Sup.** 1860)

In an action to recover drainage assessments, the record on appeal not showing the facts of the case, the appellate court presumed that public health, and not the benefit of farms, was the object to be attained, and therefore held that a case of public, and not private, benefit was made out.—*Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63.

[aa] A complaint in an action to enforce a ditch assessment by a draining association need not set out the articles of association.—(*Sup.* 1861) *Eel River Draining Ass'n v. Topp*, 16 Ind. 242; (1870) *Jordan Ditching & Draining Ass'n v. Wagoner*, 33 Ind. 50; (1872) *Etchison Ditching Ass'n v. Busenback*, 39 Ind. 362.

[b] (**Sup.** 1861)

In a complaint to recover an assessment for benefit to land by drainage, and for sale of the land, it is not necessary to aver completion of the drain; for such completion is not a condition precedent to the right to collect assessments.—*Eel River Draining Ass'n v. Topp*, 16 Ind. 242.

In suit for the sale of land, brought to recover an assessment for benefit to the land by drainage, the report of the assessors is only prima facie evidence as to the amount of benefit and quantity of land benefited, into both of which the court may have to inquire further at the trial.—*Id.*

[bb] A complaint to enforce a ditch assessment is incomplete, unless it sets forth, or is

accompanied by, a copy of the assessment.—(*Sup.* 1862) *West v. Bullskin Prairie Ditching Co.*, 19 Ind. 458; (1875) *Alkire v. Timmons Ditching Co.*, 51 Ind. 71; (1875) *Alspaugh v. Ben Franklin Draining Ass'n*, Id. 271; (1878) *Jerrell v. Etchison Ditching Ass'n*, 62 Ind. 200; (1878) *Busenback v. Same*, Id. 314; (1882) *Smith v. Clifford*, 83 Ind. 520; (1884) *Crist v. State ex rel. Whitmore*, 97 Ind. 389; (1884) *Roberts v. Same*, Id. 399; (1884) *Neiman v. State ex rel. Dickey*, 98 Ind. 58; (1884) *State v. Turvey*, 99 Ind. 599; (1884) *State ex rel. Mayfield v. Myers*, 100 Ind. 487.

[c] (**Sup.** 1862)

The complaint in a suit to enforce the lien of an assessment by a ditching corporation under section 16 of the act for the construction of drains and levees is bad, unless it describes the ditch to be constructed by declaring its termini, direction, etc.—*West v. Bullskin Prairie Ditching Co.*, 19 Ind. 458.

[cc] (**Sup.** 1866)

In a suit by a ditching company to recover an assessment made upon land improved by a ditch constructed through it, it is not necessary that an estimate of the final cost of completing the work contemplated should be made before suit is brought.—*Delawter v. Sand Creek Ditching Co.*, 26 Ind. 407.

Under the act authorizing the organization of corporations to construct levees and drains, requiring the courts in counties where their articles are filed to judicially notice their existence, the appellate court will presume that the action of the lower court in the determination of this question was correct.—*Id.*

[d] (**Sup.** 1868)

Proof that an assessment made for the purposes of a draining association, though otherwise valid, is too high, will not, under the statute, defeat the action. It will only go to mitigate or reduce the amount to the actual benefits.—*New Eel River Draining Ass'n v. Durbin*, 30 Ind. 173.

In a suit by a draining association upon an assessment, the defendant, not being a member of the association, and not having contracted with it as a corporation, may plead null tiel corporation at the date of the assessment.—*Id.*

[dd] (**Sup.** 1868)

In a suit by a drainage company to enforce the payment of an assessment of benefits to certain lands, the fact that the right of way has not been procured will not bar the suit.—*Large v. Keen's Creek Draining Co.*, 30 Ind. 263, 95 Am. Dec. 696.

In an action by a drainage association to enforce payment of assessments against a person not a member of the association, the complaint need not in terms state the use for which the money was required, provided it is evident from the whole complaint that it is for the construction of the drain referred to in the

director's order of payment set out in the complaint.—Id.

In such suit the complaint must describe the commencement, course, and termination of the drain.—Id.

[e] (Sup. 1869)

In a complaint to enforce assessment by a ditching association attempted to be organized under the act to authorize the construction of levees and drains, the description of the drain, the construction of which was alleged as the object of the association, was so defective that it was impossible to determine therefrom whether it was the intention to construct one or two drains or what lands would be affected thereby. *Held*, that the complaint was bad on demurrer.—*West v. Bullskin Prairie Ditching Co.*, 32 Ind. 138.

[ee] (Sup. 1870)

In a suit by a ditching association to enforce a lien for benefits assessed against the defendants' land, the complaint or assessment need not describe the ditch in any manner.—*Jordan Ditching & Draining Ass'n v. Wagoner*, 33 Ind. 50.

[f] (Sup. 1870)

In a suit to enforce an assessment on lands, under the ditching law, an exhibit annexed to the complaint, and referred to therein as the appraisers' schedule of assessment, consisting merely of a number of columns containing separately the name of the defendant, the description of the lands, the value thereof, and the total assessment, etc., but without either the signature or the affidavit which the statute requires, is insufficient, and renders the complaint demurrable.—*Thompson v. Honey Creek Draining Co.*, 33 Ind. 268.

[ff] (Sup. 1871)

Where, in an action for recovery of an assessment levied by a draining company against the owner of lands benefited by a ditch made by such company, the answer set up a prior assessment, a reply alleging that defendant requested and assented to the making of the new assessment, and that the company expended money in making the drain on the faith of defendant's expressing satisfaction with such new assessment, and standing by while the improvement was made, was good.—*Nevins & O. C. Tp. Draining Co. v. Alkire*, 36 Ind. 189.

In an action to recover an assessment levied by a draining company against the owner of lands benefited by a ditch made by such company, an answer alleging an appraisalment and assessment of the benefits prior to that upon which the assessment sued on was levied, but not alleging that the appraisers were sworn to such former assessment, or that notice was given to the owners of the lands at the time of making such assessment, did not allege a valid prior assessment.—Id.

[fff] In an action to enforce ditch assessments by a ditching association, since the articles of association are neither necessarily nor properly made part of the complaint, demurrer does not lie as to matters in the articles of association.—(Sup. 1871) *Excelsior Draining Co. v. Brown*, 38 Ind. 384; (1872) *Etchison Ditching Ass'n v. Busenback*, 39 Ind. 362; (1872) *Same v. Hillis*, 40 Ind. 408; (1872) *Same v. Jewell*, 41 Ind. 143; (1873) *Dobson v. Duck Pond Ditching Ass'n*, 42 Ind. 312.

[g] (Sup. 1872)

A complaint to enforce a lien for the assessment of benefits, under the act entitled "An act to enable the owners of wet lands to drain and reclaim them," etc. (3 Gav. & H. St. p. 228), need not allege that at the time when application was made to the board of commissioners for the appointment of appraisers there had been an estimate made of the cost of the proposed ditch, nor the amount of the said estimate.—*Slusser v. Ranson*, 39 Ind. 506.

[gg] (Sup. 1872)

Under Act June 12, 1852 (1 Gav. & H. St. p. 303) § 5, recording the articles of association of a draining company in the recorder's office of the county where the work is contemplated is a condition precedent to the investment of corporate powers upon the company, hence must be averred in a complaint to enforce an assessment.—*McIntire v. McLain Ditching Ass'n*, 40 Ind. 104.

[ggg] (Sup. 1872)

A complaint to enforce the collection of a ditching assessment must allege a survey and estimate of the cost, and show that the estimated cost will not exceed the aggregate amount of the assessments.—*Etchison Ditching Ass'n v. Hillis*, 40 Ind. 408.

Before the collection of an assessment can be enforced, the corporation must show a valid and legal assessment.—Id.

Although it may appear by the complaint that there had been a previous assessment, the complaint will not be bad for that reason. As the statute authorizes a reassessment, it will be presumed, in the absence of a showing to the contrary, that it has been properly made.—Id.

[h] (Sup. 1872)

In an action to enforce the collection of an assessment for the construction of a drain, if it is a valid objection that a bond has not been filed with the clerk of the circuit court by the association, it is remedied by filing one on the trial.—*Dobson v. Duck Pond Ditching Ass'n*, 42 Ind. 312.

[hh] (Sup. 1873)

A complaint by a draining association organized under Act May 22, 1869, to enforce the collection of a ditching assessment, must allege a survey and estimate of the cost, and show that the estimated cost will not exceed the aggregate amount of the assessments.—*Smith v. Duck Pond Ditching Ass'n*, 45 Ind. 94.

[hhh] A complaint to enforce the collection of a ditch assessment on land under Act March 11, 1867 (3 Gav. & H. St. p. 228), must aver that the appraisers by whom the assessment was made were not of kin to any of the parties, and were disinterested freeholders of the county.—(Sup. 1875) *Combs v. Etter*, 49 Ind. 535; (1878) *Seits v. Sinel*, 62 Ind. 253; (1879) *Laughlin v. Ayres*, 66 Ind. 445.

• [I] (Sup. 1875)

An answer of general denial puts in issue all the material matters presented by special paragraphs of answer alleging that the plaintiff could have drained all his wet lands without affecting the lands of the defendant, and that his whole proceedings were unnecessary for the drainage of his lands; or that the petition did not specify the character of the work; or that the appraisers did not, before the commencement of the action, make out a list of all the lands liable to be affected by the work; or that the petition did not describe and specify all the lands affected, with the names of the owners thereof.—*Bate v. Sheets*, 50 Ind. 329.

In an action against B. to recover drainage assessments, it is no defense that more land of S. is assessed for the drain than was mentioned in the petition for the drain, since such fact is in B.'s favor, tending to reduce the assessment against his land.—Id.

In a complaint upon an assessment against lands of the defendant to construct a ditch, under Act March 11, 1867 (3 Gav. & H. St. p. 228), it is not necessary to show the specifications on which the assessment was made, the interest of the plaintiff in the work, the description of the defendant's lands sought to be charged, and his ownership of the land, there being filed with the complaint a proper petition and the proceedings of the board of county commissioners thereon.—Id.

In an action to recover the amount of an assessment against lands for the construction of a ditch, the evidence will be insufficient where it does not show the application to the county commissioners, the appointment of the appraisers, the notice of the meeting of the appraisers, or any demand of the amount of the assessment by the plaintiff of the defendant.—Id.

[II] (Sup. 1875)

In an action to recover the amount of an assessment on land made by a draining association to aid in the construction of a ditch, an answer alleging that, after the appraisal of benefits was made and returned by the appraisers, it was changed by altering assessments from less sums to larger ones, and from larger to less, without any meeting of the appraisers to equalize the same, or any advertisement for such meeting, but not showing that the defendant was injured by what was done, is bad on demurrer.—*Bannister v. Grassy Fork Ditching Ass'n*, 52 Ind. 178; *Rich v. Same*, Id. 187.

In an action by a draining association to enforce payment of an assessment on the land

of one not a member of the association to aid in the construction of a ditch, under the law of 1869, it is not necessary that the complaint should describe the beginning, course, and termination of the ditch, or show that the company divided the work into sections before its actual construction was begun, or that with such complaint should be filed the notice of the assessment, or the notice required to be posted in the recorder's office by the secretary of the company, or the order of the board of directors fixing the per cent. of the assessment which each person assessed shall pay.—Id.

[III] (Sup. 1876)

A complaint to collect from defendant the amount assessed on his land for draining purposes must show that the benefit assessed on the lands affected by the drain is not exceeded by the estimated cost of the construction, but need not aver the amount of either.—*Smith v. Duck Pond Ditching Ass'n*, 54 Ind. 235.

[I] (Sup. 1877)

A complaint by a draining company to collect an assessment must show that the directors have executed the bond required by Act March 10, 1873 (1 Rev. St. 1876, p. 418), for the faithful application of assessments collected.—*Cooper v. Arctic Ditchers*, 56 Ind. 233.

A complaint by a draining company claiming incorporation under the act of 1869, to collect an assessment, must aver that the main line of the plaintiff's contemplated drain does not exceed sixteen miles in length; for all companies incorporated under the act of 1869 whose lines exceeded that length were abolished by the repeal of the act in 1872.—Id.

[j] (Sup. 1877)

A complaint by a draining company against the owner of certain real estate to collect a certain sum, as benefits alleged to have resulted from the construction of a certain drain, alleging that the defendant was the owner of such real estate "upon which the plaintiff had a lien for the payment of assessments of benefits resulting to said real estate from the construction of" said drain; that the plaintiff was about to enforce such lien when, upon the promise of the defendant that, if suit to enforce was not brought, he would pay the same on demand, the plaintiff waived its right to such lien; and that, upon demand for the amount due, the defendant had refused to pay the same,—is sufficient on demurrer, but may, on motion, be ordered to be made more definite and certain.—*Hull v. Brearley Run Draining Ass'n*, 58 Ind. 520.

[jij] In an action on a drainage assessment, it was necessary that a copy of the assessment should be filed with the complaint.—(Sup. 1878) *Beck v. Tolen*, 62 Ind. 469; (1886) *Pickering v. State*, 6 N. E. 611, 106 Ind. 228.

[k] (Sup. 1878)

A proceeding to construct a drain was begun under Act March 11, 1867, and while the proceedings were pending Act March 9, 1875,

was passed. An action was brought to recover an assessment made under the former act. *Held* that in accordance with section 4 of Act March 9, 1875, the evidence in such action should prove that the board of commissioners found that the proposed drain was necessary and conducive to public health, convenience, or welfare, or of public benefit or utility.—*Bate v. Sheets*, 64 Ind. 200.

[kk] (Sup. 1879)

In an action by a draining association against one of its members to collect an assessment against his lands, it is not necessary to set out the organization of the association, nor a description of the drain, nor the survey nor the estimated costs.—*Liberty Tp. Draining Ass'n v. Brumback*, 68 Ind. 93.

[kkk] (Sup. 1880)

Under 1 Rev. St. 1876, p. 424, providing that, on appeal from the assessment of the benefits, a member of a drainage association shall not be allowed to make any objection to the assessment, except such as relate to the amount of same, the evidence in an action to collect such assessments from persons alleged to be members of the association is properly restricted to such as relate to the amount of the assessment, and, though defendant alleges and proves that she is not a member, plaintiff is not thereby entitled to prove the public utility of the work and the benefit which defendant's lands would receive.—*Liberty Tp. Drainage Ass'n v. Watkins*, 72 Ind. 459.

[l] (Sup. 1882)

In an action to enforce the collection of a special assessment for the construction of a ditch, an allegation that the treasurer of the county had demanded the tax, claimed it to be valid, and that he had endeavored to collect it, but which does not allege the particular acts of the treasurer constituting effort to collect the assessment, is insufficient.—*Anthony v. Sturgis*, 86 Ind. 479.

[ll] (Sup. 1882)

In a suit to enforce a ditch assessment, the plaintiff cannot recover for work and labor done, though the labor was performed in the construction of the ditch for which the assessment was made.—*Boatman v. Macy*, 82 Ind. 490.

[lll] In an action to collect a ditch assessment, the complaint need not allege that notice of the petition for the drain was given.—(Sup. 1883) *Albertson v. State ex rel. Wells*, 95 Ind. 370; (1885) *Jackson v. Dyer*, 104 Ind. 516, 3 N. E. 863. CONTRA, see (1885) *Jackson v. State*, 103 Ind. 250, 2 N. E. 742.

[m] (Sup. 1884)

Under Rev. St. 1881, § 4280, providing that the collection of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court affirming and establishing the assessments

of benefits and injuries, an averment, in a complaint in an action to collect assessments, but three days had elapsed since the filing of the report of the commissioners, and, no remonstrance being filed to the same, the court approved the report, and ordered the ditch constructed, and ordered the relator as ditch commissioner to construct the same, was sufficient on demurrer.—*Albertson v. State ex rel. Wells*, 95 Ind. 370, 432.

[mm] (Sup. 1884)

A complaint to enforce the lien of an assessment for drainage must aver that a petition for the construction of the work was filed, that notice of the intention to present the petition was given, that the petition was referred to the commissioners of drainage, the action they took thereon, and in other respects a complete compliance with the statute.—*Shaw v. State*, 97 Ind. 23; *Wishmier v. Same*, Id. 100.

[mmm] (Sup. 1884)

Under Rev. St. 1881, § 4277, providing that the commissioner charged with the execution of the work may bring suit for his use as commissioner of drainage in a court of competent jurisdiction to enforce a lien on any land for the amount assessed by him, etc., a complaint by a commissioner of drainage to enforce a lien on land for an assessment against it is insufficient where it contains no facts showing that a petition for the construction of the work was filed as required by laws that in the proceedings to construct the work the court found that notice of the intention to present the petition had been given but that such petition was not referred by the court to the commissioners of drainage, nor that action was taken thereon by such commissioners.—*Shaw v. State*, 97 Ind. 23; *Buchanan v. Rader*, Id. 605.

[n] (Sup. 1884)

The complaint in an action to collect a ditch assessment sufficiently shows in what county the proposed ditch or the lands to be affected by its construction are situated, where the termini of the ditch and the section, township, and range of the lands affected thereby are definitely stated.—*Smith v. Clifford*, 99 Ind. 113.

[nn] (Sup. 1885)

A complaint for the collection of a ditch assessment must aver that due notice of the proceedings to establish the ditch was given, or it will be bad on demurrer; and it is not sufficient to set forth such notice, with the proceedings, as an exhibit.—*Jackson v. State*, 103 Ind. 250, 2 N. E. 742.

[nnn] (Sup. 1885)

The holder of a certificate for work performed on a ditch under Drainage Act Sept. 19, 1881, cannot maintain an action to enforce the statutory lien against the land to which the work was allotted, but the amount called for by such certificate can be collected only by the auditor placing it upon the tax duplicate and

collecting it as taxes are collected.—*Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401.

[o] (*Sup.* 1886)

In an action on a ditch assessment, under Act April 8, 1881, if the complaint alleges that notice was given of the proceedings to establish the drain, it need not also allege that the defendant was named in the petition for the establishment of the drain.—*Jackson v. State*, 104 Ind. 516, 3 N. E. 863.

[oo] (*Sup.* 1886)

A personal action cannot be maintained by a contractor for the recovery of money due him under a surveyor's certificate, given him in pursuance of Rev. St. 1881, § 4305, for work done under the drainage act. The claim must be charged and collected as a tax.—*Lockwood v. Ferguson*, 105 Ind. 380, 5 N. E. 3; *Same v. Chambers*, 105 Ind. 600, 5 N. E. 4.

[ooo] (*Sup.* 1886)

An action to collect an assessment for a drain by enforcing a lien upon the land must be brought in the county where the land lies.—*Dowden v. State*, 106 Ind. 157, 6 N. E. 136.

[p] (*Sup.* 1886)

Where the complaint in an action to collect a drainage assessment shows a petition, a notice, and an assessment, the person against whose land an assessment was levied will be presumed to have been a party to the proceedings.—*Pickering v. State*, 106 Ind. 228, 6 N. E. 611.

Where a complaint to collect a ditch assessment shows a petition, some notice, a judgment on the petition, and an assessment levied against the complaining property owner, it is sufficient to compel him to answer.—*Id.*

[pp] (*Sup.* 1886)

Where a complaint to collect a drainage assessment shows that the construction of a drain was referred to a certain named drainage commissioner, and another party appears as plaintiff without any allegation showing his authority, it is bad on demurrer for want of sufficient facts.—*Frazer v. State*, 106 Ind. 471, 7 N. E. 203.

In an action to enforce a drainage assessment, the presumption is that the lands assessed are situated in the county in which the proceeding is had.—*Id.*

[ppp] (*Sup.* 1886)

The burden is on the party asserting a lien for a ditch assessment to show a substantial compliance with the statute as to notice to landowner of the drain proceedings.—*Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569.

[q] (*Sup.* 1886)

A complaint to enforce a drainage assessment which shows the filing of a petition and the giving of notice followed by proceedings resulting in a judgment establishing the drain, and confirming the assessment, is good on demurrer, although it does not aver that the defendant's lands were described in the petition,

or the notice such in all respects as the law requires.—*Deegan v. State*, 108 Ind. 155, 9 N. E. 148.

[qq] Under the drainage act (Acts 1883, p. 179), all that a complaint to collect a drainage assessment need allege is (1) that some notice of the filing of the petition was given; (2) the filing of such petition; (3) the report of the commissioners of the benefits and damages assessed; (4) the approval and confirmation of such report by the court; and (5) the assessment or a copy thereof; and a complaint alleging these facts, being good on demurrer, is, a fortiori, good when questioned for the first time in the supreme court.—(*Sup.* 1887) *Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774; (1889) *Chaney v. State ex rel. Ely*, 118 Ind. 494, 21 N. E. 45.

[qqq] (*Sup.* 1887)

Damages caused by failure to complete a ditch as established are not proper subjects of counterclaim or set-off in a suit to collect a drainage assessment and enforce the statutory lien therefor.—*Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774.

[r] (*Sup.* 1887)

By section 2 of the act amendatory of the drainage act, the petitioner is required to file his petition for original proceedings in the circuit court; and that court is directed to set the cause on the docket, if it appears that a certain notice, as prescribed in the section, has been given. *Held*, that this notice was jurisdictional, and that it must appear that this notice was given, and must be alleged in a petition in a collateral proceeding to collect the assessments declared in the original proceedings, and enforce the statutory lien thereby created.—*Kennedy v. State*, 109 Ind. 236, 9 N. E. 778; *Whittaker v. Same*, 109 Ind. 600, 9 N. E. 916.

[rr] (*Sup.* 1887)

In an action to collect a drainage assessment, a copy of the entire report of the commissioners, with all assessments, need not be made a part of the complaint, but so much as affects the land of the defendant is sufficient, and other matters in the complaint will be treated as surplusage.—*Wishmier v. State ex rel. Wilcox*, 110 Ind. 523, 11 N. E. 201.

[rrr] (*Sup.* 1888)

In an action to enforce assessments under drainage proceedings, it is sufficient if it appears from the language of the complaint that notice of the filing of the petition for the drain was given and adjudged sufficient by the court before it took action on the petition.—*Hackett v. State*, 113 Ind. 532, 15 N. E. 799.

[s] (*Sup.* 1888)

A complaint by a drainage commissioner to enforce an assessment need not aver that the persons upon whose petition the assessment was made were landowners, as under Rev. St. 1881, § 4280, the judgment of the court making the assessment is conclusive of the regular-

ity of the proceedings in that respect. Nor need such a complaint allege that the assessments were made from time to time, as, the petition and notice being held sufficient in the original proceeding, an assessment made thereunder is valid and enforceable.—*Johnson v. State*, 116 Ind. 374, 19 N. E. 208.

[ss] (Sup. 1889)

In a suit by a drainage commissioner to enforce payment of assessments made for the construction of a drain against real estate owned by defendants, the report and assessments of benefits made by the commissioners of drainage, and the entry made by plaintiff as drainage commissioner, showing the assessments made for the construction of the drain, were admissible in evidence to prove the amount due.—*McKinney v. State ex rel. Nixon*, 117 Ind. 26, 10 N. E. 613.

[sss] (Sup. 1889)

Act March 7, 1883, providing that assessments for the construction of ditches shall be a lien on the land benefited, does not create any personal liability against the landowners, but can be enforced against the land only.—*State ex rel. Ely v. Aetna Life Ins. Co.*, 117 Ind. 251, 20 N. E. 144.

[t] (Sup. 1889)

An answer, in an action to collect a drainage assessment, which alleges the filing of the petition containing a description of defendant's land, that the petition was docketed as an action pending, and that defendant was not named in the petition and had no notice and at no time appeared, is bad for failing to allege when defendant became the owner of the land, in the absence of an averment that he held, the legal title when the petition was filed, or in the absence of an averment that his grantor did not receive proper notice.—*Chaney v. State, ex rel. Ely*, 21 N. E. 45, 118 Ind. 404.

Where the answer in an action to collect a drainage assessment contained no averment that the grantor of the defendant, who held the legal title when the petition was filed and notice given, was not a party and did not have notice, the presumption must be that the grantor was a party and did have notice, and defendant, having purchased during the pendency of the proceedings, is bound by the notice given to his grantor.—*Id.*

[tt] (Sup. 1889)

In an action to enforce the collection of a drainage assessment under the drainage act of 1883, a copy of the report of the commissioners making the assessment, in so far as it relates to the land sought to be charged, and its approval by the court, must be filed with the complaint.—*Ross v. State*, 119 Ind. 90, 21 N. E. 345.

[ttt] (Sup. 1890)

Under the drainage act of 1883 (Elliott's Supp. § 1180), creating a lien on the confirmation by the court of the assessments as made

in the report of the drainage commissioner, it is not necessary to the maintenance of an action to collect drainage assessments that the percentage of assessments made by the commissioner having the work in charge should have been reported to and confirmed by the court, nor that notice should have been filed in the recorder's office of the establishment of the work by the court, and of the several assessments against the several tracts of land.—*Louisville, N. A. & C. R. Co. v. State*, 122 Ind. 443, 24 N. E. 350.

Where assessments for drainage are made a lien upon a railroad, under the laws of this state, but a sale of the body of the railroad is not authorized, a decree cannot be made for the sale of the portion of the road assessed.—*Id.*

In the absence of a request for a more formal statement, it cannot be objected that the court failed to state its conclusions of law on the facts found in an action to collect drainage assessments, where it decreed that plaintiff recover the amount, and that the assessment be foreclosed.—*Id.*

[u] (Sup. 1890)

In an action to collect a drainage assessment, a complaint which sets out the filing of the petition, the reference to commissioners, and the approval and confirmation of their report, sufficiently shows jurisdiction of the subject-matter, though it does not specially aver that the petition was verified.—*Kennedy v. State ex rel. Dorsett*, 124 Ind. 239, 24 N. E. 748.

[uu] (Sup. 1890)

In an action to enforce an assessment for drainage (Rev. St. 1881, c. 49), the court has jurisdiction to adjudicate upon the merits of the controversy, and may, at the instance of the commissioner, reform an erroneous and insufficient description of the land in the original petition for the drain.—*State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. 331.

[uuu] (Sup. 1891)

While an order of the county commissioners establishing a ditch would be absolutely void as to those owners of lands affected thereby who have not been notified as required by the statute (1 Rev. St. 1876, p. 428, § 2), and could be attacked collaterally, yet a complaint averring that no notice was given to the then owner of the land, as shown by the records in the recorder's office, is insufficient.—*McCullum v. Uhl*, 128 Ind. 304, 27 N. E. 152.

[v] (Sup. 1892)

The drainage act of March 8, 1883, provides for an assessment by the drainage commissioners as a body, and also provides in section 4 for suit by a single commissioner to enforce the assessment "assessed by him." *Held*, that the proper construction was that there should be two assessments, the first by the commissioners as a body, fixing a maximum amount collectible from each landowner, and the second by the single commissioner in charge of the work, assessing the actual amount found



to be necessary, not exceeding the maximum, upon each landowner. By thus harmonizing the two provisions of the statute, the power of the single commissioner to sue for assessments made by him is upheld.—*Smith v. State*, 131 Ind. 441, 31 N. E. 353.

[vv] (Supp. 1892)

Where a complaint to enforce an assessment for drainage clearly shows the land intended to be benefited, and shows the mistake in the assessment describing it, the mistake may be corrected.—*Luzadder v. State*, 31 N. E. 453, 131 Ind. 598; *Martin v. Same*, 31 N. E. 453, 132 Ind. 600.

[vvv] (App. 1893)

*Elliott*, Supp. § 1207, requires every landowner, in September and October of each year, to clean out and repair the ditches allotted to his land. Section 1208 requires the township trustee, as soon after the 1st day of November of each year as is practicable, to examine the ditches in his township, and provides that, if he finds any landowner in default, such trustee shall at once cause the ditch to be repaired, and that he may enforce the expense thereof against the land. *Held* that, as it is the absolute duty of the landowner to annually clear out and repair the ditches allotted to his land, in an action by the trustee to recover the expense of making such repairs the complaint need not allege that defendant's "allotment of the ditch for repairs was out of repair or needed cleaning," though section 1203 provides that, "when it may be shown to the satisfaction of the trustee that there is no necessity for an annual cleaning, he shall not enforce the penalties for nonperformance."—*Daggy v. Ball*, 7 Ind. App. 64, 34 N. E. 246.

[w] (App. 1893)

The right of way of a railroad company cannot be sold to pay the lien of a drainage assessment, but a personal judgment for such assessment may be rendered against the company.—*Louisville, N. A. & C. R. Co. v. State ex rel. Ward*, 8 Ind. App. 377, 35 N. E. 916.

[ww] (App. 1894)

In an action to foreclose the lien of a ditch assessment, the original petition filed, and the order-book entries in the proceedings for the location and construction of the ditch, are admissible.—*Voss v. State ex rel. Stalker*, 9 Ind. App. 294, 36 N. E. 654.

[www] (App. 1895)

Under Rev. St. 1894, § 5638 (*Elliott's Supp.* § 1208), providing that where a person fails to perform his drainage allotment the township trustee shall do it, and may bring suit for the expense, he may not only sue in his own name, but in the name of the township.—*Hoch v. Monroe Tp. of Pulaski County*, 12 Ind. App. 595, 40 N. E. 925.

Under Act Feb. 26, 1891 (Acts 1891, p. 47), providing that it shall be the duty of the township trustee, before August 1st, to fix a time

within which each allotment on every ditch shall be completed by the person whose duty it is to perform it, and that it shall be the duty of such person, on receipt of the notice, to perform his allotment within the time there fixed, and on failure to do so the trustee shall proceed to have it done, recovery can be had of such person for the work done by the trustee only in case such time was fixed, and notice thereof given, and the complaint in an action therefor must allege these facts.—*Id.*

[x] (App. 1895)

In an action by a township trustee to enforce a lien for repairing an allotment of a drain, under Rev. St. 1894, § 5638 et seq., defendant alleged that the trustee extended the time within which he might clean out his allotment; that he cleaned it out in accordance with the extension; and that "the same was accepted by said trustee as completed." *Held*, that the answer was demurrable, it not showing that the trustee accepted the work as completed before he had the work done out of which arose the lien in suit.—*Norris v. Tice*, 13 Ind. App. 17, 39 N. E. 1046.

[xx] (App. 1895)

The record of the allotment of a public ditch is not the basis of the lien, and a copy of it need not be filed as an exhibit with the complaint in an action to enforce the lien for the assessment.—*Beatty v. Pruden*, 41 N. E. 961, 13 Ind. App. 507.

A complaint in an action by a township trustee for reimbursement from an abutting owner for repairing a public drain, brought under Rev. St. 1894, § 5632 et seq., which makes it the duty of such trustee to see that such ditches are kept in repair, is sufficient if it describes the drain, and alleges that it was a public drain, and was duly established and opened as such.—*Id.*

In an action to enforce a lien for the cost of the repair of a public ditch, the complaint must allege that the cost was certified to the county auditor, and by him entered on the tax duplicate, as required by Rev. St. 1894, § 5638.—*Id.*

[xxx] (Supp. 1896)

Though tenants in common acquired their interests in such a manner as to create a fiduciary relation between them, the purchase of an outstanding claim by one is not void as to his cotenant, nor does such interest vest, by operation of law, in the latter; his right to share in the benefits of the purchase being dependent on his having elected, within a reasonable time, to bear his portion of the expense necessarily incurred in the acquisition of the claim.—*Stevens v. Reynolds*, 41 N. E. 931, 143 Ind. 467, 52 Am. St. Rep. 422.

[xxxx] (Supp. 1896)

A contractor holding a surveyor's certificate for work done under the drainage act of 1881 (Rev. St. 1894, § 5673 et seq.; Rev. St. 1881, § 4303 et seq.) cannot sue the landowner for the amount due, but must file a copy of his certificate with the auditor, who is required to

place it upon the tax duplicate, to be collected as other taxes are collected.—*State v. Bever*, 41 N. E. 802, 143 Ind. 488.

[7] (App. 1886)

In an action to recover drainage assessments, for repairs to a ditch, if it is shown that the officer had jurisdiction to make repairs, the burden is on the landowner to prove that the assessments were not in proportion to the benefits received, or that there was error in their computation, or that they were excessive.—*Morrow v. Geeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59.

[77] (App. 1897)

The commissioner may enforce a lien for drainage assessments, though the work has not been completed.—*Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28.

The complaint in an action to enforce a drainage assessment lien is sufficient without an averment that the drain was made according to the plans and specifications.—*Id.*

The complaint in an action to enforce a drainage assessment lien is sufficient without an averment that all the amount of benefits assessed against the defendant's land is needed to pay the expenses and costs of construction.—*Id.*

[777] (Sup. 1908)

Under *Burns' Rev. St. 1901*, § 5675, providing that ditch assessments are to be collected in the same manner as other taxes, grantees under deeds issued on sales based on ditch certificates are, on a failure of their deeds, entitled to liens in the same manner as the holders of other void tax deeds.—*Skelton v. Sharp*, 67 N. E. 535, 161 Ind. 383.

[i] (Sup. 1904)

Where the description of defendant's land sought to be assessed for the construction of a public drain was erroneous, the court had jurisdiction to correct such assessment after the filing and recording of the drainage commissioner's report in a suit to recover benefits assessed.—*Ager v. State ex rel. Heaston*, 70 N. E. 808, 162 Ind. 538.

[ii] (App. 1904)

An action to collect a ditch assessment must be brought in the county where the land affected is situated, though the entire ditch is located in another county in which proceedings for its establishment were commenced.—*State v. Elliott*, 70 N. E. 397, 32 Ind. App. 605.

[iii] (App. 1906)

Where lands are sold at sheriff's sale for drainage assessments, and the purchaser accepts the redemption money, as such, from the clerk, to whom it was paid by the redemptioner, the question of the right of redemption cannot be raised in a proceeding by the redemptioner against alleged owners to enforce against their interests the lien for the amount paid by him.—*Ellison v. Branstrator*, 73 N. E. 146, 34 Ind. App. 410.

A complaint against the alleged owners of interests in land to enforce the lien of drainage assessments thereon paid by the plaintiff to redeem his and the interest of others therein from sale on execution, levied to enforce payment of a judgment for such assessments obtained by the drainage commissioner, is insufficient, in the absence of allegation that defendants had or claimed an unfounded interest in the land, or one junior or inferior to that of the plaintiff; no money judgment being sought.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. DRAINS, §§ 91–101, 103.

See, also, 14 Cyc. pp. 1067–1071.

§ 91. — Remedies for wrongful enforcement.

Pleading matters of fact or conclusion, see PLEADING, § 8.

[a] (Sup. 1882)

In an action to set aside a sheriff's sale and conveyance of land made upon a decree of the circuit court for the enforcement of a ditch assessment, it was not necessary to make the plaintiffs in the judgment parties defendant. The owner of the alleged invalid deed was the only necessary party.—*Cox v. Bird*, 88 Ind. 142.

A sale of land to enforce a ditch assessment is voidable if made without appraisalment; hence, in an action to set aside such sale, it will be presumed that the order of sale did not direct a sale without appraisalment.—*Id.*

[b] (Sup. 1884)

The fact that a bond accompanying a petition for the construction of a ditch was signed as surety by one of the county commissioners did not constitute ground for an injunction restraining the collection of the ditch assessment, in the absence of any showing that the irregularity caused an injury to plaintiff.—*Cauldwell v. Curry*, 93 Ind. 363.

The fact that a contract for the construction of a ditch was not performed within the time limited by the order of the board of commissioners was not sufficient to entitle a landowner to an injunction restraining the collection of an assessment.—*Id.*

[c] (Sup. 1884)

Where, in a proceeding for the collection of an assessment on complainant's land under certain proceedings before the board of commissioners to establish a ditch, it appeared that his lands were assessed in the name of another person, and it was alleged that the lands were in no way benefited by the ditch, and that complainant had no notice of the proceedings in time to appear before the county board to assert his rights, he was entitled to relief by injunction.—*Vizzard v. Taylor*, 97 Ind. 90.

[d] (Sup. 1884)

Where separate and distinct parcels of land are subjected to an assessment for establishing a ditch, the causes of action to enjoin the as-

assessment are separate and distinct, and are not the subject of a joint action.—*Jones v. Cardwell*, 98 Ind. 331.

[e] (*Sup.* 1885)

Seven years after the county board had made an order establishing a ditch, under Act March 9, 1875 (1 Rev. St. 1876, p. 428), plaintiff filed his complaint to enjoin the sale of his land on account of a ditch certificate issued by the auditor for work done thereon. The complaint did not show when plaintiff became the owner of the land, and averred that the viewer's report, on which the order was made, did not apportion any benefit to the plaintiff or his land, nor assess any benefit to it, nor in any manner mention plaintiff or his land. *Held*, that the averments were insufficient to show the invalidity of the certificate, it being presumed that the ditch was constructed over plaintiff's land, and that the viewers awarded to its then owner, perhaps by an erroneous description of the land, his proportionate share of the cost of the ditch.—*Baker v. Clem*, 102 Ind. 109, 26 N. E. 215.

The act providing in section 12 that, if any one shall fail to construct the portion of the ditch set off to him, the work shall be let, and, on completion and acceptance thereof by the auditor, he shall issue a certificate to the one doing the work for the amount due, and shall enter the amount on the tax duplicate against the land, the invalidity of the certificate is not shown by an averment that the one to whom it was issued did not complete the work, it not appearing that he had not done work to the full amount of the certificate.—*Id.*

[f] (*Sup.* 1886)

If drainage proceedings are void, an injunction will issue; but, where the proceedings are not void, a suit for injunction cannot be maintained, no matter how erroneous the proceedings may be.—*Sunier v. Miller*, 4 N. E. 867, 105 Ind. 393.

[g] (*Sup.* 1886)

Injunction will not lie against the auditor of a county to restrain him from selling the shares of ditch work set apart and apportioned to plaintiff's lands, unless the proceedings by the county board and the trial court, which resulted in the assessment of the plaintiff's lands and the allotment of the work, are void upon the face of the record.—*Young v. Sellers*, 5 N. E. 686, 106 Ind. 101.

[h] (*Sup.* 1887)

In the absence of any showing that parties whose lands had been assessed for repair of a drain were not given notice of such assessments in time to appeal, they cannot enjoin the collection thereof for informalities and irregularities in the proceedings of the township trustee, there being no grounds shown for equitable relief.—*Trimble v. McGee*, 112 Ind. 307, 14 N. E. 83; *Wisman v. Same*, 112 Ind. 600, 14 N. E. 375.

[i] (*Sup.* 1888)

In an action to restrain an assessment for repairing a public ditch, plaintiff, a railway corporation, cannot question the legality of the original construction of the ditch as being wrongfully located on its right of way, having acquiesced therein.—*Davis v. Lake Shore & M. S. R. Co.*, 114 Ind. 364, 16 N. E. 639.

An action to enjoin the sale of plaintiff's property under a void assessment for the repair of a public ditch is properly brought against the county treasurer, without making the county a party defendant.—*Id.*

[j] (*Sup.* 1892)

In an action to enjoin the collection of an assessment for repairs of a ditch, an attack on the original proceedings for the construction of the ditch is clearly collateral, and an allegation of the complaint that the ditch was never properly constructed or repaired must be disregarded.—*Millikan v. Wall*, 32 N. E. 828, 133 Ind. 51.

Where plaintiffs allege that a ditch has been constructed, of no benefit to them, and the cost thereof assessed on their land by the surveyor, and the proceedings authorizing the construction of the ditch have been declared void, but this was not done until the time had expired for an appeal from the assessment, and it does not appear that plaintiffs knew of the worthlessness of the ditch, or were in law chargeable with knowledge of that fact in time to appeal, they may maintain an action for an injunction to restrain the collection of the taxes.—*Id.*

[k] (*Sup.* 1896)

It being declared by statute the duty of the person to whom is allotted a portion of a drain to clean and repair to do the work between August 1st and November 1st, and provided that, on his failure to do it, it shall be done at his expense by the township trustee, it will be presumed, on suit to enjoin collection of expense of cleaning and repairing, no facts being stated to the contrary, that work done on the ditch in July was to complete repairs for the preceding year, left undone by the person to whom it was allotted.—*Zimmerman v. Savage*, 145 Ind. 124, 44 N. E. 252.

The allegation of a complaint, in an action to enjoin collection of the expense of cleaning and repairing the portion of a ditch allotted to plaintiff, that plaintiff and those acting under authority of law cleaned such portion of the ditch, to the depth originally established, to and including the year 1892, does not state facts showing that the township trustee had no legal right to clean it, at plaintiff's expense, for the year 1892, it not being alleged that he cleaned it to the acceptance of the trustee, as it was necessary to do; and the presumption being that any further work done by the trustee was pursuant to his decision, in good faith, in the exercise of his discretion, which is final, that it had not been properly cleaned to the depth and

width of the original plans and specifications.—Id.

In an action to enjoin a county treasurer from collecting the expense of cleaning out and repairing complainant's allotment of a public ditch, the presumption is that the county surveyor gave the notice prescribed by Rev. St. 1894, §§ 5634, 5635, to the complainant and all other parties.—Id.

[l] (Sup. 1898)

A landowner cannot, by a suit to enjoin the collection of an assessment, obtain a review of the assessment of benefits against his land by the construction of a public ditch.—*Studabaker v. Studabaker*, 51 N. E. 933, 152 Ind. 89.

If proceedings in regard to the construction of a public ditch are absolutely void, a suit to enjoin the collection of an assessment for its construction is maintainable, but, if not void, plaintiff cannot prevail, no matter how erroneous or irregular the proceedings were.—Id.

The collection of an assessment for the construction of a public ditch will not be enjoined on the ground that the work on the ditch is not completed according to its plans and specifications.—Id.

[m] (Sup. 1900)

Where property assessed for the expenses of a drainage ditch has received all the benefits of the ditch, the assessment will not be enjoined merely for an irregularity in the acceptance of the work by the surveyor.—*Sarber v. Rankin*, 56 N. E. 225, 154 Ind. 236.

An allegation in a complaint in a suit to enjoin an assessment for benefits of a drainage ditch, that plaintiff had no notice of the time set for the hearing of the petition, without stating that the constructive notice provided for by statute was not given, is insufficient.—Id.

An assessment for benefits of a drainage ditch will not be enjoined on the ground that the drain was not completed according to contract, since, if the owner of the property assessed was damaged thereby, he had a legal remedy by appearing and controverting the report of the surveyor accepting the work.—Id.

[n] (App. 1908)

Several parties whose lands were specially assessed for the repair of a drain, who claimed that the assessment was void because their lands were not liable to contribute for the repairs in question, were entitled to join as complainants in a suit to restrain the enforcement of the assessment, under *Burns' Ann. St. 1908*, § 270, providing that those parties who are united in interest must be joined as plaintiffs or defendants, etc., and section 263, declaring that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be so joined.—*Quick v. Templin*, 42 Ind. App. 151, 85 N. E. 121.

[o] (App. 1909)

An action to enjoin a drainage assessment against land, being a collateral proceeding, cannot be maintained unless the assessment is void.—*Pumphrey v. Hollis*, 43 Ind. App. 319, 87 N. E. 255.

The fact that others over whom the court had no jurisdiction were assessed for drains would not entitle another owner to restrain the assessment against his own land, if the court had jurisdiction over him.—Id.

[p] (App. 1909)

A landowner may not enjoin a sale of his land for a ditch assessment on the ground that the letting of a contract for the construction of an allotment was void without paying or tendering the amount of the lien.—*Smith v. Pyle*, 88 N. E. 733.

A complaint to enjoin a sale of land for a ditch assessment on the ground that the letting of the contract for the construction of an allotment was void in that the notice given designated the auditor's office as the place of letting instead of at the door of the courthouse as required by statute, was demurrable where it was not alleged that complainants were in any manner deceived or injured; that any persons who would have bid for such contract were thereby prevented from bidding; that there was any fraud or collusion on the part of any one; that the contract as let was not reasonable; and it was not alleged that it was let at the auditor's office.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drains, §§ 53, 82, 102, 103; 30 CENT. DIG. Judgm. § 860.

See, also, 14 Cyc. pp. 1072, 1073.

## DRAMSHOPS.

See INTOXICATING LIQUORS.

## DRAWBARS.

At private crossings over railroad tracks, liability for killing stock, see RAILROADS, § 413.

## DRAWBRIDGES.

See NAVIGABLE WATERS, § 20.

## DRAWING JURORS.

See JURY, §§ 66, 78, 79.

## DRIFTWOOD.

Rights of adjoining proprietors to driftwood carried by overflow of stream, see WATERS AND WATER COURSES, § 95.

## DRIVEWAY.

Injuries from defects in, see NEGLIGENCE, § 32.

## DRIVERS' PASSES.

Persons riding on, as passengers, see CARRIERS, § 242.

## DROWNING.

See—

Accident within terms of insurance policy. INSURANCE, §§ 440, 461.

Contributory negligence of child drowned at bathing place in park. NEGLIGENCE, § 85.

# DRUGGISTS.

### Scope-Note.

[INCLUDES regulation of the manufacture, dispensing, and sale of medicines and other drugs by apothecaries or others, and liability for injuries from negligence therein.

[EXCLUDES regulation of manufacture and sale of intoxicants (see *Intoxicating Liquors*) or poisons (see *Poisons*), and offense of adulterating drugs (see *Adulteration*). For complete list of matters excluded, see cross-references, post.]

### Analysis.

- § 2. Statutory and municipal regulation.
- § 3. Registration, certificate, or license.
- § 7. Liabilities to persons purchasing or using articles sold or dispensed.
- § 9. — Negligence.
- § 10. Actions for damages.

### Cross-References.

See—

Prohibition of intoxicating ingredients in medicinal preparations. INTOXICATING LIQUORS, § 130.

Sale of liquor without license. INTOXICATING LIQUORS, § 152.

## § 2. Statutory and municipal regulation.

Act authorizing boards of health to prepare regulations as unauthorized delegation of legislative power, see CONSTITUTIONAL LAW, § 66.

Subjects and titles of acts, see STATUTES, § 107.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRUG. § 1.

See, also, 14 Cyc. p. 1079.

## § 3. Registration, certificate, or license.

Publication of statute as time of taking effect, see STATUTES, § 257.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRUG. §§ 2, 3.

See, also, 14 Cyc. pp. 1079-1083.

## § 7. Liabilities to persons purchasing or using articles sold or dispensed.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. DRUG. §§ 7, 8.

See, also, 14 Cyc. pp. 1084-1087.

## § 9. — Negligence.

[a] (App. 1895)

The highest degree of care known to practical men must be used to prevent injuries from the use of drugs and poisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care required must be commensurate with the danger involved. The skill employed must correspond with that superior knowledge of the business which the law requires.—Howes v. Rose, 42 N. E. 303, 13 Ind. App. 674, 53 Am. St. Rep. 251.

Where a wholesale druggist delivers to a retail druggist a package of tartaric acid, labeled "Rochelle Salts," and the retail druggist breaks the package, and sells a part of the contents as Rochelle salts, the latter will be liable for injury resulting to the vendee from taking the drug.—Id.

[b] (App. 1907)

A druggist is held to a specially high degree of care to avoid selling a poisonous drug

as a harmless one.—*Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. DRUG. §§ 7, 8.

See, also, 14 Cyc. pp. 1085-1087; note, 21 L. R. A. 139.

**§ 10. Actions for damages.**

[a] (App. 1896)

In an action against a druggist for injury from taking a drug which he has by mistake delivered in lieu of one called for by a purchaser, actual negligence of defendant, independent of the prima facie negligence shown by the fact of delivery of a wrong drug, must be shown.—*Howes v. Rose*, 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251.

[b] (App. 1907)

Evidence in an action against a druggist for negligently selling acetanilide for phosphate of soda held to justify a finding that the package from which plaintiff took a poisonous dose was the same package sold by defendant's clerk as phosphate of soda.—*Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600.

Where a customer calls upon a druggist for a harmless remedy, the delivery of a poison-

ous drug by mistake by the druggist or his clerk is prima facie negligence placing the burden on him to show the mistake was, in the circumstances, consistent with the exercise of due care.—*Id.*

In an action against a druggist for negligently selling acetanilide for phosphate of soda, it was not necessary that the complaint set forth the circumstances tending to show negligence; it being sufficient to allege the act was negligently done.—*Id.*

Where the complaint in an action against a druggist for selling acetanilide, instead of phosphate of soda, alleges negligence generally and gives the details of the transaction, evidence may be sufficient to establish negligence, although it does not establish the particular facts averred in the complaint.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. DRUG. § 9.

See also, 14 Cyc. pp. 1086, 1087; note, 101 Am. St. Rep. 765.

**DRUMMERS.**

Requirement of license tax as regulation of commerce, see **COMMERCE**, § 66.

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# DRUNKARDS.

## Scope-Note.

[INCLUDES persons affected by intoxication not merely temporary in its effects; their rights and disabilities in general; custody and protection of their persons and property, and legal proceedings affecting them; and the offense of drunkenness, either habitual or occasional.

[EXCLUDES disability from temporary intoxication (see *Contracts; Deeds; Criminal Law*; and other specific heads); testamentary capacity (see *Wills*); sale, etc., of liquors to drunkards or intoxicated persons (see *Intoxicating Liquors*); asylums for inebriates (see *Asylums*); and divorce for drunkenness (see *Divorce*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 2. Inquisitions.
- § 3. Guardians or committees.
- § 6. Contracts.
- § 7. Torts.
- § 8. Actions.
- § 9. Criminal drunkenness.
- § 10. — Offenses.
- § 11. — Prosecution and punishment.

## Cross-References.

See—

Death of insured while intoxicated as risk covered by policy. *INSURANCE*, §§ 443, 464.  
Ejection of intoxicated persons from trains. *CARRIERS*, §§ 360, 366.  
Habitual drunkenness affecting limitation of actions. *LIMITATION OF ACTIONS*, § 74.  
Evidence of in mitigation of damages for death. *DEATH*, § 91.  
Ground for removal of administrator. *EXECUTORS AND ADMINISTRATORS*, § 35.  
Ground for removal of officer. *OFFICERS*, § 66.  
Intoxication affecting validity of assignment. *ASSIGNMENTS*, § 62.  
Affecting validity of contracts. *CONTRACTS*, §§ 92, 100.  
As breach of warranty in insurance policy. *INSURANCE*, § 341.  
As contributory negligence—  
    *MUNICIPAL CORPORATIONS*, § 802.  
    *NEGLIGENCE*, § 88.  
As defense in criminal prosecutions—  
    *CRIMINAL LAW*, §§ 52-57, 774.  
    *HOMICIDE*, § 28.

Intoxication, etc.—(Cont'd).

As evidence of negligence. *RAILROADS*, § 297.  
As excuse for refusal to receive person as passenger. *CARRIERS*, § 236.  
Ground for refusal to grant liquor license. *INTOXICATING LIQUORS*, § 58.  
Of mortgagor affecting validity of mortgage. *MORTGAGES*, §§ 76, 84.  
Of witness, ground for adjournment of trial. *TRIAL*, § 26.  
Of witness, impeachment by showing. *WITNESSES*, § 336.  
Laws relating to as denial of right to enjoy, control, and dispose of property. *CONSTITUTIONAL LAW*, § 83.  
Power of city to prohibit sales to junk dealers by intoxicated persons. *MUNICIPAL CORPORATIONS*, § 616.  
Sale or gift of liquor to, civil liability. *INTOXICATING LIQUORS*, §§ 282-317.  
Criminal liability. *INTOXICATING LIQUORS*, §§ 119, 161.  
Testamentary capacity. *WILLS*, § 44.

### § 2. Inquisitions.

[a] (*Sup.* 1896)

The discharge of a guardian appointed for an habitual drunkard will be presumed to have been the result of a finding in accordance with Rev. St. 1894, § 5745 (Rev. St. 1881, § 4320), that the ward had reformed, and that, therefore, his legal disabilities then ceased.—*Makepeace v. Bronnenberg*, 45 N. E. 336, 146 Ind. 243.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drunk. §§ 2-4, 9.

See, also, 14 Cyc. pp. 1090, 1100.

### § 3. Guardians or committees.

Filing written instrument with pleading in action on bond of, see *PLEADING*, § 308.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Drunk. §§ 5, 6.

See, also, 14 Cyc. pp. 1100-1103.

### § 6. Contracts.

[a] (*Sup.* 1870)

One found by inquisition to be an habitual drunkard is thereby rendered incompetent, sub-

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sequently, to enter into a contract which will bind his estate.—*Devin v. Scott*, 34 Ind. 67.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drunk. § 7.  
See, also, 14 Cyc. pp. 1099–1106.

**§ 7. Torts.**

[a] (Sup. 1856)

A degree of mental incompetency produced by habits of intemperance which disqualifies the party from doing an act intentionally and knowingly exempts him from responsibility for the commission of a tort.—*Gates v. Meredith*, 7 Ind. 440.

**§ 8. Actions.**

Filing written instruments with pleading, see PLEADING, § 308.

[a] (Sup. 1896)

Rev. St. 1894, § 5743, gives guardians of habitual drunkards all the powers and duties of a guardian of a minor. Rev. St. 1894, § 2685, cl. 5, makes it the duty of a guardian of a minor to defend all suits against his ward, and provides that, if he does so, a guardian ad litem need not be appointed. *Held*, in ejectment by the guardian of a drunkard, that a guardian ad litem need not be appointed to defend against a cross complaint seeking to quiet cross complainant's title.—*Makepeace v. Bronnenberg*, 45 N. E. 336, 146 Ind. 243.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drunk. § 8.

**§ 9. Criminal drunkenness.**

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drunk. §§ 10–18.  
See, also, 14 Cyc. pp. 1092–1096.

**§ 10. — Offenses.**

[a] (Sup. 1876)

If a person is found in a state of intoxication at a social party held at the residence of another, he is not thereby rendered liable to prosecution for being found intoxicated in a public place.—*State v. Sowers*, 52 Ind. 311.

[b] (Sup. 1876)

Under Act March 17, 1875, § 11, making it a criminal offense to be found in a public place in a state of intoxication, a public place within the meaning of the statute is a place where all persons are entitled to be.—*State v. Waggoner*, 52 Ind. 481.

[c] (Sup. 1877)

1 Rev. St. 1876, p. 872, § 11, providing that any person of sound mind found in any public place in the state of intoxication should be deemed guilty of a misdemeanor, etc., sufficiently defines the offense of intoxication.—*Evans v. State*, 59 Ind. 563.

[d] (Sup. 1889)

Defendant being charged with violation of Rev. St. 1881, § 2091, providing that "whoever is found in any public place in a state of intoxication shall be fined," etc., it was error to charge that defendant was not guilty if under a physician's prescription he took liquor which caused him in good faith to become intoxicated in a public place.—*State v. Sevier*, 117 Ind. 338, 20 N. E. 245.

[e] (App. 1898)

A private residence, at which an ice-cream supper and a dance are given, attended by a number of people, with or without invitation, is not a public place, within *Horner's* Rev. St. 1897, § 2091, punishing intoxication at public places.—*State v. Tincher*, 51 N. E. 943, 21 Ind. App. 142.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drunk. §§ 10, 11.  
See, also, 14 Cyc. pp. 1092, 1093.

**§ 11. — Prosecution and punishment.**

[a] Under 1 Rev. St. 1876, p. 872, which prescribes a penalty for intoxication in certain cases, an indictment, alleging that defendant was found intoxicated "in a public street, highway, and sidewalk," sufficiently charges the commission of the offense in a public place.—(Sup. 1876) *State v. Waggoner*, 52 Ind. 481; (1881) *Same v. Moriarity*, 74 Ind. 103.

[b] (Sup. 1882)

An indictment under Rev. St. 1881, § 2091, making it a penal offense for a person to be found in a public place in a state of intoxication, which charges that defendant was found intoxicated in "a certain public place," without further describing the place, is insufficient.—*State v. Welch*, 88 Ind. 308.

[c] (App. 1894)

An affidavit charging one with having been found in a state of intoxication in a public place must also describe the place where the accused was found, so that the court may see that such place was a public place within the statute, and by this is meant a description not of the location of the place, but of its kind and character.—*Rosenstein v. State*, 36 N. E. 652, 9 Ind. App. 200.

An affidavit charging defendant with having been found in a state of intoxication "in a public place, to wit, in the public streets of the city of I," etc., sufficiently describes the place where defendant was found to enable the court to determine whether such place was public.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Drunk. §§ 12–18.  
See, also, 14 Cyc. pp. 1093–1096.

**DUEBILLS.**

See BILLS AND NOTES.



# DUELING.

## *Scope-Note.*

[INCLUDES fighting with weapons by previous agreement or on a previous quarrel; advising or aiding therein; sending, carrying, delivering, or accepting a challenge so to fight; provoking or inducing another to give or accept such challenge, and posting or advertising another for not fighting, or for not sending or accepting a challenge to fight such a duel; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES fighting by agreement without weapons (see *Prize Fighting*); fighting without previous agreement therefor or quarrel (see *Affray*); and killing another in a duel (see *Homicide*). For complete list of matters excluded, see cross-references, post.]

## *Cross-References.*

Ex post facto laws, see CONSTITUTIONAL LAW,  
§ 199.

### § 1. Nature and elements of offenses.

[a] (Sup. 1841)

The giving of a verbal challenge to fight a duel is an indictable offense.—State v. Perkins, 6 Blackf. 20.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Duel. § 1.

See, also, 14 Cyc. pp. 1112-1114, 1116.

## DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, §§ 251-320.

## DUES.

See—

Building and loan association stock. BUILDING AND LOAN ASSOCIATIONS, §§ 16-22.

Members of beneficial association. BENEFICIAL ASSOCIATIONS, § 13.

Of mutual benefit insurance associations.

INSURANCE, §§ 731-742, 749-754.

## DUMB PERSONS.

See—

Competency as witnesses. WITNESSES, § 43.

Mode of testifying. WITNESSES, § 220.

## DUPLICATE.

See—

Assessment rolls or lists. TAXATION, § 436.

Compensation of county auditor for. COUNTIES, § 78.

Fees of clerks of state courts for making copies and duplicates of papers. CLERKS OF COURTS, § 23.

## DUPLICITY.

See—

INDICTMENT AND INFORMATION, § 125.

Pleading—

EQUITY, § 145.

PLEADING, §§ 64, 99, 183, 196, 412.

## DURATION.

See—

PARTNERSHIP, § 61.

POWERS, § 13.

## DURESS.

See—

CANCELLATION OF INSTRUMENTS.

Confessions procured by threats. CRIMINAL LAW, § 522.

Consent to sexual intercourse obtained by. RAPE, § 11.

Excuse for crime. CRIMINAL LAW, § 38.

Pleading conclusions of law as to. PLEADING, § 8.

Plea of guilty obtained by. CRIMINAL LAW, § 273.

Recovery of payments made under. PAYMENT, § 87.

Of taxes paid under. TAXATION, § 541.

THREATS.

Affecting validity of particular classes of contracts or transactions.

See—

Assignment of insurance policy. INSURANCE, § 212.

BILLS AND NOTES, §§ 104, 477, 505.

BONDS, § 41.

CONTRACTS, § 95.

DEEDS, § 71.

MORTGAGES, §§ 79, 275.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EASEMENTS.

## *Scope-Note.*

[INCLUDES nature and incidents of privileges of proprietors of real property in lands of others, independent of ownership of the soil; creation thereof by reservation, grant, express or implied, or prescription, and use, transfer, and extinguishment thereof; rights, powers, and liabilities of proprietors of dominant and servient estates; and remedies relating thereto.

[EXCLUDES mutual rights, duties, and liabilities of proprietors of adjoining lands in general (see *Adjoining Landowners*); public easements (see *Dedication*; *Highways*; *Navigable Waters*); easements affecting particular species of property (see *Mines and Minerals*; *Party Walls*; *Waters and Water Courses*); and other specific heads). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. Creation, Existence, and Termination.**

- § 1. Nature and elements of right.
- § 3. Easements appurtenant or in gross.
- § 4. Prescription.
- § 5. — In general.
- § 6. — Mode and extent of use.
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- § 12. Express grant.
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- § 21. — In general.
- § 22. — Continuous and apparent easements, and notice.
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- § 26. Termination in general.
- § 30. Abandonment or nonuser.
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### **II. Extent of Right, Use, and Obstruction.**

- § 38. Relation between owners of dominant and servient tenements in general.
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- § 41. — By prescription.
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## II. Extent of Right, Use, and Obstruction—Continued.

- § 58. — Ways.
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#### In particular species of property.

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##### See—

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## I. CREATION, EXISTENCE, AND TERMINATION.

Application of statute of frauds to creation of easements, see **FRAUDS, STATUTE OF**, § 60.  
 Capacity of married women to grant, see **HUSBAND AND WIFE**, § 74.  
 Implied authority of agent to sell lots to authorize purchaser to use adjoining land as a private way, see **PRINCIPAL AND AGENT**, § 100.

### § 1. Nature and elements of right.

#### [a] (Sup. 1830)

The privilege of vending goods is a purely personal right not appendant to land on which the goods are sold or growing out of the same. —Taylor v. Moffatt, 2 Blackf. 304.

#### [b] (Sup. 1873)

A way is an incorporeal hereditament and consists in the right of passing over another's ground. It may arise from grant, prescription, or necessity, and is either in gross, that is attached to the person using it or appurtenant, or annexed to and passing with a conveyance of the estate. —Sanxay v. Hunger, 42 Ind. 44.

#### [c] (Sup. 1877)

One who owns the fee of lands in which another owns an easement is the owner of the servient estate, and the latter the owner of the dominant estate. —Davidson v. Nicholson, 50 Ind. 411.

#### [d] (App. 1804)

An executed parol license may become an easement imposing a servitude upon one estate in favor of another. —Knoll v. Baker, 34 Ind. App. 124, 72 N. E. 480.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Ease. §§ 1, 2, 5–7.

See, also, 14 Cyc. pp. 1139–1144.

### § 3. Easements appurtenant or in gross.

Transfer of right, see post, § 24.

#### [a] (Sup. 1873)

An easement is never presumed to be in gross, or a mere personal right, when it can be fairly construed to be appurtenant to some other estate. —Sanxay v. Hunger, 42 Ind. 44.

Ways are appurtenant when they are incident to an estate, one terminus being on the land of another, inhere in the land, concern the premises, and are essentially necessary to their enjoyment. They are of the nature of covenants running with the land, must respect the thing granted, and concern the estate conveyed. —Id.

#### [b] (Sup. 1873)

A way is appurtenant when it is incident to an estate, one terminus being on the land of the party claiming. It must inhere in the land, concern the premises, and be essentially necessary to the enjoyment. —Moore v. Crose, 43 Ind. 30.

## [c] (Sup. 1875)

An easement of light and air is not an appurtenant.—Keiper v. Klein, 51 Ind. 316.

## [d] (Sup. 1877)

An easement in the lands of another, held by one owning the fee of lands adjoining them, is appurtenant to, and runs with, the estate.—Davidson v. Nicholson, 59 Ind. 411.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. §§ 8-12.

See, also, 14 Cyc. pp. 1140, 1141.

## § 4. Prescription.

Evidence, see post, § 36.

Extent of right, see post, § 41.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. §§ 13-34.

See, also, 14 Cyc. pp. 1145-1157; note, 53 L. R. A. 900; notes, 7 Am. Dec. 62, 11 Am. Dec. 663; note, 29 Am. Rep. 309.

## § 5. — In general.

## [a] (Sup. 1881)

In an action by the owner of the dominant estate to enjoin the disturbance of an easement, it is not necessary for plaintiff to show that he had personally enjoyed the easement for 20 years.—Ross v. Thompson, 78 Ind. 90.

## [b] (Sup. 1906)

An easement by prescription consists of the adverse, exclusive, uninterrupted, and continuous use of realty under a claim of right with the knowledge and consent of the owner.—Null v. Williamson, 166 Ind. 537, 78 N. E. 76.

The 20-year statute of limitations applies to cases of easement by prescription, though formerly it did not.—Id.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. §§ 13, 20-22, 26.

See, also, 14 Cyc. pp. 1145-1154; note, 2 L. R. A. (N. S.) 976.

## § 6. — Mode and extent of use.

## [a] (Sup. 1875)

The use and enjoyment of what is claimed by prescription must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out of, which the easement prescribed for is claimed, and while such owner was able, in law, to assert and enforce his rights, and to resist such adverse claim if not well founded; and it must moreover be of something which one party could have granted to the other.—Peterson v. McCullough, 50 Ind. 35.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. §§ 14, 15, 27-33.

See, also, 14 Cyc. p. 1154.

## § 7. — Duration and continuity of use.

## [a] (Sup. 1882)

Where defendant gave plaintiff's predecessor in title permission to use a right of way over defendant's land, the use of such way even for the period of prescription did not give plaintiff's predecessor in title a title thereto.—Hill v. Hagaman, 84 Ind. 287.

## [b] (Sup. 1887)

Where a way had been used by an owner of land as appurtenant thereto under claim of title for more than 20 years and had been uninterrupted, the fact that the original claim was not well founded would not destroy the easement.—Parish v. Kaspere, 10 N. E. 109, 109 Ind. 586.

## [c] (Sup. 1890)

One who so erects and maintains his buildings that the water falling thereon, after passing through spouts to the ground, flows off his land and upon that of another, to the latter's damage, does not acquire the right to so flow the water by lapse of more than 20 years, during which complaint was frequently made of the discharge of water from the building, and the owner as frequently promised to remove the cause thereof; Rev. St. § 4321, providing that the right of way, air, light, or other easements shall not be acquired by adverse use, unless such use shall have been continued uninterruptedly for 20 years.—Conner v. Woodfill, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568.

## [d] (Sup. 1905)

A right by prescription to conduct water through a culvert under a highway, when so maintained as to impose no hindrance or expense to the public, may be acquired against the fee owner of the land underlying the highway by 20 years' adverse and uninterrupted user.—Terre Haute & I. R. Co. v. Zehner, 76 N. E. 169, 166 Ind. 149, 3 L. R. A. (N. S.) 277.

## [e] (Sup. 1909)

To gain a way by prescription, the use must be uninterrupted for 20 years or more.—Pitser v. McCreery, 172 Ind. 663, 88 N. E. 303, 89 N. E. 317.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. §§ 16-19, 27-33.

See, also, 14 Cyc. p. 1149.

## § 8. — Adverse character of use.

## [a] (Sup. 1882)

In an action for the obstruction of a private way, an instruction that, if plaintiff's predecessor in title used the way continuously, uninterruptedly, and openly with the knowledge and acquiescence of the defendant under a claim of right, the jury will be justified in finding that plaintiff's predecessor in title had acquired a permanent title to the way, was erroneous for failure to state that the claim of right should be exclusive or adverse to defendant.—Hill v. Hagaman, 84 Ind. 287.

A complaint for obstructing a way alleged that A. had a right of way through B.'s land, which he exchanged for a similar right through another portion, and used the latter continuously for more than 20 years, when plaintiff purchased and continuously used it for 15 years, when defendant obstructed. *Held* to show adverse user for more than 20 years, and not a mere use by license.—*Id.*

No use of a way under a parol license, though for more than 20 years and under a claim of right, can mature into a title.—*Id.*

[b] (Sup. 1889)

A general right, as by prescription, cannot be maintained by alleging and proving a particular or permissive right.—*Nowlin v. Whipple*, 22 N. E. 669, 120 Ind. 596, 6 L. R. A. 159.

[c] (Sup. 1895)

Exercise of a right under license or by permission will not ripen into an easement, as there can be no adverse possession in such case.—*Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93.

[d] (App. 1903)

A license to use the land of another as a private way, without the assertion of rights in connection with the use, for which no consideration was paid or any value parted with on the faith that the license was perpetual, constitutes no basis for a prescriptive easement.—*Kibbey v. Richards*, 65 N. E. 541, 30 Ind. App. 101, 96 Am. St. Rep. 333.

[e] (Sup. 1906)

Where the facts and circumstances of a case show that the use of a way was merely permissive, they are fatal to an easement by prescription.—*Null v. Williamson*, 78 N. E. 76, 166 Ind. 537.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 23, 24, 27-33.  
See, also, 14 Cyc. pp. 1150, 1151.

§ 9. — Claim or color of right.

[a] (Sup. 1887)

Where a right of way is granted as an appurtenance to land, and is used as such, the user, is under claim of right, and 20 years' uninterrupted user will create a right in the dominant estate.—*Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109.

[b] (Sup. 1895)

In an action to enjoin the obstruction of an easement consisting of a right of way, it affirmatively appearing that the use was without any claim of right, and it not appearing that it was with the knowledge or acquiescence of the defendant, there could be no recovery.—*Davis v. Cleveland, C., C. & St. L. Ry. Co.*, 39 N. E. 495, 140 Ind. 468.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 25, 27-33.

§ 10. — Acquisition of rights of way.

[a] (Sup. 1873)

A land owner has an easement in adjoining land, where it appeared that he and those under whom he claimed for 35 years passed over a certain private road on such land continuously and uninterruptedly, under claim of right, and as the owners thereof.—*Sanxay v. Hunger*, 42 Ind. 44.

[b] (Sup. 1875)

To establish a right of way by prescription, the use must have been adverse, under a claim of right, with the knowledge of the owner of the estate in and over which the easement was claimed, and while such owner was able in law to resist such adverse claim if not well founded.—*Peterson v. McCullough*, 50 Ind. 35.

[c] (Sup. 1877)

Where in an action of trespass for entering upon the lands of the plaintiff, and removing therefrom a fence and gate, the defendant justifies by alleging that such inclosure was an obstruction to his easement in a right of way across the plaintiff's lands to a public highway, acquired by user, he must, to establish such easement, show that he had used such right of way uninterruptedly for 20 years, under a claim of title thereto adverse to the plaintiff, and with his knowledge and acquiescence.—*Palmer v. Wright*, 58 Ind. 486.

[d] The presumption of a grant does not arise from the user of a private way for 20 years or more, not adversely nor under a claim of right.—(Sup. 1882) *Hill v. Hagaman*, 84 Ind. 287; (1887) *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109.

[e] (Sup. 1891)

The continuous, uninterrupted use for more than 20 years of a private way over the land of another by an adjoining owner and his successor in title, and the fact that during such time the claimant expended money on improving the way, and fenced it, and the owner of the servient estate marked the boundaries with stones set at its entrance, are sufficient to establish title by prescription to the way, as against a subsequent purchaser of the servient estate, who had knowledge of the existence of the way.—*Fankboner v. Corder*, 127 Ind. 164, 26 N. E. 766.

[f] (Sup. 1891)

One who has enjoyed a right of way over the lands of another adversely for more than 30 years has a right of way by prescription, and can enjoin the landowners from obstructing it.—*Sheeks v. Erwin*, 130 Ind. 31, 20 N. E. 11.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. §§ 27-32.  
See, also, 14 Cyc. pp. 1154-1157.

§ 11. — Acquisition of rights as to light, air, and view.

[a] (Sup. 1877)

The English doctrine that, by an uninterrupted enjoyment for 20 years, the owner ac-

quires a right against his neighbor for stopping ancient windows by the erection of buildings upon his own land, forms no part of the law of this country.—*Stein v. Hauck*, 56 Ind. 65, 26 Am. Rep. 10.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 34.

See, also, 14 Cyc. p. 1157.

### § 12. Express grant.

[a] (Sup. 1837)

The conveyance of a right to use the second story of a building carries a right in the nature of an easement in the land, but does not carry such a right as will enable the grantee to maintain an action to recover an interest in the land itself.—*Thorn v. Wilson*, 110 Ind. 325, 11 N. E. 230, 59 Am. Rep. 209.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 35–38, 41.

See, also, 14 Cyc. pp. 1159–1165.

### § 13. Covenant operating as grant.

[a] (Sup. 1881)

Where the grantors covenanted as a part of their conveyance that they would maintain a sufficient fence on the line between them and their grantee, the grant of such land and the covenant to maintain a fence imposed an easement in favor of the grantee on the adjacent lands of the grantors.—*Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 39.

See, also, 14 Cyc. p. 1162.

### § 14. Exception or reservation.

[a] (Sup. 1894)

A deed from one to an adjoining owner of a strip of land lying between them, in which it is stipulated that the strip is to be used as a passage, the grantor reserving to himself and his heirs and grantees the privilege of driving or passing over it, conveys to the grantee a fee, subject to the right of user for these purposes.—*McKinney v. Lanning*, 130 Ind. 170, 38 N. E. 601.

[b] (App. 1904)

Where a part of the consideration for a deed was an agreement by the grantee to open a certain way, and fill it to the level of the street, within a certain time, his failure to fill the way did not deprive the grantor of his right to use it in the meantime.—*Vanatta v. Waterhouse*, 71 N. E. 159, 33 Ind. App. 516.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 40.

See, also, 14 Cyc. pp. 1163, 1164; note, 20 L. R. A. 631.

### § 15. Implication.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 42–58.

See, also, 14 Cyc. pp. 1166–1183; notes, 23 Am. Rep. 446; 40 Am. Rep. 537; note, 122 Am. St. Rep. 206.

### § 16. — Severance of ownership of dominant and servient tenements.

Extent of right acquired, see post, § 38.

[a] (Sup. 1835)

Where the owner of a house and lot placed a mortgage thereon, and, after the foreclosure of the mortgage, it appeared that the house projected a few feet over an adjoining lot belonging to the same owner, the right to the support on such lot passed with the grant.—*John Hancock Mut. Life Ins. Co. v. Patterson*, 2 N. E. 188, 103 Ind. 582, 53 Am. Rep. 550.

[b] (Sup. 1891)

Where the owner of an estate imposes on one part an apparent and obvious servitude in favor of another, and at the time of the severance the servitude is in use and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law.—*Ellis v. Bassett*, 27 N. E. 344, 128 Ind. 118, 25 Am. St. Rep. 421.

A partition of real estate among heirs carries with it by implication the same right of way from one part to and over another as had been plainly and obviously enjoyed by the common ancestor in so far as it is reasonably necessary for the enjoyment of each part.—*Id.*

[c] (App. 1909)

Where the owner of two lots erected a dwelling house on one lot, now owned by plaintiff, which extended over the line of the other lot, now owned by defendant, the fact that the house had been used for 35 years on that location did not justify plaintiff in maintaining it there, as against defendant, under the rule that where a permanent and obvious servitude is imposed on one part of land in favor of another part, and is used at the time of severance of ownership of such parts, a grant or reservation of the right to continue such use is implied; the character of the building and the necessity for its protection to secure plaintiff the fair enjoyment of his property not being shown.—*Mayer v. C. P. Lash Paper Co.*, 89 N. E. 894.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 43.

See, also, note, 34 Am. St. Rep. 708.

### § 17. — Ways in general.

[a] A sale of lots with reference to a map which calls for certain streets and alleys gives the grantee the right to use such streets and alleys.—(Sup. 1855) *Haynes v. Thomas*, 7 Ind. 38; (1856) *Tate v. Ohio & M. R. Co.*, Id. 479,

485; (1856) *Hutton v. Indiana Cent. R. Co.*, 1d. 522.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Ease. §§ 45-49.

See, also, 14 Cyc. pp. 1166-1171.

**§ 18. — Ways of necessity.**

Action for establishment of easement, see post, § 61.

Action for injuries, see post, §§ 61, 68.

Evidence, see post, § 36.

**[a] (Sup. 1856)**

In trespass *quare clausum fregit*, the defendant pleaded that he purchased of the ancestor of the plaintiff a tract of land adjoining that on which the alleged trespass was committed; that there was no so "convenient way" to said tract as across the remaining land of the plaintiff, and that the defendant crossed said land, as well he might, etc. *Held*, that the plea was bad, not setting up a way of necessity.—*Anderson v. Buchanan*, 8 Ind. 132.

**[b] (Sup. 1873)**

Where plaintiff's farm is surrounded on every side, except on the side of defendant's farm, with precipitous bluffs of such grade and steepness that it is impossible to go to or from his farm except by passing over defendant's farm, a right of way over defendant's farm is created from necessity.—*Sanxay v. Ilunger*, 42 Ind. 44.

**[c] (Sup. 1874)**

A way of necessity derives its origin from a grant, and cannot legally exist where neither the party claiming the way, nor the owner of the land over which it is claimed, or any one under whom they or either of them claim, was ever seised of both tracts of land.—*Stewart v. Hartman*, 46 Ind. 331.

**[d] (Sup. 1885)**

Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude at the time of the severance of ownership is in use, and is reasonably necessary for the fair enjoyment of such other part, then, upon the severance, either by voluntary alienation or judicial proceedings, there arises, by implication of law, a grant or reservation of the right to continue such use.—*John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550.

**[e] (Sup. 1891)**

The owner of land opened and maintained a private way from one part of his land over another part to the highway, and the way was necessary for access to the land. After his death, on partition, the part of the land on the highway was allotted to his widow, and the balance was sold by order of the court. *Held*, that the purchaser took an easement in the road.—*Ellis v. Bassett*, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421.

**[f] (Sup. 1898)**

Where, in partition, the share allotted to one of the parties had no outlet to a highway, it would be presumed, unless the contrary clearly appeared from the record, that the allottee had an easement of a way of necessity over the land allotted to others which right was the same as though provision had been made therefor in the report of the commissioners and decree of the court.—*Ritchey v. Welsh*, 48 N. E. 1031, 149 Ind. 214, 40 L. R. A. 105.

A party to a partition suit is not entitled to a way of necessity in other lands set off to him in a prior partition proceeding concerning lands derived from another common ancestor.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Ease. §§ 50-55.

See, also, 14 Cyc. pp. 1172-1176; notes, 13 Am. Dec. 746, 35 Am. Dec. 404, 85 Am. Dec. 675; note, 36 Am. Rep. 415.

**§ 19. — Light, air, and view.**

Transfer of right, see post, § 24.

**[a] (Sup. 1875)**

A conveyance of land upon which is a building depending for its light and air on windows therein, which overlook adjoining land of the grantor, does not include any right of light and air through such windows, unless expressly granted thereby. Such right does not pass as an appurtenance or hereditament, and, in the absence of such express grant, the owner of the adjoining land may build thereon, and thereby totally obstruct such windows.—*Keiper v. Klein*, 51 Ind. 316.

**[b] (App. 1908)**

Plaintiff, owning a two-story building, the lower story of which was divided into two rooms by a stairway leading to a hallway on the second floor, from which doors opened into apartments on either side, there being a window in the end of the hall facing the street designed to light the hallway, conveyed one of the lower rooms with the ground on which it stood to defendant, who thereafter extended the wall separating her room from the stairway to the street so as to partially shut out the light from the window lighting the hallway, the extension being made on defendant's land. *Held*, in an action to enjoin the continuance of the wall in front of the window, and for damages, that complainant had no easement in the light from the window, whether he owned a part of or all of the hallway lighted thereby.—*Cummins v. Grimes*, 41 Ind. App. 367, 83 N. E. 1023.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Ease. §§ 56-58.

See, also, note, 22 L. R. A. 536.

**§ 20. Right as against purchasers of servient tenement.**



**§ 21. — In general.****[a] (Sup. 1830)**

An incorporeal hereditament may be conveyed to one, and the right to the soil to another, and, after the grant of the incorporeal hereditament, a conveyance of the land to which it is appendant is subject to that grant.—Taylor v. Moffatt, 2 Blackf. 304.

**[b] (Sup. 1887)**

An easement of a private right of way over the land of another is a burden on the servient estate in the hands of subsequent owners.—Robinson v. Thraikill, 10 N. E. 647, 110 Ind. 117.

**[c] (Sup. 1891)**

Where a person takes an estate on which a servitude has been imposed, he holds it subject to such servitude, and in the same manner as it was held by his grantor.—Fankboner v. Corder, 26 N. E. 766, 127 Ind. 164.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 59, 60; 48 CENT. DIG. VEN. & PUR. §§ 546, 547.

**§ 22. — Continuous and apparent easements, and notice.****[a] (Sup. 1881)**

Where an easement is created by a deed, a subsequent grantee of the servient estate will be bound by the notice contained therein.—Hazzlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254.

**[b] (Sup. 1887)**

Where a private way is laid out, and there is an almost constant user, a grantee of the servient estate will be charged with notice of the existence of the easement.—Robinson v. Thraikill, 110 Ind. 117, 10 N. E. 647.

**[c] (Sup. 1891)**

The constant use of a private way is notice of the easement to purchasers of the land over which it passes.—Ellis v. Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421.

**[d] (Sup. 1896)**

The maintenance, over a vacant lot, of a stairway, for entrance to the upper story of a building on the lot adjoining, is notice to a purchaser of the vacant lot of any right which the adjoining owner may have to maintain the stairway.—Joseph v. Wild, 140 Ind. 249, 45 N. E. 467.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 60; 48 CENT. DIG. VEN. & PUR. §§ 546, 547.

**§ 24. Transfer of right.****[a] (Sup. 1873)**

A way appurtenant cannot be turned into one in gross, since it is inseparably united to the land to which it is incident. So a way in gross cannot be granted over to another, because of its being attached to the person.—Moore v. Crose, 43 Ind. 30.

A right of way appurtenant to land conveyed passes therewith.—Id.

**[b] (Sup. 1875)**

Since an easement of light and air is not an appurtenant, such easement does not pass under a deed conveying the land with the appurtenances.—Keiper v. Klein, 51 Ind. 316.

**[c] (Sup. 1881)**

Where an easement is annexed as an appurtenant to land, it passes as an appurtenance by implication.—Ross v. Thompson, 78 Ind. 90.

Where an easement is appurtenant to land, it passes by a conveyance of the dominant estate, though the deed does not particularly describe it, or use the term "appurtenances."—Id.

**[d] (Sup. 1887)**

Where a way was laid out as appurtenant to certain land and actually became an appurtenance thereto by user for more than 20 years, it passed by a conveyance of the land without an express grant.—Parish v. Kaspary, 10 N. E. 109, 100 Ind. 586.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 64-69.

See, also, 14 Cyc. pp. 1184, 1185; note, 14 L. R. A. 333.

**§ 25. Commencement and duration.****[a] (Sup. 1882)**

An agreement by the owner of land that another may use a way over the same during the latter's life confers no rights upon the latter's heirs.—Hill v. Hagaman, 84 Ind. 287.

**[b] (Sup. 1892)**

A reservation in a grant of land by a city to a railroad company of a right to cross the track of the company whenever the city should lay off an addition does not give the city the right to cross the railroad track where no addition is laid off.—City of Fort Wayne v. Lake Shore & M. S. Ry. Co., 32 N. E. 215, 132 Ind. 558, 32 Am. St. Rep. 277.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 70-72.

See, also, note, 14 Am. St. Rep. 278.

**§ 26. Termination in general.**

Right of grantee of dominant estate from married woman to avoid easement created by his grantor, see HUSBAND AND WIFE, § 74.

**[a] (Sup. 1882)**

Where defendant gave plaintiff's predecessor in title permission to use a way across defendant's land, the right to the use of the way terminated with the death of plaintiff's predecessor in title.—Hill v. Hagaman, 84 Ind. 287.

**[b] (Sup. 1882)**

An oral grant of a right of way is not revocable after the grantee pays valuable consideration therefor, and opens and works the right of way.—Simons v. Morehouse, 88 Ind. 391.

[c] (Sup. 1894)

Half of a lot on which the owner had erected a double building, the only entrance to the second story of which was by stairways upon that half, was sold, reserving such a right of way over the stairways "as should be necessary to the proper use of the second story" of the other half of the building. *Held*, that the reservation did not create an interest in the soil, so that it would survive the destruction of the building.—*Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. §§ 72½-74, 80-82.

See, also, 14 Cyc. pp. 1190-1194; note, 43 Am. Rep. 195.

### §30. Abandonment or nonuser.

[a] (App. 1894)

An easement acquired by actual grant or reservation is not lost by nonuser.—*Kammerling v. Grover*, 9 Ind. App. 628, 36 N. E. 922.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Ease. §§ 77-79.

See, also, 14 Cyc. pp. 1185-1187; note, 18 L. R. A. 535.

### §33. Dedication or appropriation to public use.

[a] (Sup. 1884)

The owner of the fee may change an easement from a private to a public one, where all others interested concur in his acts.—*City of Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 740.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Ease. § 85.

See, also, 14 Cyc. p. 1196.

### §35. Pleading as defense.

Conclusiveness against pleader of allegations relating to, see PLEADING, § 36.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1906)

An allegation of ownership of an easement is sufficient, leaving the evidence to show a right by prescription, since every easement lies in the grant, actual or presumed.—*Null v. Williamson*, 166 Ind. 537, 78 N. E. 76.

### §36. Evidence.

In action for establishment and protection of easement, see post, § 61.

[a] (Sup. 1877)

One who seeks to excuse his failure to take proceedings to prevent a user, upon which a person having continued it for 20 years claims to found a prescriptive right, upon the ground that he was under a disability, has the burden of proving the disability, the presumption being

that a person is capable of asserting his rights.—*Palmer v. Wright*, 58 Ind. 486.

Freedom from a disability urged as a defense to an alleged prescriptive easement is presumed in the absence of affirmative evidence to the contrary.—*Id.*

[b] (Sup. 1877)

Where defendant resists the claim of another on the ground that he has an easement in defendant's lands which he acquired by prescription, defendant has the burden of proof to show that, during the other's continuous user, he was under disability.—*Davidson v. Nicholson*, 59 Ind. 411.

[c] (Sup. 1881)

Under a complaint alleging user of a certain way for 35 years, that during that time plaintiff had no other means of getting to her land, and that by the act of defendant in closing the way she would be deprived of the use of her land, evidence was admissible tending to show a way from necessity.—*Steel v. Grigsby*, 79 Ind. 184.

[d] (Sup. 1887)

Where a way was used by a landowner as appurtenant to his land for 50 years, such user will be presumed to have been under a claim of title.—*Parish v. Kaspere*, 10 N. E. 109, 109 Ind. 586.

[e] (Sup. 1891)

A person claiming a right of way by prescription is not required to prove that the owner of the servient estate was not under disabilities, as disability is a matter of defense, and is never presumed.—*Fankboner v. Corder*, 127 Ind. 164, 26 N. E. 766.

[f] (Sup. 1895)

Under an allegation that the only means of access to plaintiffs' land was a roadway which was used by plaintiffs continuously for 50 years, and that during said time said road was an easement belonging to plaintiffs' land, title to such easement may be shown by grant or prescription.—*Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230.

[g] (Sup. 1906)

Where the use of a space, left open by the owner, by one who claimed an easement was shared by the public, it is presumed that the use was not under an exclusive or particular claim of right.—*Null v. Williamson*, 78 N. E. 76, 166 Ind. 537.

Evidence held to show that the use of the way was not adverse, but permissive.—*Id.*

Where there has been open and continuous use of an easement for the period of limitation concerning ejectment, the owner of the servient tenement may not show that there was no grant, but he may show by facts and circumstances that there was not such a holding as would ripen into a legal title.—*Id.*

The use of an insignificant part of an open lot which is of practically no value to the

owner creates no presumption of a grant of an easement, but rather that the use was permissive.—Id.

Grants of easements are presumed where the use shown would otherwise be unreasonable; but where the facts are consistent with the nonexistence of a grant, as where the use was by permission, no easement will be presumed.—Id.

Where the plaintiff shows an open use of a way apparently as owner for 20 years, the burden of disproving his prescriptive right to an easement is on the defendant, and this may be done by proof that the use was not under a claim of right.—Id.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. §§ 77, 78, 88-93.

See, also, 14 Cyc. pp. 1196-1199.

## II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

### § 38. Relation between owners of dominant and servient tenements in general.

[a] (Sup. 1890)

Where the grantor of land which has no access to the highway owns at the time the intervening land, his grantee may have a way of necessity established across such intervening land, even after it has been conveyed to a third person.—Logan v. Stogdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58.

[b] (Sup. 1893)

Where a landowner conveys to a stone company a tract of land, together with a right of way over another tract on which to construct a railway switch to connect the land granted with a certain railroad, the easement is appendant to the land granted, and the railroad company has no right to use the switch constructed thereon for its own general purposes.—Louisville, N. A. & C. Ry. Co. v. Malott, 135 Ind. 113, 34 N. E. 709.

[c] (Sup. 1894)

Where the owner of 80 acres of land fronting on a highway conveyed to plaintiff's grantor a remote 20 acres thereof, having no way of egress to any highway except over the remaining 60 acres, the contemporaneous conveyance of said 60 acres by said owner in trust for himself, he continuing in possession, does not defeat the attachment of a way by necessity to said 60-acre tract.—Miller v. Richards, 139 Ind. 263, 38 N. E. 854.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. §§ 61, 62, 114-116.

### § 39. Extent of right.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. §§ 95-101.

See, also, 14 Cyc. pp. 1200-1203.

### § 41. — By prescription.

[a] (Sup. 1856)

To acquire a title by prescription to an easement, it must, as a general rule, have been enjoyed in the same degree, and to the same extent, as claimed in the suit involving it.—Postlethwaite v. Payne, 8 Ind. 104.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. § 96.

See, also, 14 Cyc. p. 1200.

### § 44. — Ways.

[a] (Sup. 1902)

A way of necessity, 16 feet wide, recognized and in use for 25 years, cannot be made wider because the soil is so wet and soft for a large portion of the year as to render its use inconvenient and difficult without the additional strip.—Dudgeon v. Bronson, 64 N. E. 910, 65 N. E. 752, 159 Ind. 562, 95 Am. St. Rep. 315.

[b] (App. 1904)

Where a part of a consideration of a deed was an agreement by the grantee to open a "passable highway" for "public utility," the width of the highway not being specified, the parties contemplated that the way should be suitable to the particular locality.—Vanatta v. Waterhouse, 71 N. E. 159, 33 Ind. App. 516.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. §§ 98-100.

See, also, 14 Cyc. pp. 1201, 1202; note.

2 L. R. A. (N. S.) 983; note, 88 Am. Dec. 279; note, 95 Am. St. Rep. 318.

### § 46. Location.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. EASE. §§ 103-108.

See, also, 14 Cyc. pp. 1203-1205; note, 15 L. R. A. 93.

### § 48. — Ways.

[a] (Sup. 1873)

Where there is no record evidence of a right of way, and the owner of the real estate over which the way is claimed denies its existence and is threatening to interrupt the use and enjoyment of the way, and has placed on the record a notice that he disputes such right, the person claiming such way may, by an action, have his right ascertained and the way established while those who are acquainted with the facts are alive.—Sanxay v. Hunger, 42 Ind. 44.

[b] (Sup. 1898)

When the owner of land subject to a way of necessity fails to select such way when requested, the owner of the way may select a suitable route for it, having due regard to the convenience of the owner of the servient estate.—Ritchey v. Welsh, 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105.

When a party is entitled to a way of necessity over certain land owned by another, the owner of the land cannot deprive him of his right to it by offering him a private way over

any other lands owned either by himself or others.—Id.

When once a way of necessity is selected, it cannot be changed by either party without the consent of the other.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 103-107.

See, also, 14 Cyc. pp. 1204, 1205; note, 4 L. R. A. (N. S.) 872.

#### § 50. Mode of use.

[a] (Sup. 1882)

Acquiring an easement for a way gives no right to ice which may form within the boundaries of such way.—Julien v. Woodsmall, 82 Ind. 588.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 109-112.

See, also, 14 Cyc. pp. 1206-1208.

#### § 52. Persons entitled to use.

[a] (Sup. 1891)

A landowner conveyed part of his tract to a stone company, together with a right to construct a line of railway over the remaining part to connect the land granted with a public railroad. *Held*, that this easement was appendant to the land granted, and the stone company had no right to permit its use by third persons to convey stone quarried on lands owned by them.—Hoosier Stone Co. v. Malott, 130 Ind. 21, 29 N. E. 412.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 113-116.

See, also, 14 Cyc. p. 1208.

#### § 56. Obstruction or disturbance.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 121-128.

See, also, 14 Cyc. pp. 1211-1214.

#### § 58. — Ways.

[a] (Sup. 1890)

The owner of the fee in land across which a private right of way has been reserved in a deed is entitled to maintain a gate across the way at the point where it intersects the public road.—Phillips v. Dressler, 122 Ind. 414, 24 N. E. 226, 17 Am. St. Rep. 375.

[b] (Sup. 1891)

The owner of the servient estate has no right to put a gate or bars across a private way acquired by prescription at the point where such way intersects the public road, where no gates or bars were ever erected during the time requisite to gain the right of way.—Fankboner v. Corder, 127 Ind. 164, 26 N. E. 766.

[c] (Sup. 1892)

Where a deed reserves a right of way which is not to be fenced, and the parties for 40 years maintain and use the way with gates swung at either end, such must be deemed to have been the intention of the parties, and none

of them can subsequently contend that no gates were to be permitted.—Frazier v. Myer, 132 Ind. 71, 31 N. E. 536.

[d] (Sup. 1899)

Where one grants a right of way across his land, he may close the termini of the same by gates, which the grantee must open and close when he uses the same, unless an open way is expressly granted.—Boyd v. Bloom, 52 N. E. 751, 152 Ind. 152.

Provision of a deed that the grantee should have "a free and undisturbed right to the use" of a way is not a grant of an open way, preventing the grantor from maintaining gates at the termini.—Id.

[e] (Sup. 1900)

Since marking a street on a plat does not divest the owner of his title to the land, one who has a mere easement in the street, for the purpose of maintaining a bridge across the same, cannot complain of any use of the street by the abutting property owner which is not inconsistent with its use under such easement.—Peoria & E. R. Co. v. Attica, C. & S. R. Co. 56 N. E. 210, 154 Ind. 218.

[f] (App. 1907)

The owner of a servient estate may maintain gates in a reasonable way at the termini of an easement for right of way passing over the estate; and an ordinary gate 10 feet wide is not an obstruction of a 16½ foot right of way for wagons and other vehicles.—Berg v. Neal, 40 Ind. App. 575, 82 N. E. 802.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 121-127.

See, also, 14 Cyc. pp. 1211-1213; notes, 15 L. R. A. 487, 3 L. R. A. (N. S.) 461.

#### § 60. Removal of Obstruction.

[a] (App. 1907)

A complaint to enjoin the removal of a gate, at a point where a private right of way entered a highway, alleged that plaintiff was the owner in fee simple of certain land and was in possession thereof, subject to an easement of a private right of way for wagons and other vehicles over and along the south side thereof, which easement was owned by defendant; that plaintiff had erected a farm gate of usual style and make, and sufficient width for the easy passage of wagons, other vehicles, etc.; that it was properly constructed, hung on hinges, and might be readily and easily opened and closed, and did not interfere with the free use and enjoyment of the right of way; and there were averments showing irreparable damage and threats of removal by defendant. *Held*, that the averments as to the easement might be treated as surplusage, but, in any event, the complaint was sufficient to maintain the action without an allegation of a right to close the right of way, since the admission of a right of way did not imply that it was an open way, and, if the grant gave defendant an open way, that was

a matter of defense, which plaintiff was not required to anticipate or negative.—*Berg v. Neal*, 40 Ind. App. 575, 82 N. E. 802.

An averment that a certain easement was a private right of way for wagons and other vehicles is an averment that it is a private right of way for passage only, since nothing passes as an incident to the grant of an easement but what is requisite to the fair enjoyment of the privilege.—*Id.*

In an action by the owner of a servient estate to restrain the removal of a gate at one end of a right of way where plaintiff, upon the profer of a deed showing a right of way across different land, stated that he would show that the right of way claimed by defendant was taken possession of, laid out, and used under the deed, and that the misdescription resulted from a mistake of the parties, admission of the deed and testimony showing the mistake were not error, even though the misdescription had not been pleaded nor reformation asked.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 129.

See, also, 14 Cyc. p. 1214.

#### § 61. Actions for establishment and protection of easements.

Application of general statutes of limitations, see LIMITATION OF ACTIONS, § 19.

Motion to make pleading more definite and certain, see PLEADING, § 367.

Motion to strike out pleadings, see PLEADING, § 352.

Statutory new trial, see NEW TRIAL, § 178.

[a] (Sup. 1881)

In an action to restrain the obstruction of a private easement, a discrepancy of a few feet for a short distance between the location of the easement as proved and that as alleged in the complaint does not constitute a material variance.—*Ross v. Thompson*, 78 Ind. 90.

[b] (Sup. 1891)

Where the complaint seeks to enjoin the obstruction of a right of way, based both on necessity and prescription, an answer pleaded as a defense to all the matters set up in the complaint, but which is no defense to the claim of the right by prescription, is demurrable.—*Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 709.

It is no error to sustain a demurrer to an answer to such complaint, which alleges that when complainants purchased their land there was a highway through it which gave complainants ingress and egress to and from town, and which they obstructed, and cut themselves off from town, since such facts are admissible in evidence under the general denial.—*Id.*

In a suit to enjoin obstruction of a right of way, the complaint, in stating that 50 years before complainants' and defendants' lands were owned by one J., who then conveyed the land owned by complainants to R., through whom

they claim; that J. afterwards conveyed the land owned by defendants; and that for more than 20 years complainants and their grantors have enjoyed the right of way over defendants' land,—alleges a right of way by prescription.—*Id.*

In a suit to enjoin obstruction of a right of way, the cause of action rests upon the threatened obstruction, and the complaint, in basing complainant's right to the way both on necessity and on a right by prescription, does not state two causes of action.—*Id.*

In a suit to enjoin the obstruction of a right of way, a description of the way as a well-defined road, 30 feet wide, which has been in use for 20 years, and is still open and in use, is sufficiently specific.—*Id.*

[c] (Sup. 1894)

In an action to recover a way by necessity, a verdict for plaintiff is not insufficient because damages are not found in his favor.—*Miller v. Richards*, 139 Ind. 263, 38 N. E. 854.

[d] (Sup. 1895)

Where, in a suit to restrain the discharge of surface water on a private road, the complaint alleged that plaintiffs were the owners of certain real estate, and that their only means of ingress and egress to and from the same was over the road in controversy to a public highway, that the same had been used by plaintiffs and those under whom they claimed for 50 years continuously to the present time, and that the road had been during all that time and still was an easement and right of way belonging to and connected with plaintiff's said land, such was a sufficient allegation of plaintiff's title to the road to withstand a demurrer.—*Mitchell v. Bain*, 42 N. E. 230, 142 Ind. 604.

[e] (Sup. 1898)

A complaint to enjoin defendant from obstructing a private way alleged that plaintiff entered into an agreement with defendant whereby the latter granted to him a perpetual roadway "for consideration paid and value parted with, said consideration being the use of, and right in, certain lands of plaintiff by defendant as a roadway; \* \* \* also to grade, grub, and make said highway suitable for travel." Held not demurrable on the ground that it failed to show that plaintiff had paid the consideration or otherwise performed his part of the contract.—*Noble v. Sherman*, 52 N. E. 150, 151 Ind. 573.

[f] (Sup. 1900)

In an action to quiet title to an easement in a way located by certain deeds under which the parties claimed title, the admission of evidence showing how long it had been used was not error, though it was not alleged that plaintiff had title to it by prescription, since such evidence showed the construction given to the deeds by the parties thereto.—*Roush v. Roush*, 55 N. E. 1017, 154 Ind. 562.

[g] (App. 1901)

Where, in a suit for injunction, the court found as conclusions of law, to which no exception was taken, that defendant railroad company had no right to in any way obstruct plaintiff's driveway under defendant's track, a mandatory injunction was properly granted restraining defendant from obstructing such driveway.—*Lake Erie & W. R. Co. v. Essington*, 60 N. E. 457, 27 Ind. App. 291.

[h] (App. 1903)

Before a person entitled to a way of necessity over the land of another can maintain an action to have it established, he must show that he has requested the owner of the land over which it is to pass to select a location for the way; that the owner has either failed to do so, or else has done it in an unreasonable manner; and that, in case the owner has failed to designate the route, the person seeking to have the way established has selected a location for it.—*Thomas v. McCoy*, 66 N. E. 700, 30 Ind. App. 555.

Where the complaint in an action to have a way of necessity established, and the title thereto quieted, did not contain a particular description of the route selected, it was insufficient.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 102, 130-144, 148; 39 CENT. DIG. PLEAD. § 1323.

#### § 62. Actions for damages for injuries.

##### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 130-133, 138-149.

See, also, 14 Cyc. pp. 1214-1225.

#### § 63. — Nature and form.

[a] (Sup. 1838)

Case is the proper remedy for injury or disturbance to a right of way.—*Martin v. Bliss*, 5 Blackf. 35, 32 Am. Dec. 52.

##### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. § 130.

See, also, 14 Cyc. pp. 1216-1219.

#### § 68. — Pleading.

Conclusiveness of allegations on pleader, see PLEADING, § 36.

[a] (Sup. 1881)

In an action for damages, and to restrain defendant from stopping up a private way, an allegation in the complaint that defendant had given plaintiff a private right of way over real estate, and that plaintiff had entered upon and used such way for 16 years without objection or hindrance, is sufficient.—*Nowlin v. Whipple*, 79 Ind. 481.

[b] (Sup. 1890)

The complaint in an action to enjoin the obstruction of an easement, and for damages,

alleged that plaintiff was the owner of certain land, and also an easement or right of way across certain land of defendant, describing it. *Held* a sufficient allegation of ownership of the right of way to withstand a demurrer, it not being necessary to aver the particular manner in which plaintiff derived his title; and that under such allegations it was competent to prove a parol nonrevocable license to pass over defendant's land.—*Hall v. Hedrick*, 125 Ind. 326, 25 N. E. 350.

[c] (Sup. 1891)

The owner of land opened and maintained a private way from one part of his land over another part to the highway, and the way was necessary for access to the land. After his death, on partition, the part of the land on the highway was allotted to his widow, and the balance was sold by order of the court. *Held* that, in an action against a purchaser from the widow, for obstructing the way, the complaint need not allege that plaintiff is unable to obtain a way to the highway over the lands of others.—*Ellis v. Bassett*, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421.

[d] (Sup. 1891)

In a suit by the grantor of a right of way to enjoin its use by third persons, it is unnecessary to aver title to the land at the commencement of the suit, when title is averred at the time of granting the easement.—*Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. 412.

[e] (App. 1894)

A complaint alleging that plaintiff purchased land from defendant upon the faith of an agreement that he would construct and give plaintiff a right of way across his lands; that defendant did construct such way, which was used for several years; that afterwards he conveyed the land, over which said way passed, to a purchaser, without notice, who refuses to permit plaintiff to use such way,—does not state a cause of action for the destruction of the easement, since it does not allege that defendant sold the land for the purpose of destroying the easement.—*Kammerling v. Grover*, 9 Ind. App. 628, 36 N. E. 922.

[f] (Sup. 1895)

To show title to a roadway in another's land by prescription, an allegation that it was used by plaintiffs for 50 years continuously, with the knowledge and acquiescence of the owner, is sufficient, without an averment that the use thereof was adverse.—*Mitchell v. Bain*, 42 N. E. 230, 142 Ind. 604.

##### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EASE. §§ 141, 142, 144.

See, also, 14 Cyc. pp. 1220-1222.

#### § 70. — Damages.

[a] (Sup. 1882)

In an action for obstructing a private way over another's land, it is proper to admit evi-

dence of all expenditures by plaintiff in improving the way, but not as to his having acquired title to abutting land.—*Hill v. Hagaman*, 84 Ind. 287.

**FOR CASES FROM OTHER STATES.**

SEE 17 CENT. DIG. EASE. §§ 145, 146.  
See, also, 14 Cyc. p. 1224.

**§ 71. — Trial.**

[a] (*Sup.* 1879)

An instruction that a party who has for more than 20 years occupied, used, and enjoyed a right of way over another's land, under a claim of right, uninterruptedly, continuously, and with the knowledge of the owner, has acquired an easement, is erroneous for omitting to state that the claim of right must have been adverse to the owner of the land.—*McCardle v. Barricklow*, 68 Ind. 356.

[b] In a suit for the destruction of means of ingress to and egress from plaintiff's property by the construction of a railroad track on a way, the jury specially found that plaintiff purchased the undivided two-thirds of the property in 1873, and that she had since that time occupied the same; that prior thereto a fence was built, and had since been maintained on the line between the land and the towpath of a canal forming the boundary thereof; that the towpath was about 14 feet wide along plaintiff's property; that defendant's track was 4 feet and 8½ inches wide, the center of which was about 4 feet from the bank of the canal; that defendant owned in fee a portion of the canal embracing that part along plaintiff's premises, including the banks, basins, and towpaths originally owned by the canal; that the remote grantor of defendant became the owner thereof about 30 years before the construction of the railroad track. *Held*, that defendant was not entitled to a judgment notwithstanding the general verdict that there was a way along plaintiff's property at the time defendant built its road, the special verdict not negating the presumption that the right to use the way, though on a part of the towpath of the canal, came into existence in a legal way, and the right to use the towpath as a means of ingress and egress to plaintiff's property not being inconsistent with the use of the towpath by the canal.—(*App.* 1904) *Cincinnati, R. & M. R. R. v. Miller*, 36 Ind. App. 26, petition for rehearing overruled (1905) 72 N. E. 827, 73 N. E. 1001; *Same v. Troutman* (1906) 38 Ind. App. 700, 75 N. E. 277; *Same v. Patterson*, 39 Ind. App. 702, 77 N. E. 1199.

**FOR CASES FROM OTHER STATES.**

SEE 17 CENT. DIG. EASE. §§ 147, 148.  
See, also, 14 Cyc. p. 1224.

**EAVES DRIP.**

See **WATERS AND WATER COURSES**, § 121.

**EBB AND FLOW.**

Ownership of land between high and low water marks, see **NAVIGABLE WATERS**, §§ 36, 37.

**ECCLESIASTICAL CORPORATIONS.**

See—

**CHARITIES.**

**RELIGIOUS SOCIETIES.**

**ECCLESIASTICAL TRIBUNALS.**

See **RELIGIOUS SOCIETIES**, § 12.

**EDITORS.**

See—

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**EDUCATION.**

See—

Charge of, on property devised. **WILLS**, §§ 820-826.

Child. **PARENT AND CHILD**, § 3.

**COLLEGES AND UNIVERSITIES.**

Contracts by infants for. **INFANTS**, § 53.

Department of, in cities. **MUNICIPAL CORPORATIONS**, § 211.

Gifts for purposes of. **CHARITIES**, § 12.

**SCHOOLS AND SCHOOL DISTRICTS.**

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**EGRESS.**

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**EJECTION.**

See—

Passengers or intruders from passenger trains. **CARRIERS**, §§ 350-385.

Persons from fair grounds. **AGRICULTURE**, § 4.

Tenant. **LANDLORD AND TENANT**, § 278.

Trespassers from freight trains. **RAILROADS**, § 277.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EJECTMENT.

## *Scope-Note.*

[INCLUDES actions for recovery of specific real property, founded on right of possession and right to damages for being deprived thereof, whether proceeding according to common-law or statutory forms; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; incidental recovery, in the same action or in a separate proceeding, for use and occupation, profits, damages, improvements, etc.; verdict and judgment and enforcement thereof by writ of possession or otherwise; review of proceedings; and costs in such actions.

[EXCLUDES real actions in general, whether founded on right of property (see *Real Actions*), or on mere right of possession (see *Entry, Writ of*), and actions founded on forcible entry, unlawful detainer, etc. (see *Forcible Entry and Detainer*), or on right to damages for trespass (see *Trespass to Try Title*); actions for damages for wrongful entry upon or injury to real property (see *Trespass*); recovery of possession of particular kinds of property, or by holders of particular classes of estates or interests (see *Mines and Minerals; Tenancy in Common; Landlord and Tenant; Mortgages*; and other specific heads); effect of adverse possession and of statutes of limitation (see *Adverse Possession; Limitation of Actions*); and new trials as of right in actions of ejectment, etc. (see *New Trial*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

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**VI. Equitable Ejectment.**

[No paragraphs or references in this Digest. But see 17 Cent. Dig. Eject. §§ 536-550].

*Cross-References.**See—*

FORCIBLE ENTRY AND DETAINER, §§ 1-43.

Restraining. INJUNCTION, §§ 26, 118.

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Claimant under tax title. TAXATION, §§ 793-817.

Landlord to recover possession of demised premises. LANDLORD AND TENANT, §§ 279-286.

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**I. RIGHT OF ACTION AND DEFENSES.**

Joinder of causes of action under code, see ACTION, § 45.

To determine property rights of church, see RELIGIOUS SOCIETIES, § 25.

**§ 1. Nature and scope of remedy in general.**

[a] (Sup. 1881)

An action to recover real property and compensation for the use and occupation thereof, as authorized by Code §§ 592, 598, 599, is an action sounding in tort.—Dorrell v. Hannah, 80 Ind. 497.

[b] (Sup. 1888)

In an action for possession of land, the remedy at the time the entry was made may be invoked as it was then that the cause of action accrued.—Cincinnati, H. & R. Co. v. Clifford, 15 N. E. 524, 113 Ind. 460.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 1, 2, 6.

See, also, 15 Cyc. pp. 12-15, 20 Cyc. p. 660.

**§ 8. Title to support action.**

Admissibility of evidence, see post, § 90.

Pleading, see post, §§ 65, 82.

Title of third person as defense, see post, § 25.  
Weight and sufficiency of evidence, see post, § 95.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 16-62.

See, also, 15 Cyc. pp. 17-50; note, 18 L. R. A. 781, 790.

**§ 9. — In general.**

[a] (Sup. 1818)

A tenant at will can maintain an action of ejectment.—Buntin v. Doe ex dem. Duchane, 1 Blackf. 26.

[b] (Sup. 1821)

A term for years will support ejectment.—Duchane v. Goodtitle ex dem. Buntin, 1 Blackf. 117.

[c] (Sup. 1821)

It is not a prerequisite to a recovery in ejectment that plaintiff should trace his lessor's title back to the government. The legal right of possession is the subject of controversy in this action, and not the ultimate title to the land.—Doe ex dem. Wood v. West, 1 Blackf. 133.

[d] (Sup. 1832)

To sustain an action of disseisin, the plaintiff must, as in ejectment show a legal title.—Mosier v. Smith, 3 Blackf. 132.

[e] Plaintiff must recover, if at all, on the strength of his own title, and not because of the weakness or want of title in defendant.—(Sup. 1843) *Eldon v. Doe ex dem. Wynn*, 6 Blackf. 341; (1854) *State v. State Bank*, 5 Ind. 353; (1879) *Tharp v. Jarrell*, 66 Ind. 52; (1879) *Mull v. Orme*, 67 Ind. 95; (1880) *Hasselman v. Lowe*, 70 Ind. 414; (1881) *Smith v. Bryan*, 74 Ind. 515; (1881) *Brandenburg v. Seigfried*, 75 Ind. 568; (1882) *Cox v. Rash*, 82 Ind. 519; (1884) *Pierce v. Spear*, 94 Ind. 127; (1884) *Deputy v. Mooney*, 97 Ind. 463; (1884) *Coan v. Elliott*, 101 Ind. 275; (1886) *Castor v. Jones*, 107 Ind. 283, 6 N. E. 823; (1887) *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; (1888) *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253; (1888) *Stafford v. Cronkhite*, 114 Ind. 220, 16 N. E. 596; (1889) *Shockley v. Starr*, 119 Ind. 172, 21 N. E. 473; (1890) *Grayson v. Schlamm*, 126 Ind. 142, 25 N. E. 810; (1894) *Silver v. Creek Cement Corp. v. Union Lime & Cement Co.*, 138 Ind. 297, 35 N. E. 125, 37 N. E. 721; (1894) *McKinney v. Lanning*, 38 N. E. 601, 139 Ind. 170; (1900) *Wilson v. Carrico*, 58 N. E. 847, 155 Ind. 570; (App. 1905) *Cline v. Hays*, 76 N. E. 257, 37 Ind. App. 329.

[f] (Sup. 1843)

In disseisin, as in ejectment, the legal title must prevail.—*Allen v. Smith*, 6 Blackf. 527.

[g] (Sup. 1854)

In a suit to recover possession of land, plaintiff must show a valid title to the premises, and an inquiry as to the validity of defendant's title is not pertinent to the case.—*State v. State Bank*, 5 Ind. 353.

[h] (Sup. 1866)

In an action to recover the possession of land, plaintiff must recover on the strength of his own title, and he must show a title to the possession of the land.—*Stehman v. Crull*, 26 Ind. 436.

[i] (Sup. 1868)

Where the complaint avers that plaintiff is the owner in fee simple and entitled to the possession of the land in controversy, and that defendant holds possession of the same without right, plaintiff can only recover on a legal title to the possession, paramount to the legal or equitable title of defendant.—*Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676.

[j] (Sup. 1871)

In an action to recover the possession of real estate, a deed conveying the real estate in controversy to the plaintiff, executed after the commencement of the suit, will not enable the plaintiff to maintain his action.—*Inge v. Garrett*, 38 Ind. 96.

[k] (Sup. 1879)

Any person having a valid subsisting interest in real property, whether legal or equitable, which entitles him to the possession thereof, may recover the same in an action of eject-

ment under Code, § 592.—*Bibbler v. Walker*, 69 Ind. 362.

[l] In an action to recover real property, plaintiff must trace his title to the United States, or to a grantor in possession.—(Sup. 1881) *Smith v. Bryan*, 74 Ind. 515; (1881) *Brandenburg v. Seigfried*, 75 Ind. 568; (1884) *Peck v. Louisville, N. A. & C. R. Co.*, 101 Ind. 366.

[m] (Sup. 1891)

Ejectment will not lie to recover land on which a railroad is located, after public rights have intervened.—*Morgan v. Lake Shore & M. S. Ry. Co.*, 130 Ind. 101, 28 N. E. 548.

[n] (App. 1904)

In ejectment plaintiff must recover on the strength of his own title, and hence if he claim under an execution sale he must show a valid judgment, execution, or decree, and deed.—*Richcreek v. Russell*, 34 Ind. App. 217, 72 N. E. 617.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 16-20.

See, also, 15 Cyc. pp. 17-28.

## § 10. — Adverse possession.

[a] (Sup. 1821)

Where one in peaceable possession of land is ousted by a bare trespasser, who enters without claim of title, he may recover in ejectment on proof of prior possession, though such possession was not held for the time and in the manner required for a prescriptive title.—*Doe ex dem. Wood v. West*, 1 Blackf. 133.

[b] (Sup. 1841)

The prior possession of plaintiff, or parties through whom he claims, is sufficient evidence of title to support ejectment.—*Robinoe v. Doe ex dem. Colwell*, 6 Blackf. 85.

The possession of real estate by an ancestor raises a presumption that he was seised in fee, and is sufficient, prima facie, to support an ejectment on the demise of his heirs.—Id.

[c] (Sup. 1850)

An acknowledgment by a person under whom plaintiff claims, after such person had transferred his right and possession to plaintiff, of the right and title of defendant in the premises, does not prevent plaintiff from setting up the statute of limitations, and claiming an adverse possession.—*Wiley v. Doe ex dem. Meyneke*, 2 Ind. 230.

[d] (Sup. 1873)

In an action to recover real estate held adversely by defendant under claim of title, a party will not be allowed to attack, as fraudulently procured, any instrument forming a link in the chain of title, unless it in some way concerns his own.—*Steeple v. Downing*, 60 Ind. 478.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 30-41; 1

CENT. DIG. Adv. Poss. § 616.

See, also, 15 Cyc. pp. 30-30.

**§ 11. — Interest in public lands.**

[a] (Sup. 1889)

One who seeks to recover land included in a swamp-land grant, though he has never been in possession, need not show a chain of title from the United States to him.—*Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 42-46.

See, also, 15 Cyc. p. 18.

**§ 12. — Paper title.**

[a] (Sup. 1841)

A joint demise, by several heirs, of real estate, is sufficient to support ejectment.—*Robinoe v. Doe ex dem. Colwell*, 6 Blackf. 85.

[b] (Sup. 1843)

In ejectment, the lessor of plaintiff claimed the premises in dispute as a purchaser under an execution on a judgment in his favor against one S. Defendant claimed the premises as a prior purchaser under an execution issued before the lessors, on a judgment rendered against S. at the same term with the other, but a few days later. The lessor's execution was issued and delivered to the sheriff a short time before the defendant's purchase, of which the latter had notice. *Held*, that plaintiff was entitled to recover.—*Whitney v. Rightclaim ex dem. Southwick*, 6 Blackf. 322.

[c] (Sup. 1884)

Where plaintiff relies on a warranty deed, defendant may put in evidence a quitclaim deed made by the same grantor to defendant's lessor before plaintiff's deed was recorded.—*Hastings v. Brooker*, 98 Ind. 158.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 47-55.

See, also, 15 Cyc. pp. 17, 18, 39-41.

**§ 13. — Equitable title.**

Sufficiency of proof of equitable title on pleading legal title, see post, § 82.

[a] (Sup. 1873)

In an action by the heirs of a deceased former owner of real property for its recovery, the complaint was in the statutory form, and defendant pleaded the general denial, and claimed under a deed from plaintiff's ancestor. *Held*, that plaintiff should be permitted to show that the ancestor was insane when he executed the deed.—*Brown v. Freed*, 43 Ind. 253.

[b] (Sup. 1876)

Where a complaint for the recovery of land is in the usual form of a possessory action in stating the nature of plaintiff's title, or where recovery is sought on the ground that plaintiff was insane at the time of the execution of the deed under which plaintiff claims title, there can be no recovery on an equitable title.—*Nichol v. Thomas*, 53 Ind. 42.

[c] (Sup. 1879)

An equitable title is available to plaintiff in ejectment.—*Burt v. Bowles*, 69 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 56-58.

See, also, 15 Cyc. pp. 43-45.

**§ 15. — Title from common source.**

Issues and proof, see post, § 82.

[a] Where both parties claim title under the same grantor, it is sufficient to prove a title derived from him without proving his title, as neither party can deny such title.—(Sup. 1850) *Pierson v. Doe ex dem. Turner*, 2 Ind. 123; (1881) *Wilson v. Peelle*, 78 Ind. 384; (1883) *Boyce v. Graham*, 91 Ind. 420; (1889) *Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749; (1890) *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 59-62.

See, also, 15 Cyc. pp. 47-50; note, 47 Am. St. Rep. 72.

**§ 17. Right of plaintiff to possession.**

Admissibility of evidence, see post, § 90.

Pleading, see post, §§ 62, 65.

Right of possession in third person as defense, see post, § 25.

Verdict and findings, see post, § 111.

Weight and sufficiency of evidence, see post, § 95.

[a] (Sup. 1826)

It is generally necessary in ejectment for plaintiff to show a right of possession in his lessor at the date of the demise and at the time the action was commenced.—*Jackson ex dem. Bartholomew v. Hughes*, 1 Blackf. 421.

[b] (App. 1909)

A plaintiff in ejectment must recover on the strength of his own title, and show in himself a present right to enter and possess without regard to the character of defendant's possession.—*Welborn v. Kimmerling*, 89 N. E. 517.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 63, 64.

See, also, 15 Cyc. p. 50.

**§ 19. Possession of defendant.**

Pleading, see post, § 66.

[a] (Sup. 1843)

To sustain ejectment, it must appear that defendant was in possession of the premises when the action was commenced.—*Williamson v. Doe ex dem. Crawford*, 7 Blackf. 12.

[b] (Sup. 1875)

To sustain an action for the recovery of the possession of real estate, it must be shown that defendant keeps plaintiff out of possession unlawfully. Therefore, when the action was for the recovery of a strip of ground 8½ inches wide off the side of plaintiff's land, and it was

shown that it was occupied by a party wall built by defendant, which, by agreement between the parties, was to be 12 inches thick, one-half on the land of each party, and that, as to the other 2½ inches taken, plaintiff had recovered of defendant a judgment for damages, there can be no recovery.—*Lotz v. Briggs*, 50 Ind. 346.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 65-73.

See, also, 15 Cyc. pp. 51-55.

**§ 21. Demand or notice to quit.**

[a] (Sup. 1826)

In ejectment, A. and B. were admitted defendants, the former as tenant and the latter as landlord. *Held*, that A. was precluded, by his appearance as B.'s tenant, from afterwards showing that he was the tenant of plaintiff's lessor, and entitled to notice to quit.—*Jones v. Doe ex dem. Perdue's Heirs*, 1 Blackf. 351.

[b] (Sup. 1829)

A. died in possession of a tract of land which he held by virtue of a title bond executed by C. The widow of A. remained in possession and married B. who also continued in possession. C., having the legal title, brought an action of disseisin for the premises against B. without having previously demanded possession. *Held*, that C. could not sustain his action of disseisin against B., under the circumstances, without a previous demand.—*Taylor v. McCrackin*, 2 Blackf. 260.

[c] In an action of disseisin, it is not necessary to prove a notice to quit, or a denial of possession, if there be no privity between the parties.—(Sup. 1838) *Bowser v. Warren*, 4 Blackf. 522; (1843) *Allen v. Smith*, 6 Blackf. 527.

[d] Defendant purchased the premises for a valuable consideration from one of the lessors, who was a female and under age. Subsequently the grantor married the other lessor. Defendant was in possession of the premises under his purchase for several years after the marriage, and after the grantor's majority, with the acquiescence of herself and husband. *Held*, that, until notice of the grantor's intention to avoid the conveyance was given, ejectment could not be maintained.—(Sup. 1840) *Clawson v. Doe ex dem. Moore*, 5 Blackf. 300; (1845) *Doe ex dem. Berry v. Shaw*, 7 Blackf. 402.

[e] (Sup. 1841)

A person in possession of real estate under a contract of sale with A., the owner, is not liable to an action of ejectment by the lessee of a subsequent vendee of A. without a demand of possession.—*Stackhouse v. Doe ex dem. Reynolds*, 5 Blackf. 570.

[f] (Sup. 1844)

In ejectment against a trespasser, notice to quit need not be proved.—*Meeker v. Doe ex dem. Place*, 7 Blackf. 169.

[g] (Sup. 1880)

Where not only a verbal demand for possession was made, but one of the plaintiffs undertook also to read a written demand for possession, which defendant refused to listen to, and which was, on such refusal, thrown into the house, a demand was well made, if any were necessary.—*Clouse v. Elliott*, 71 Ind. 302.

[h] (Sup. 1881)

Where the possession of defendants was under a claim of ownership of the premises, and they never acknowledged themselves to be tenants of plaintiff, nor did he claim that they were such, no notice to quit was necessary.—*Eberwine v. Cook*, 74 Ind. 377.

[i] (Sup. 1885)

In ejectment, a demand need not be alleged or proved.—*McCaslin v. State ex rel. Auditor of State*, 99 Ind. 428.

[j] (App. 1909)

Where adjacent landowners, in doubt as to the true boundary line, established a line by agreement, and erected a fence thereon, and each went into possession up to the line so established, there must be a demand for the land claimed by one notwithstanding the agreement before ejectment will lie therefor.—*Welborn v. Kimmerling*, 89 N. E. 517.

A statement by an owner of land to the adjacent owner after the parties had agreed on a boundary line that he was not satisfied, and would like to have the thing settled peaceably, was not a demand for any part of the land in dispute essential to the maintenance of ejectment therefor, for a "demand" is a pre-emptory claim to a thing of right, and differs from a "claim," in that it presupposes that there is no question as to the right, and demand will not admit of delay, while "claim" implies that the right is or may be doubtful, and that negotiations may be had to determine the same.—*Id.*

[k] (App. 1909)

Where defendant was rightfully and peaceably put in possession, a prior demand was necessary to the maintenance of ejectment.—*Furst v. Satterfield*, 89 N. E. 906.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 76-80.

See, also, 15 Cyc. p. 56.

**§ 22. Defenses.**

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 81-116.

See, also, 15 Cyc. pp. 61-79.

**§ 23. — In general.**

[a] (Sup. 1878)

Defendants in ejectment who do not show any title from the plaintiff's grantors, but claim the land by adverse possession, cannot attack the validity of the deed under which plaintiffs claim on the ground of fraud in procuring its execution.—*Steeple v. Downing*, 60 Ind. 478.

[b] (Sup. 1831)

Defendant in ejectment cannot show title to section 36, by a sheriff's deed describing the land as section 26, in the absence of evidence of a misdescription.—*Goss v. Meadors*, 78 Ind. 528.

[c] (Sup. 1885)

Color of title may arise from a void tax deed, yet it will protect the party in possession under it from being treated as a mere trespasser. Such deed conveys a lien, and should be admitted in evidence in an action of ejectment against its owner.—*Watkins v. Winings*, 102 Ind. 330, 1 N. E. 638.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 81-93.

See, also, 15 Cyc. p. 61.

#### § 24. — Adverse possession.

[a] (Sup. 1821)

Since possession is prima facie evidence of the right to possession, in an action against one in possession it is not necessary for the latter, in order to recover, to show a perfect paper title, where the adverse party neither alleges nor proves title in himself, or that the occupant's right to possession has ceased.—*Doe ex dem. Wood v. West*, 1 Blackf. 133.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 94-98; 1 CENT. DIG. Adv. Poss. § 607.

#### § 25. — Title or right of possession of third person.

Pleading, see post, § 84.

[a] (Sup. 1821)

In ejectment, defendant may show that the title of plaintiff's lessor has expired.—*Doe ex dem. Wood v. West*, 1 Blackf. 133.

[b] In ejectment by a purchaser at a sheriff's sale against the judgment debtor in possession, the latter cannot show an outstanding title in another, to defeat the action.—(Sup. 1838) *Hobson v. Doe ex dem. Harper*, 4 Blackf. 487; (1878) *Joyce v. First Nat. Bank of Madison*, 62 Ind. 188.

[c] When defendant in ejectment is in possession under color of title or right, he can avail himself of an outstanding title as a defense.—(Sup. 1847) *Connelly v. Doe ex dem. Skelly*, 8 Blackf. 320; (1847) *Galbreath v. Doe ex dem. Zook*, 8 Blackf. 366.

[d] (Sup. 1847)

In ejectment by a purchaser at sheriff's sale against a person in possession under the execution debtor, or collusively, defendant cannot set up an outstanding title in a third person.—*Sherry v. Denn ex dem. State Bank of Indiana*, 8 Blackf. 542.

[e] (Sup. 1867)

The estate of the mortgagee in the mortgaged premises cannot be set up as an outstand-

ing title, in ejectment, to defeat the mortgagor.—*Johnson v. Cornett*, 29 Ind. 59.

[f] (Sup. 1881)

An execution defendant cannot set up title in a third person in an action by the purchaser at the sheriff's sale, or his assignee, for possession of the land sold.—*Turner v. First Nat. Bank of Madison*, 78 Ind. 19.

[g] (Sup. 1882)

Defendant in possession of land may defeat an action to recover the possession by showing that the ancestor, under whom plaintiff claims by descent, conveyed the land in his lifetime.—*Hagenbuck v. McClaskey*, 81 Ind. 577.

[h] (Sup. 1886)

Defendant in possession cannot defend on the ground that a stranger, with whom he is not in privity, is the equitable owner thereof, and entitled thereto by reason of a mistake in a deed by which it was intended to convey the real estate in controversy to such stranger, but under which defendant makes no claim.—*East v. Peden*, 106 Ind. 92, 8 N. E. 722.

An outstanding title with which the defendant is connected, and through which he makes no claim, must, in order to be available to protect his possession, appear to be a present, subsisting, operative legal title on which the owner may sue and recover.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 99-106.

See, also, 15 Cyc. pp. 65-71.

#### § 26. — Equitable defenses in general.

[a] (Sup. 1818)

At common law, an equitable defense is not available in ejectment.—*Smith v. Allen ex dem. Bigger*, 1 Blackf. 22.

[b] (Sup. 1830)

An application to be joined as a party defendant to an action of ejectment by one claiming title to the premises for which the action was brought, by virtue of a title bond only, is properly denied, since such applicant has an equitable, and not a legal, title.—*Rench v. Doe ex dem. Webster*, 2 Blackf. 309.

[c] (Sup. 1849)

An objection to a sheriff's sale, under which plaintiff's lessor claims title, may be made in an action of ejectment.—*Sherry v. Nick of the Woods ex dem. Lockwood*, 1 Ind. 575, *Smith*, 289.

[d] (Sup. 1868)

The complaint in a possessory action by S. and others against A. and others alleged title in S. for himself and as trustee for his co-plaintiffs. Plaintiffs' title was derived through a sheriff's sale, under a decree in favor of Y. against L. for a balance of the purchase money (Y. having previously sold the land by title bond to L.), on which decree A. became replevin bail. At the time of suing out execution, S.

was the assignee of the decree, and became one of the purchasers at the sale. *Held*, that it was error on the trial to reject evidence offered by defendants to prove an assignment of the title bond to A. before the decree, and notice thereof to S., and that A., by becoming replevin bail on the decree, did not subject his equitable title to sale thereon.—*Adler v. Sewell*, 29 Ind. 598.

[e] (Sup. 1886)

As to what constitutes an equitable defense, the authority seems to be that any state of facts which would entitle the defendant in a proper case to the reformation of an instrument or which would under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by plaintiff would be such a defense.—*East v. Peden*, 8 N. E. 722, 108 Ind. 92.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 107-113.

See, also, 15 Cyc. pp. 71-77.

## § 27. — Equitable estoppel.

[a] (Sup. 1900)

Plaintiff furnished money to his brother to buy land at a tax sale. The land was conveyed to the latter, who, without plaintiff's knowledge, quitclaimed the same to defendant, and thereafter paid the purchase money to plaintiff. *Held* that, so long as plaintiff retained the purchase money paid by defendant, he could not assail the latter's title.—*Wilson v. Carrico*, 58 N. E. 847, 155 Ind. 570.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 114.

See, also, 15 Cyc. p. 76.

## § 28. — Set-off and counterclaim.

Pleading, see post, § 72.

[a] (Sup. 1881)

In an action to recover real estate, a counterclaim that defendant is the owner in fee simple and in possession, and that plaintiff's claim created a cloud on his title, is sufficient.—*Arnold v. Smith*, 80 Ind. 417.

[b] (Sup. 1883)

In a suit by a purchaser of land for possession against a prior purchaser from the same vendor, defendant, having paid the purchase money, taken possession, and made valuable improvements, may set up by counterclaim the equitable title thus acquired, and have the title quieted.—*Barnes v. Union School Tp.*, 91 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 115, 116.

See, also, 15 Cyc. p. 78.

## § 29. Pendency of other action or proceeding.

Pleading, see post, § 70.

[a] (Sup. 1889)

In an action to recover real estate, it is no defense that there has been an appeal from the judgment on which plaintiff bases his title.—*Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 117, 119; 1

CENT. DIG. Abate. & R. § 51.

## § 31. Successive actions.

[a] (Sup. 1897)

In ejectment, where the burden of proving title is on the plaintiffs, they cannot support their title upon the fact that, in a previous action of ejectment by the defendants against the plaintiffs, judgment had been rendered in favor of the latter for costs.—*Graham v. Lunsford*, 48 N. E. 627, 149 Ind. 83.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 120-122.

See, also, 15 Cyc. p. 59.

## § 33. Persons entitled to sue.

Executor, see EXECUTORS AND ADMINISTRATORS, §§ 130, 134.

Heirs of mortgagee, see DESCENT AND DISTRIBUTION, § 90.

Parties plaintiff, see post, §§ 40-42.

Purchasers of equity of redemption, see MORTGAGES, § 214.

Right to contest validity of deed, see DEEDS, § 77.

Wife against husband, see HUSBAND AND WIFE, § 205.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 125.

See, also, 15 Cyc. p. 60.

## § 35. Persons against whom action may be brought.

Husband by wife, see HUSBAND AND WIFE, § 205.

Parties defendant, see post, §§ 44-46.

[a] (Sup. 1886)

Where land is devised, charged with the support of a person during her life, one who claims title by sheriff's deed under a sale upon foreclosure of a mortgage executed to him by the devisee cannot maintain ejectment against the person with whose support the land is charged.—*Castor v. Jones*, 107 Ind. 283, 6 N. E. 823.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 126.

See, also, 15 Cyc. p. 60.

## II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

### § 38. Venue.

Application of general statutes, see VENUE, § 5.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 130.

See, also, 15 Cyc. p. 79.

### § 39. Time to sue and laches.

Application of general statutes of limitation, see LIMITATION OF ACTIONS, § 19.

Pleading, see post, § 84.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 131.

See, also, 15 Cyc. p. 78; note, 4 Am. St. Rep. 382.

### § 40. Parties plaintiff.

Substitution of parties, see PARTIES, § 59.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Eject. §§ 132-137.

See, also, 15 Cyc. pp. 80, 81.

### § 42. — Lessor of plaintiff.

[a] (Sup. 1818)

A lessor in ejectment ought to have a subsisting legal title or interest in the premises.—*Jared v. Goodtitle ex dem. Hill*, 1 Blackf. 29.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 136.

See, also, 15 Cyc. p. 81.

### § 44. Parties defendant.

Persons against whom action may be brought, see ante, § 35.

FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Eject. §§ 132, 138-142.

See, also, 15 Cyc. pp. 82-85.

### § 46. — Casual ejector or tenant in possession.

As parties to writ of error, see post, § 121.

[a] (Sup. 1892)

Where a paragraph of a complaint seeks to recover possession of land on the ground that defendant had leased the land of plaintiff and the tenancy had expired, it is error to join a third person as party defendant without having alleged anything as to her except that "she has some pretended claim to said land," and, as to her, the complaint is bad on demurrer.—*Liggett v. Lozier*, 133 Ind. 451, 32 N. E. 712.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 138, 139; 32 CENT. DIG. Land. & Ten. § 218.

See, also, 15 Cyc. p. 82.

### § 48. Notice to tenant and entry of consent rule.

[a] (Sup. 1844)

In ejectment, a notice served on the tenant in possession to appear at the term next after the term succeeding the time of notice is illegal.—*Jackson v. Goodtitle ex dem. Bromley*, 7 Blackf. 129.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 143.

See, also, 15 Cyc. p. 155.

### § 50. Intervention and bringing in new parties.

[a] (Sup. 1847)

The Revised Statutes do not require the court, after the admission of a person as defendant, to sustain a motion to admit other persons as defendants whose title is not consistent with that of the defendant previously admitted.—*Sherry v. Denn ex dem. State Bank of Indiana*, 8 Blackf. 542.

It was necessary, before the Revised Statutes, for a person claiming to be let in to defend in ejectment to show that his title was connected to and consistent with the possession of the occupant.—*Id.*

In ejectment, where the affidavit on which a motion to admit certain persons as defendants is based is not made by such persons, or by their agent or attorney, such fact is a sufficient reason in itself for overruling the motion.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 139, 145.

See, also, 15 Cyc. pp. 85, 86.

### § 58. Surveys.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 152.

See, also, 15 Cyc. p. 90.

### § 59. — In general.

[a] (Sup. 1883)

In ejectment involving the location of a division line, a survey fixing a corner made by a private surveyor at the instance of others than the parties to the suit or their privies, and without notice to them, is inadmissible.—*Brown v. Anderson*, 90 Ind. 93.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 152.

## III. PLEADING AND EVIDENCE.

Aider of pleading by verdict or judgment, see PLEADING, § 433.

Competency of witness, as affected by interest, see WITNESSES, §§ 96, 97.

Effect of tax deeds as evidence, see TAXATION, §§ 787-789.

Exhibits annexed to pleading, see PLEADING, § 307.



Failure of court to find on particular question, see TRIAL, § 397.

Failure to produce writing on order of court, see DISCOVERY, § 107.

Filing written instruments with pleadings, see PLEADING, §§ 310, 311.

Waiver of objections to pleading, see PLEADING, § 406.

### § 62. Declaration, complaint, or petition.

Aider by verdict or judgment, see PLEADING, § 433.

Allegations as to title of party, see ante, § 50. Filing written instruments with complaint, see PLEADING, §§ 310, 311.

Waiver of objections, see PLEADING, § 406.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 154-180.

See, also, 15 Cyc. pp. 90-99.

### § 63. — Form and requisites in general.

[a] (Sup. 1862)

In an action for the possession of realty, plaintiff's deed, being only evidence of title, is not the foundation of the action, requiring it to be set out in the complaint by copy or otherwise.—Lash v. Perry, 19 Ind. 322.

[b] (Sup. 1870)

In an action to recover realty, the fact that in one paragraph of the complaint plaintiff seeks to recover, together with property claimed in another paragraph, other property taken possession of by defendant at different times under different circumstances, does not invalidate the portion in relation to such additional claim, nor the paragraph containing it.—Harrison, N. T., R. & B. Turnpike Co. v. Roberts, 33 Ind. 246.

[c] (Sup. 1871)

A complaint is sufficient in an action for the recovery of real estate, if it contains the substance required by the statute.—Knight v. McDonald, 37 Ind. 463.

[d] (Sup. 1877)

On the filing of a disclaimer by defendant, an additional paragraph of the complaint, asking that the person named in the disclaimer as the possessor of the land be made a party to answer as to his interest in the land mentioned, and to show cause why plaintiff should not have judgment for possession of the land, is insufficient, since each paragraph of the complaint must be complete in itself, and this does not allege any title or right to recover in plaintiff.—McCarman v. Cochran, 57 Ind. 166.

[e] (Sup. 1881)

Where a complaint stated facts sufficient to constitute a cause of action in plaintiff's behalf for the recovery of real estate, and, as an incident to such recovery, plaintiffs sought to have an alleged mistake in one of their title papers corrected, held, that a demurrer to the

complaint was properly overruled, even though the allegations in regard to the alleged mistake in the deed were clearly defective and insufficient.—Smith v. Kyler, 74 Ind. 575.

[f] (Sup. 1883)

The allegation in a complaint in ejectment, required by Rev. St. 1881, § 1054, that the plaintiff is entitled to possession and that the defendant unlawfully keeps him out, need not be made in the words of the statute.—Swaynie v. Vess, 91 Ind. 584.

[g] (Sup. 1884)

A complaint which alleges that, while plaintiff was a married woman, defendant, knowing her husband to be of weak mind, confederated with him and a justice of the peace to induce her to execute a deed to property the legal title of which was in her husband, but the equitable title in her, under the false pretense of taking a mortgage to save the land to her and to save her husband from arrest, and alleging that defendant had possession of the land and claimed title under a deed which as to her was a forgery, and asking that the land be reconveyed to her and damages adjudged for its detention, states a good cause of action.—Carver v. Carver, 97 Ind. 497.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 154-157.

See, also, 15 Cyc. pp. 90, 91.

### § 64. — Description of property.

[a] (Sup. 1865)

An allegation in an action to recover possession of land that the premises, which were described accurately in the complaint, were those leased to plaintiff by a lease, a copy of which was filed with the complaint, is sufficient, though the description of the land in the lease, while not very definite, was sufficient to identify the land as that mentioned in the complaint by following the directions and distances indicated in the lease.—Guy v. Barnes, 24 Ind. 345.

[b] (Sup. 1870)

In a complaint against a turnpike company to recover possession of realty, a description is sufficient which describes a portion of the property as "all that part of the southwest quarter of section 33, township 9, range 2 west," on which is located and constructed the turnpike road and tollhouse of said company, and describes another portion by metes and bounds, commencing at the southeast corner of said tollhouse, and running thence east 8½ feet, etc., to the place of beginning.—Harrison, N. T., R. & B. Turnpike Co. v. Roberts, 33 Ind. 246.

[c] (Sup. 1871)

In an action to recover the possession of land, the complaint must describe it with reasonable certainty, and must designate the county and state in which it is situated.—Leary v. Langsdale, 35 Ind. 74.

## [d] (Sup. 1871)

An averment in a complaint for the recovery of real property that plaintiff is entitled to the possession of "six — of lot No.," etc., will not sustain a recovery for "six acres" of such lot.—*Unversaw v. Myers*, 37 Ind. 487.

## [e] (Sup. 1871)

Where, in a complaint in ejectment, there are two descriptions of the property, one general, and the other particular, and they cannot stand together, the particular will be adopted.—*Inge v. Garrett*, 38 Ind. 96.

## [f] (Sup. 1872)

A description of land as "part of the southwest quarter of section —, township 19, range 4 W., containing 114 acres," is uncertain.—*Jolly v. Ghering*, 40 Ind. 139.

## [g] (Sup. 1873)

In an action to recover the possession of real estate, if the real estate can be identified from the description in the complaint, the description will be sufficient.—*Indianapolis Mfg. & Carpenters' Union v. Cleveland, C., C. & I. R. Co.*, 45 Ind. 281.

## [h] (Sup. 1876)

In an action to recover real estate, a complaint describing the real estate in controversy so that it may be ascertained is sufficient.—*Rosenbaum v. Schmidt*, 54 Ind. 231.

## [i] (Sup. 1881)

Where the complaint, in an action to recover land, in describing the land, fails to state the direction of the township and range from the base line and principal meridian, but states the county in which the land lies, and from the position of the county on the map the township and range intended are easily determinable, the court will not treat the description as insufficient on demurrer.—*Franco v. Allman*, 77 Ind. 417.

In an action to recover real estate, a description of the land as "the northwest quarter of the north half of section 10," *held* equivalent to "the north half of the northwest quarter."—*Id.*

## [j] (Sup. 1882)

A complaint in ejectment, describing the premises without apparent uncertainty, will be *held* sufficient on demurrer.—*Railsback v. Walke*, 81 Ind. 400.

## [k] (Sup. 1882)

In an action to recover land, if from the description of the land the court can judicially know that it is in a certain county, the complaint is good in this regard, so as to give the court jurisdiction.—*Wilcox v. Moudy*, 82 Ind. 219.

## [l] (Sup. 1882)

Where, in a suit to recover the possession of land, the land was described, in the complaint, as known as "a part of the 'Joshua Wilson Farm,' in section 15, township," etc.,

"containing 40 acres," the description was *held* insufficient.—*Hammond v. Stoy*, 85 Ind. 457.

## [m] (Sup. 1882)

A correct description of the premises in ejectment, save that they were located in the wrong city, will not vitiate the complaint.—*Brake v. Stewart*, 88 Ind. 422.

## [n] (Sup. 1883)

The description of land in a complaint in ejectment is sufficient, where the land can be identified from the description by the aid of a competent surveyor and persons knowing the location of monuments mentioned as points in the boundaries.—*Brown v. Anderson*, 90 Ind. 93.

## [o] (Sup. 1883)

A description in an ejectment writ of premises as "about one-fourth of an acre situate in the northwest corner of section [giving number, town, and range], being the same parcel now in possession of defendant, and enclosed and used as a tollgate, and garden and tollhouse," is, on a motion in arrest of judgment, bad for uncertainty.—*College Corner & R. Gravel Road Co. v. Moss*, 92 Ind. 119.

The failure of a complaint in ejectment to so describe the property as to enable the sheriff to ascertain the same cannot be corrected by evidence.—*Id.*

In an action affecting the title or possession of real estate founded on an instrument in which there is a description of land defective, but capable of aid from existing facts, the complaint should give an accurate description of the property, so that its exact boundaries may be known from the description in the complaint.—*Id.*

## [p] (Sup. 1883)

A complaint in ejectment which describes the land as "the N. E. part of the N. W. quarter, \* \* \* containing 35 acres," is bad on demurrer.—*Roberts v. Lanam*, 92 Ind. 380.

## [q] (Sup. 1884)

In a suit to recover the possession of real estate, a complaint describing the property as a house, and the ground covered thereby, and more particularly as the house built by the plaintiff in 1878 for defendant on the Eziriah Crandall farm, near the east line in fractional section 13, township 4 south, and range 5 east, in Harrison county, Ind., and the ground covered thereby, is sufficient to identify the property.—*Cunningham v. McCollum*, 98 Ind. 38.

## [r] (Sup. 1884)

A petition in ejectment should so describe the land sued for that in the event of a recovery, the officer executing the writ of possession will know to what land the plaintiff is entitled.—*Lenninger v. Wenrick*, 98 Ind. 596.

## [s] (Sup. 1889)

In ejectment a description of the land sued for as "the fractional northeast quarter of section 36, in township 33 north, of 4 west, lying south of the Kankakee river, in Starke county,

Indiana," is sufficient.—*Sphung v. Moore*, 120 Ind. 352, 22 N. E. 319.

The description, "all that part of the fractional northeast quarter of section 36, in township 33 north, of range 4 west, which lies south of the middle line of the Kenkakee river, in Starke county, Indiana," is sufficient—*Id.*

[t] (*Sup.* 1892)

Under Rev. St. 1881, §§ 1054, 5225, requiring a complaint for the recovery of possession of real estate to describe the land, a copy, attached as an exhibit to the complaint, of a deed which is not the foundation of the action, cannot aid a want of description in the complaint.—*Liggett v. Lozier*, 133 Ind. 451, 32 N. E. 712.

[u] (*Sup.* 1896)

In ejectment the complaint described the land as "ten acres off of the south end of the northeast quarter of section 35, in township 19 north, in range 7 east, except four acres off of the west side of said ten-acre tract, heretofore conveyed to C." *Held*, that the description was sufficient to identify the land.—*Barton v. Cridge*, 145 Ind. 698, 44 N. E. 541.

[v] (*Sup.* 1897)

Where the complaint in an action in ejectment described a portion of the land in controversy as "a part of the east half of the southeast quarter of" a certain section, "commencing 12 feet west of the northwest corner of lot 4, in the town of C., C. county, Indiana, due west to the west line of said lot of land, and to include all the land heretofore owned by one H. S., as recorded in Deed Record, Book G, page 117, and all that lies west of the town of C., and supposed to contain 4 acres, more or less," and the description thereof returned in the special verdict was the same, and the deed referred to conveyed 80 acres, except two lots, 132 by 66 feet each, the court could render no judgment including a sufficient description from either the complaint or the findings of the jury.—*Boyer v. Robertson*, 48 N. E. 7, 149 Ind. 74.

[w] (*App.* 1910)

A complaint in an action to recover real estate, which describes the premises as 51 feet in front of a designated street on the south side of lot No. 154 of Donation enlargement of the city, also the rear part of lot No. 183 in said enlargement, sufficiently describes the property as against a demurrer and a motion in arrest of judgment.—*Pritchard v. Saunders*, 91 N. E. 743.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 158-164; 39 CENT. DIG. Plead. § 64.

See, also, 15 Cyc. pp. 92-95.

## § 65. — Title, estate, and possession of plaintiff.

Necessity of proof of title pleaded, see post, § 82.

[a] (*Sup.* 1822)

In ejectment, the demise was alleged in the declaration to have been made on October 1, 1819, and the ouster to have taken place afterwards, to wit, on April 2d, in the said year. *Held*, that the declaration was good, and that the scilicet, being contrary to the word "afterwards" and the precedent matter, was repugnant and void.—*Armstrong v. Jackson ex dem. Elliott*, 1 Blackf. 210, 12 Am. Dec. 225.

[b] (*Sup.* 1849)

If lessor of plaintiff in ejectment claims under a sheriff's sale, his title relates back to the date of the judgment, and it cannot be said that a demise stated in the declaration to be anterior to the date of the sheriff's deed is therefore laid before the commencement of his title.—*Doe ex dem. Hutchinson v. Horn*, 1 Ind. 363, Smith, 242, 50 Am. Dec. 470.

[c] (*Sup.* 1876)

In pleading title in fee simple, it is only necessary to simply state it, without alleging its derivation; and if a party pleading such title, in alleging his chain of title, leaves some of the links blank, this will not vitiate his pleading.—*McMannus v. Smith*, 53 Ind. 211.

[d] (*Sup.* 1877)

Where, because of a breach of a condition subsequent contained in a conveyance of real estate, the heir of the deceased grantor seeks to recover such real estate, plaintiff should allege that such grantor at the time of making such conveyance was seised in fee simple of such real estate.—*Clark v. Holton*, 57 Ind. 564.

[e] (*Sup.* 1881)

An averment in a complaint to recover possession of land that in a certain partition suit it was adjudged that plaintiff was entitled to the possession of the land was insufficient as an averment that plaintiff was entitled to possession at the time of the commencement of her action.—*Vance v. Schroyer*, 77 Ind. 501.

[f] (*Sup.* 1882)

A complaint which, by the facts, shows title in plaintiff, is valid, though it does not state the conclusion that he is owner.—*Lovely v. Speisshoffer*, 85 Ind. 454.

[g] (*Sup.* 1882)

Under Rev. St. 1881, § 1054, providing that in ejectment plaintiff must allege that he is entitled to the possession, and section 1050 providing that any person having a valid subsisting interest in land, and a right to the possession, may recover the same, a complaint for the recovery of land must allege that plaintiff is entitled to possession, and an allegation of ownership in fee is insufficient.—*Miller v. Shriner*, 87 Ind. 141.

[h] (*Sup.* 1882)

The precise character of the estate claimed, whether it be in fee, for life, or for years, need not be specified in a declaration in ejectment.—*Schenck v. Kelley*, 88 Ind. 444.

## [i] (Sup. 1885)

In ejectment, plaintiff need not allege that he is entitled to possession.—*McCaslin v. State ex rel. Auditor of State*, 99 Ind. 428.

## [j] (Sup. 1885)

In an action, under Rev. St. 1881, §§ 1050, 1054, to recover the possession of real estate, it is necessary to aver in the complaint, in terms, that plaintiff is entitled to its possession, or to state facts from which his right to possession arises by necessary implication.—*Mansur v. Streight*, 103 Ind. 358, 3 N. E. 112.

## [k] (Sup. 1886)

A complaint for the recovery of the possession of real estate which contains no averment that plaintiff was entitled to possession at the time of the commencement of the action is insufficient, and under Rev. St. 1881, § 1054, a demurrer thereto ought to have been sustained.—*Simmons v. Lindley*, 9 N. E. 360, 108 Ind. 207.

## [l] (Sup. 1891)

Where plaintiffs alleged title in themselves specifically, a general allegation of ownership will not help them in case the specific allegations do not show title in them.—*Morgan v. Lake Shore & M. S. R. Co.*, 130 Ind. 101, 28 N. E. 548.

Though plaintiffs in ejectment are not required to anticipate in their complaint defendant's defense, yet, where they do so, the complaint must state facts sufficient to show a title sufficiently strong to destroy the defense attempted to be anticipated.—*Id.*

## [m] (Sup. 1892)

Where a complaint in ejectment showed plaintiff's title to be based on a deed which was regular in form and founded on a valuable consideration, it was error to hold the complaint insufficient on demurrer.—*Ewing v. Lutz*, 131 Ind. 361, 30 N. E. 1069; *Same v. Cones*, 131 Ind. 600, 30 N. E. 1069; *Same v. Wade*, *Id.*; *Same v. Carr*, *Id.*; *Same v. Boggs*, *Id.*; *Same v. Parke*, *Id.*; *Same v. Williamson*, *Id.*; *Same v. Lumaree*, *Id.*

## [n] (Sup. 1893)

In an action for the possession of land under the Code, an allegation that plaintiff is the owner and entitled to the possession is sufficient as against a demurrer, the remedy, if any, being by motion to make the complaint more definite and certain.—*Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810.

## [o] (Sup. 1898)

Under Rev. St. 1894, § 1066 (*Horner's Rev. St. 1897*, § 1054), providing that a complaint in ejectment shall state that plaintiff is in possession, particularly describing the premises and the interest he claims therein, and that defendant unlawfully keeps him out of possession, a cause of action which omits allegations of plaintiff's right to possession, and that defendant unlawfully keeps him out of it, is

not an action to recover possession.—*Nutter v. Hendricks*, 50 N. E. 748, 150 Ind. 605.

## [p] (App. 1908)

A complaint, averring that plaintiff is the owner in fee simple, as a tenant in common, of the undivided one-fifteenth of the premises described, and that he is entitled to the possession of all the premises, and that the defendants hold possession without right, is not demurrable as averring that plaintiff and defendants were co-tenants, and hence that plaintiff was not entitled to bring ejectment.—*Bivens v. Henderson*, 42 Ind. App. 562, 86 N. E. 426.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 165-174.

See, also, 15 Cyc. pp. 95-97.

## § 66. — Ouster by and possession of defendant.

## [a] (Sup. 1881)

In ejectment, allegations that plaintiffs were entitled to possession, and that defendants kept them out of it, without right, instead of "unlawfully," held sufficient.—*Smith v. Kyler*, 74 Ind. 575.

## [b] (Sup. 1881)

In an action to recover possession of land, an allegation in the complaint that defendant was and is in possession without right or title to the lands, and wrongfully holds possession and occupies to the damage of the plaintiff, is not equivalent to an averment that the defendant has no right of possession, since right to possession may exist apart from any right or title to the fee of the land.—*Vance v. Schroyer*, 77 Ind. 501.

## [c] (Sup. 1883)

The complaint, in an action for the possession of land, which fails to show as required by Rev. St. 1881, § 1054, that plaintiff is unlawfully kept from the possession, is defective.—*Levi v. Engle*, 91 Ind. 330.

## [d] (Sup. 1884)

Where a complaint in an action to recover possession of land charges that the defendant had possession unlawfully, and without right, it is good as charging possession acquired by trespass.—*Ft. Wayne M. & C. R. Co. v. Mellett*, 92 Ind. 535.

## [e] (Sup. 1884)

Under Rev. St. 1881, § 1054, requiring the complaint in ejectment to allege that defendant unlawfully keeps plaintiff out of possession, a complaint in ejectment against several defendants failing to allege that one of them unlawfully keeps plaintiff out of possession is demurrable as to him.—*Second Nat. Bank of Lafayette v. Corey*, 94 Ind. 457.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 175-179.

See, also, 15 Cyc. pp. 98, 99.

**§ 67. — Demand and notice.**

[a] (Sup. 1877)

In an action to recover land because of an alleged breach of a condition subsequent contained in the conveyance thereof, plaintiff should allege an entry on or claim to the real estate, made by plaintiff before bringing suit.—*Clark v. Holton*, 57 Ind. 504.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EJECT. § 180.

See, also, 15 Cyc. p. 90.

**§ 68. Plea, answer, and disclaimer.**

Admissions, see PLEADING, § 127.

Cross-complaint, see PLEADING, § 148.

Exhibits annexed to pleading, see PLEADING, § 307.

General issue, see PLEADING, § 115.

Joinder of defenses, see PLEADING, § 90.

Joint or separate answers of codefendants, see PLEADING, § 84.

Matter in avoidance, see PLEADING, § 130.

Partial defense, see PLEADING, § 80.

Responsiveness of plea, see PLEADING, § 98.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EJECT. §§ 181-197.

See, also, 15 Cyc. pp. 99-104.

**§ 69. — Form and requisites in general.**

[a] (Sup. 1858)

An answer, purporting to go to the whole case, setting up title to half the land sued for, is bad.—*Slaughter v. Definey*, 10 Ind. 103.

[b] (Sup. 1869)

Where, in an action to recover possession of real estate, the defendant claims title through a sale and conveyance to him under an order of court granted upon the application of an administrator, to make assets to pay debts of a decedent, the answer need not aver that a real-estate bond was filed, but copies of the record and the deed must be exhibited as parts of the answer.—*Spaulding v. Baldwin*, 31 Ind. 376.

[c] (Sup. 1872)

In an action to recover the possession of real estate, if the defendant pleads a former adjudication and judgment of title in the defendant, it is not necessary that he should further allege that he is still vested with the title. If the title has since become vested in the plaintiff, this may be set up in reply.—*Campbell v. Cross*, 39 Ind. 155.

[d] (Sup. 1881)

An answer by defendant in ejectment, averring that the sheriff had wrongfully disallowed a claim made by him that the property sued for was exempt, is bad on demurrer where it does not aver that defendant had any title thereto, or any facts warranting such an inference.—*Over v. Shannon*, 75 Ind. 352.

[e] (Sup. 1882)

A special answer to a complaint in ejectment which sets up a right to occupy as tenant

must show that the tenancy had not been terminated before the commencement of the action.—*Railsback v. Walke*, 81 Ind. 400.

[f] (Sup. 1882)

A complaint for possession of real estate set forth plaintiff's title in fee, that defendant was tenant under a 10-year lease from plaintiff's grantor, that his term had expired, and possession had been demanded and refused. *Held*, that an answer that defendant was put into possession under a contract of purchase with plaintiff's grantor on 10 years' credit, that he had paid the price and performed all conditions, and that plaintiff purchased with notice, was good, though it failed to deny the lease.—*Donaldson v. Dunn*, 87 Ind. 343.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EJECT. §§ 181-189.

See, also, 15 Cyc. p. 99.

**§ 70. — Matter in abatement.**

[a] (Sup. 1887)

In ejectment, an answer alleging that plaintiff based his suit on a foreclosure decree given against defendant in favor of H., and that within a year from the rendition of the decree defendant filed his complaint in the proper court asking for a review of the judgment and decree, and that such proceedings were had in that behalf, as that the court on a hearing adjudged that he was not entitled to review and gave judgment accordingly, from which defendant had prayed an appeal, had filed an appeal bond, and directed the clerk to make a transcript of the record which he intended to file in the office of the clerk of the supreme court immediately on its completion, wholly failed to show that an appeal had been perfected, and was therefore insufficient for any purpose.—*Bryan v. Scholl*, 10 N. E. 107, 100 Ind. 367.

[b] (Sup. 1889)

In an action to recover possession of land, a plea in abatement denying plaintiff's title is demurrable, as alleging matter in bar.—*Peters v. Banta*, 120 Ind. 416, 23 N. E. 95, 23 N. E. 84.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. EJECT. §§ 190-192.

See, also, 15 Cyc. p. 102.

**§ 71. — Disclaimer.**

Demurrer to, see post, § 75.

Effect as to costs, see post, § 123.

[a] (Sup. 1877)

Where a defendant appears and answers, disclaiming all interest in or title to the premises, and alleging the possession thereof to be in a third person, such answer amounts to a disclaimer.—*McCarnan v. Cochran*, 57 Ind. 166.

[b] (Sup. 1881)

Where, in an action to recover certain land described as lying east of and adjoining the

eastern boundary of a certain town, defendant in his answer alleged that he was not in possession of any part of the land lying east of the eastern boundary of the town, and that he did not claim any right or title thereto, and that the plaintiff had no title or right of possession to, or in any of the land lying west of the eastern boundary of such town, the location of the eastern boundary of the town was not a question in controversy, and could not properly be determined by the judgment.—*Hill v. Forkner*, 76 Ind. 115.

In an action to recover real estate described in the complaint as bounded by the eastern boundary of a town, an answer that defendant was not in possession of any part of the land lying east of said line and disclaiming title thereto, but averring that plaintiff had no title to any land lying west of such line, does not respond to the complaint.—*Id.*

[c] (Sup. 1889)

Under the statute (Rev. St. 1881, § 1072), a disclaimer does not bar an action for the wrongful withholding of possession, nor defeat the right to damages therefor.—*McAdams v. Lot-ton*, 118 Ind. 1, 20 N. E. 523.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 193-196.

See, also, 15 Cyc. p. 102.

§ 72. — Set-off and counterclaim.

[a] (Sup. 1876)

In an action for the recovery of the possession of real estate, a pleading filed by defendant alleged that he was the owner in fee simple of the real estate, describing it, and that plaintiff was claiming and pretending to hold some interest therein as heir at law of the person named, and was endeavoring to dispossess defendant, which claim was a cloud upon his title, and prayed that his title be quieted, and that plaintiff be enjoined from setting up his claim. *Held*, that this pleading, being a counterclaim, was sufficient to authorize the relief sought.—*McMannus v. Smith*, 53 Ind. 211.

[b] (Sup. 1881)

Defendant alleged that he executed a mortgage on the property sought to be recovered, which was foreclosed and sold; the mortgagee becoming purchaser. Subsequently it was sold to another person on a judgment, and the certificate of purchase assigned to the mortgagee. Later the mortgagee made a verbal contract with his brother for redemption of the property, and in pursuance thereof paid to the mortgagee a certain sum, receiving an assignment of the certificate, upon which he afterwards obtained a sheriff's deed. Still later a similar agreement was made between the judgment debtor and the mortgagee's brother; both agreements being with the knowledge and consent of the mortgagee. In pursuance of the last agreement, the brother paid to the mortgagee a

certain sum, and a conveyance was made of the property to the brother's son, but subsequently it was conveyed to plaintiff, who had notice and knowledge sufficient to put him on inquiry that the conveyance to the brother and his son was solely for the use and benefit of defendant, and was intended to be security for the repayment of the money advanced by the brother. The property, at the time of the agreements, and of the various sales and conveyances, was in the possession of the judgment debtor, who claimed title thereto. The declaration thereto prayed for the affirmative relief. *Held*, that such a pleading is a counterclaim, and not an answer.—*Rucker v. Steelman*, 73 Ind. 396.

[c] (Sup. 1882)

It is error to sustain a demurrer to a counterclaim averring a purchase of real estate at a delinquent sale, possession thereof under a tax deed, and the making of valuable improvements, praying that defendant's title be quieted, or that a lien be declared in his favor for taxes.—*Crecelius v. Mann*, 84 Ind. 147.

[d] (Sup. 1895)

In an action to recover real estate, a pleading filed by defendant in which he claims title to the land and asks the title to be quieted, or any other affirmative relief, constitutes a counterclaim.—*Ross v. Banta*, 34 N. E. 865, 39 N. E. 732, 140 Ind. 120.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 197.

See, also, 15 Cyc. p. 104.

§ 73. Cross-complaint and answer thereto.

[a] (Sup. 1875)

Upon an action for the recovery of the possession of real estate, and a cross complaint making an additional party defendant, who answered, disclaiming any interest in the real estate and showing that it was the property of the original plaintiff by devise, it was error to strike out the answer on motion of the original defendant, since, it appearing that the defendant to cross-complaint had no interest in property, he should not be compelled to endure the vexation and expense of litigation.—*Montgomery v. Gorrell*, 51 Ind. 309.

[b] (Sup. 1881)

In ejectment to recover certain real estate, a cross-complaint alleging that defendant F. was the owner in fee simple, was in possession, and that plaintiff's claim created a cloud on his title was sufficient.—*Arnold v. Smith*, 80 Ind. 417.

[c] (Sup. 1882)

In an action to recover possession of real property, defendant's cross-complaint alleged, in substance, that he purchased the property of one T.; that prior thereto the property was sold by the sheriff under execution together with other real estate belonging to T.; that

plaintiff purchased at such sale and received a certificate thereof; that before execution of a sheriff's deed therefor said T. paid the plaintiff in full of his purchase money, interest, and costs, and that plaintiff received such payment in full satisfaction of all his claim in and to the property, but failed to surrender his certificate of purchase to said T. or to defendant, but subsequent thereto procured a sheriff's deed to the property and claimed title thereunder. *Held*, that such cross-complaint stated facts sufficient to constitute a cause of action in defendant's favor, and was not demurrable.—*Taggart v. McKinsey*, 85 Ind. 392.

[d] (Sup. 1883)

In an action to recover land, a cross-complaint which states that defendant owns the land in fee, and that plaintiff asserts title, but has none, is good on demurrer.—*Collins v. McDuffie*, 89 Ind. 562.

#### FOR CASES FROM OTHER STATES.

SEE 17 CENT. DIG. Eject. § 198.

See, also, 15 Cyc. p. 104.

#### § 74. Replication or reply.

[a] (Sup. 1861)

Where the vendee under an agreement for a deed, but without a right of possession, enters before the receipt of the deed with the consent of the vendor, and afterwards the latter brings ejectment to recover the possession, the vendor's reply, averring a demand of possession after entry and before suit brought, will be sufficient.—*Kratemayer v. Brink*, 17 Ind. 509.

[b] (Sup. 1878)

Where the defendant's answer, in an action brought in the grantor's name to recover real property held adversely by the defendant, avers that the plaintiff had conveyed the land to another, a reply thereto, alleging that the defendant was at the time in adverse possession of the land under a claim of ownership, is sufficient.—*Steeple v. Downing*, 60 Ind. 478.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 199.

See, also, 15 Cyc. p. 104.

#### § 75. Demurrer.

Demand for unauthorized relief as ground for demurrer, see PLEADING, § 193.

[a] (Sup. 1882)

Where the complaint in a suit to recover land does not directly state an existing interest, but indirectly alleges the same, argumentatively, it is sufficient on demurrer; defendant's remedy being a motion to make more specific.—*Vance v. Schroyer*, 82 Ind. 114.

[b] (Sup. 1889)

A disclaimer, being a confession of the cause of action, and operating to preclude plaintiff from prosecuting his case beyond a judgment for possession and damages, is not de-

murrable.—*McAdams v. Lotton*, 118 Ind. 1, 20 N. E. 523.

[c] (Sup. 1895)

In ejectment, there was no error in sustaining a demurrer to a special answer where the evidence in support thereof was admissible under the general denial.—*Waters v. Lyon*, 40 N. E. 662, 141 Ind. 170.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 204.

See, also, 15 Cyc. pp. 107, 108.

#### § 76. Amended and supplemental pleadings.

[a] (Sup. 1844)

In ejectment against a trespasser, the declaration may be amended as to the date of the demise at any time before verdict, provided the amendment does not injure or impose any hardship on the defendant.—*Meeker v. Doe ex dem. Place*, 7 Blackf. 169.

[b] (Sup. 1883)

In an action of ejectment, title acquired subsequently to the beginning of the action can be set up by defendant only by supplemental pleading.—*Johnson v. Briscoe*, 92 Ind. 367.

[c] (Sup. 1886)

Where the complaint in a suit for the recovery of real estate, fails to allege that the plaintiff was entitled to the possession at the time she commenced her suit, a supplemental complaint averring that the complainants were entitled to possession of the real estate in controversy did not supply such omission, as it did not follow from such averment that the original plaintiff was in fact entitled to the possession at the time she commenced the suit.—*Simmons v. Lindley*, 9 N. E. 360, 108 Ind. 297.

[d] (Sup. 1891)

Where, in a suit to recover possession of land and quiet title thereto, plaintiff has filed a sufficient abstract of title, he cannot be compelled to furnish a more specific abstract and a bill of particulars, since bills of particulars are not required in actions for torts.—*Roberts v. Vornholt*, 126 Ind. 511, 26 N. E. 207.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 205-214.

See, also, 15 Cyc. pp. 108-111.

#### § 78. Delivery or filing of abstract or evidence of title.

[a] (App. 1891)

In an action for possession of real estate, it is not necessary that a copy of a lease, under an assignment of which plaintiff claims, be filed with the complaint.—*Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 216, 217.

See, also, 15 Cyc. p. 111.

### § 79. Motions for judgment on pleadings.

[a] (App. 1909)

In an action against a husband and wife to recover possession of and quiet title to land, the husband, withdrawing a general denial, pleaded specially, admitting the allegations of the complaint except that he had possession, and his wife, withdrawing her general denial, disclaimed any interest in the land except as his wife and denied possession. *Held*, under Burns' Ann. St. 1908, §§ 1101–1103, providing that the answer of defendant may contain a denial under which he may make every defense that he has, and that, if defendant makes defense, possession need not be proved, and that plaintiff must recover on the strength of his own title, the case was properly taken from the jury, and judgment rendered for plaintiff on the pleadings.—*Masephol v. Heimbach*, 43 Ind. App. 632, 88 N. E. 316.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 218.

See, also, 15 Cyc. p. 112.

### § 80. Issues, proof, and variance.

In action for mesne profits, see post, § 134.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 220–236.

See, also, 15 Cyc. pp. 113–123.

### § 81. — Issues in general.

[a] (Sup. 1850)

Under Rev. St. p. 798, the defendant's possession of the premises, or of the part he defends, must be admitted.—*Applegate v. Doe ex dem. Hall*, 2 Ind. 169.

[b] (Sup. 1861)

Where the defendant in a suit to recover possession of real estate appears and pleads his possession, the boundaries of the lands described by the plaintiffs are conceded, and evidence of them is immaterial. 2 Rev. St. § 597, pp. 166, 167.—*Voltz v. Newbert*, 17 Ind. 187.

The provisions of 2 Rev. St. p. 167, § 597, declaring that, in an action to recover the possession of real estate, where the defendant makes defense, it should not be necessary to prove him in possession of the premises, were not affected by Acts 1855, p. 57, providing that the answer of the defendant shall contain a general denial of each material statement or allegation, and that under such denial the defendant shall be permitted to give in evidence every defense that he may have, either legal or equitable; such act being intended merely to change the mode of pleading, and not to increase the amount of evidence.—*Id.*

[c] (Sup. 1881)

Where, in a suit to recover land described as lying east of and adjoining the eastern boundary of a certain town, defendant disclaimed any title to any part of the land lying east of the eastern boundary, the question of the lo-

cation of the eastern boundary of the town was immaterial.—*Hill v. Forkner*, 76 Ind. 115.

[d] (Sup. 1883)

In ejectment under the Code, if the defendant make defense, it is not necessary to prove him in possession of the premises, as in such case his possession of the land described is admitted for purposes of the action.—*College Corner & R. Gravel Road Co. v. Moss*, 92 Ind. 119.

[e] (Sup. 1884)

Where, in a suit to recover realty all the defendants joined in an answer of general denial and made defense, there was such an admission of possession on their part as relieved plaintiff of the necessity of proving them to be in possession.—*Carver v. Carver*, 97 Ind. 497.

[f] (Sup. 1892)

Under Rev. St. 1881, § 1056, providing that in ejectment, "where defendant makes defense, it shall not be necessary to prove him in possession of the premises," where defendants pleaded a denial of the complaint, and on the trial admitted plaintiff to be the owner of the land, proof of defendants' possession is not necessary.—*Weigold v. Pross*, 132 Ind. 87, 31 N. E. 472.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 220, 221.

### § 82. — Necessity of proof of title pleaded.

[a] (Sup. 1854)

In ejectment brought by the execution defendant to recover land levied on and sold by the sheriff against the purchaser at the sheriff's sale, such purchaser need only show a judgment, execution, sale, and sheriff's deed, and need not show that there had been an appraisal of the land before the sale.—*Mercer v. Doe ex dem. Nutting*, 6 Ind. 80.

[b] (Sup. 1865)

On the trial in ejectment, where plaintiff claims under a lease, the land mentioned in the complaint must be identified with that described in the lease.—*Guy v. Barnes*, 24 Ind. 345.

[c] A plaintiff who bases his claim to property, or its possession, upon a legal title, cannot recover on the strength of an equitable title.—(Sup. 1869) *Groves v. Marks*, 32 Ind. 319; (1882) *Stout v. McPheeters*, 84 Ind. 585.

[d] (Sup. 1871)

In an action to recover part of 10 acres of land off the east side of a certain quarter section, plaintiff should not be permitted to introduce a deed conveying 10 acres off the southeast side of the same quarter section.—*Buchanan v. Whitham*, 36 Ind. 257.

[e] (Sup. 1874)

In an action for the recovery of real property, the deed of conveyance to plaintiff under which he claims title is not the foundation of the action; and, if it is set out by copy and



made part of the complaint, the plaintiff is not thereby relieved from proving its delivery.—*Burkholder v. Casad*, 47 Ind. 418.

[f] (Sup. 1874)

In an action to recover real estate, it is not sufficient for the plaintiff to trace his title back to a remote grantor, without further evidence of title or possession in such grantor.—*Huddleston v. Ingels*, 47 Ind. 498.

[g] (Sup. 1878)

In an action for the recovery of real estate, a party who traces his title through his grantors to the United States need not establish possession in his grantors.—*Steeple v. Downing*, 60 Ind. 478.

[h] (Sup. 1880)

Plaintiff in ejectment must prove title in the remote grantors, respectively, to render their conveyance effectual as a link in his chain of title, it being insufficient merely to prove a conveyance to plaintiff himself.—*Shipley v. Shook*, 72 Ind. 511.

[i] (Sup. 1881)

Where, in ejectment both parties claim under the same person, title in him is admitted, and need not be otherwise proved.—*Woolen v. Rockefeller*, 81 Ind. 208.

[j] (Sup. 1882)

Where plaintiff fails to show either possession or a continuous chain of title from one in possession, he cannot recover, and there is no error in striking out evidence consisting of a chain of title not reaching back to one in possession.—*Start v. Clegg*, 83 Ind. 78.

[k] (Sup. 1883)

A party may have different evidences of title, and plead them all, but he need only prove one good and paramount title.—*Leary v. New*, 90 Ind. 502.

[l] (Sup. 1891)

One claiming under a deed from a woman, who inherited from a former husband, may maintain ejectment without showing that she has no children by him living at the time she executed the deed.—*Grigsby v. Akin*, 128 Ind. 591, 28 N. E. 180.

[m] (App. 1904)

Where plaintiff in an action to recover real estate alleges that he has the legal title to the premises in fee, he cannot recover on proof showing an equitable title; *Burns' Ann. St.* 1901, § 1066, requiring plaintiff in such an action to state the interest claimed in the land.—*Coppock v. Austin*, 72 N. E. 637, 34 Ind. App. 319.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 222-228.

See, also, 15 Cyc. pp. 114-118.

§ 84. — Evidence admissible under pleadings.

Evidence admissible under general denial, see PLEADING, § 382.

[a] (Sup. 1856)

In an action to recover the possession of real estate, defendant, under the Revised Statutes of 1852, cannot give evidence of an outstanding title in a third person under a general denial of the allegations in the complaint.—*Millhollin v. Jones*, 7 Ind. 715.

[b] (Sup. 1860)

In an action for the recovery of realty, limitations or any other defense, as provided by Acts 1855, p. 57, may be given in evidence under the general denial.—*Vail v. Halton*, 14 Ind. 344.

[c] All defenses are admissible under the general issue.—(Sup. 1863) *Woodruff v. Garnor*, 20 Ind. 174; (1880) *Webster v. Bebinger*, 70 Ind. 9.

[d] All defenses are admissible under the general denial in an action to recover the possession of real estate.—(Sup. 1877) *Dale v. Frisbie*, 59 Ind. 530; (1878) *Steeple v. Downing*, 60 Ind. 478; (1881) *Wood v. Eckhouse*, 79 Ind. 354.

[e] (Sup. 1882)

In a complaint for the recovery of land under Code 1852, § 596 (Rev. St. 1881, § 1055), all matters of defense, including limitations, were admissible under the general denial.—*Brown v. Fodder*, 81 Ind. 491, *Same v. Lee*, 83 Ind. 598.

[f] (Sup. 1886)

Under a statutory general denial in an action for recovery of real estate, any facts which show that according to the principles of equity as applied by courts of chancery the plaintiff ought not to recover possession of the land in controversy may be given in evidence to defeat a recovery.—*East v. Peden*, 108 Ind. 92, 8 N. E. 722.

[g] (Sup. 1890)

In an action to recover land which the complaint alleged was owned by plaintiff in fee simple, the answer put the ownership in issue. *Held*, that the defense based on the fact that plaintiff owned only an undivided one-third of the land was not waived by failing to demur for want of parties, or to plead in abatement.—*Martin v. Neal*, 125 Ind. 547, 25 N. E. 813.

[h] (Sup. 1891)

In ejectment, where plaintiff claims land included in an unrecorded deed to defendant, on the ground that the vendor, after selling to defendant, remained in possession, and afterwards conveyed to plaintiff without notice of defendant's deed, a reply by defendant, in addition to the general denial, that plaintiff's deed contained a reference to defendant's title sufficient to put him on inquiry, is demurrable, since such fact can be shown under the general denial, and the additional reply is merely argumentative.—*Cincinnati, I., St. L. & C. R. Co. v. Smith*, 127 Ind. 461, 26 N. E. 1009.

## [l] (Sup. 1832)

In an action to recover real estate, defendants claimed title by their cross-complaint, and they also answered the plaintiff's complaint by general denial. *Held*, that defendants were entitled to prove their title under their cross-complaint and under their answer of general denial, and to give in evidence any defense legal or equitable, and a contention that there was no issue on which evidence tending to prove fraud or mistake was admissible, was untenable.—*Ewing v. Smith*, 31 N. E. 404, 132 Ind. 205.

[j] In an action for the recovery of real estate all defenses, both legal and equitable may be given under the general denial.—(Sup. 1895) *Waters v. Lyon*, 40 N. E. 662, 141 Ind. 170; (App. 1904) *Richcreek v. Russell*, 34 Ind. App. 217, 72 N. E. 617.

## [k] (App. 1903)

Under Burns' Rev. St. 1901, § 1067, providing that in ejectment defendant may, under the general denial, give in evidence every defense that he may have, either legal or equitable, defendant may show a mistake of description in the deed under which he claims, though he cannot make it the basis of affirmative relief.—*Wieneke v. Deputy*, 68 N. E. 921, 31 Ind. App. 621.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 230-236.

See, also, 15 Cyc. pp. 119-123.

## § 85. — Variance between allegations and proof.

## [a] (Sup. 1832)

Proof of an estate for years will not support an allegation of an estate in fee.—*Hunt v. Campbell*, 83 Ind. 48.

## [b] (App. 1892)

In ejectment by a landlord against a tenant holding over, the complaint described the premises as "the east 18 feet of the west 38½ feet of the front 90 feet" of a certain lot, "being 80 feet front," etc. A frontage of 18 feet was proved. *Held*, that there was no variance, since the misstatement of frontage was a mere informality, which will be presumed to have been amended, and was, moreover, controlled by the statement of distance, and by the lease, filed as an exhibit, which gave the true frontage.—*Goodbub v. Scheller*, 3 Ind. App. 318, 29 N. E. 610.

## FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 220-229;  
39 CENT. DIG. PLEAD. § 85.

See, also, 15 Cyc. pp. 113-123.

## § 86. Presumptions and burden of proof.

Execution, existence, and identity of deed, see DEEDS, § 193.

[a] The burden is on the plaintiff in ejectment to make out his title and right of possession by affirmative proof.—(Sup. 1887) *Roots v. Beck*, 9 N. E. 698, 109 Ind. 472; (1895) *Pittsburgh C. & St. L. R. Co. v. O'Brien*, 41 N. E. 528, 142 Ind. 218.

## [b] (Sup. 1887)

Where, in ejectment, defendant's answer consisted of a plea in confession and avoidance, admitting plaintiff's prima facie case and avoiding it by affirmative matter, it was proper for the court to charge that defendant was put to the proof of such affirmative matter.—*Roots v. Beck*, 9 N. E. 698, 109 Ind. 472.

## [c] (Sup. 1889)

In ejectment by the purchaser at a sale under a judgment of foreclosure which is not void as to the mortgagor, who was the owner and in possession when the mortgage was given, it will not be presumed that defendant, who was a stranger to the record in the foreclosure suit, purchased from the mortgagor before the foreclosure proceedings, especially where there is nothing to show that he ever had any title.—*Bateman v. Miller*, 118 Ind. 345, 21 N. E. 292.

## [d] (Sup. 1891)

Where defendant, in ejectment brought by one claiming under a deed from a woman who inherited from a former husband, claims that she had children by such husband living at the time she executed the deed, the burden is on him to show it.—*Grigsby v. Akin*, 128 Ind. 591, 28 N. E. 180.

## [e] (Sup. 1896)

In an action for the possession of land, plaintiff claimed title by adverse possession, the possession having ceased several years before suit, while defendant was in possession under claim of ownership at the time of suit. *Held*, that plaintiff had the burden of showing title and the right to possession.—*Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930.

In an action for the possession of land, plaintiff claimed title by adverse possession, the possession having ceased several years before suit, while defendant was in possession under claim of ownership at the time of the suit. *Held*, that plaintiff had the burden of showing title.—*Id.*

## [f] (Sup. 1897)

In ejectment under Rev. St. 1894, § 1069 (Rev. St. 1881, § 1057), the burden is upon the plaintiff to show his title, and the failure of the defendant to establish any title can afford the plaintiff no ground for recovery.—*Graham v. Lunsford*, 48 N. E. 627, 149 Ind. 83.

## [g] (App. 1909)

In ejectment the burden is on plaintiffs not only to show title in themselves, but that they are entitled to possession according to the strength of their own title, regardless of the

weakness of that of their adversary.—Furst v. Satterfield, 89 N. E. 906.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 238-245.

See, also, 15 Cyc. pp. 123-129.

**§ 87. Admissibility of evidence.**

Admissions as evidence, see EVIDENCE, § 229.

Best and secondary evidence, see EVIDENCE, § 157.

Documentary evidence, see EVIDENCE, § 343.

Improvements by defendant, see post, § 139.

Improvements or taxes, see post, § 147.

Materiality of evidence, in general, see EVIDENCE, § 143.

Parol evidence to vary instrument, see EVIDENCE, § 390.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 246-278.

See, also, 15 Cyc. pp. 129-143.

**§ 88. — In general.**

Mental incapacity of grantor, see DEEDS, § 68.

[a] (Sup. 1882)

Where an action of ejectment was not founded on a contract with or demand against the deceased mother or infant defendants, but on a sale made under foreclosure of a vendor's lien against their father, the rightful defendant in the case, plaintiff's testimony as to what occurred between him and the father in reference to the possession of the property after the mother's death and before the bringing of the action was competent.—Biting v. Ten Eyck, 85 Ind. 357.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 246-248.

See, also, 15 Cyc. pp. 129-131.

**§ 89. — Identity and description of property.**

[a] (Sup. 1871)

A deed to the plaintiff, in an action to recover real estate, in which the real estate is described in the general terms alleged in the complaint, and which does not contain the particular description in the complaint, is not admissible in evidence.—Inge v. Garrett, 38 Ind. 96.

[b] (Sup. 1879)

In ejectment to recover a strip of land lying between a tract conveyed to plaintiff by deed and a tract conveyed to defendant in the same manner, and which defendant claimed as against plaintiff by an estoppel originating in a survey made at the request of plaintiff's grantor, the deed to defendant showing what land was thereby conveyed to him was irrelevant.—Mull v. Orme, 67 Ind. 95.

[c] (Sup. 1881)

Where the defense to an action of ejectment comprises a confession that defendant was in possession of the property described

in the complaint, evidence of the boundaries of the land is irrelevant. Code, § 597.—Rucker v. Steelman, 73 Ind. 396.

[d] (Sup. 1883)

The recorded plat of a city lot is proper evidence for plaintiff in ejectment for part thereof.—Meikel v. Greene, 94 Ind. 344.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 249-253.

See, also, 15 Cyc. p. 132.

**§ 90. — Title and right to possession.**

Self-serving declarations, see EVIDENCE, § 273.

[a] (Sup. 1829)

In ejectment, evidence tending to show that a deed under which plaintiff claimed the title was fraudulent and void as to creditors of the grantor is admissible.—Brown v. Wyncoop, 2 Blackf. 230.

[b] (Sup. 1851)

Where title is claimed through a board of county commissioners, the record of a deed from a third person to the board of justices of such county is admissible, as evidence of the claimant's title.—Doe ex dem. Trustees of Baptist Church v. Trustees of Methodist Episcopal Church, 2 Ind. 647.

[c] (Sup. 1865)

In an action for the possession of real estate, evidence is admissible to prove that plaintiff, at the time he made a conveyance was a minor.—Miles v. Lingerman, 24 Ind. 385.

[d] (Sup. 1872)

Where A. seeks to recover of B. the possession of real estate, and B. claims possession under a lease from A. to C., and by C. assigned to B., the lease is competent evidence on the part of A. to show that the time for which the premises were leased has expired.—Cromie v. Hoover, 40 Ind. 49.

[e] (Sup. 1874)

To make out a title to real estate under a sheriff's sale, the judgment, execution, return, and sheriff's deed are pertinent and relevant evidence, when otherwise unobjectionable.—White v. Rice, 48 Ind. 225.

[f] (Sup. 1874)

In an action to recover possession of real estate, where the plaintiff claims title by purchase at sheriff's sale under a decree of foreclosure, the decree of foreclosure and order of sale, the return of the sheriff thereon, and the deed of the sheriff to the plaintiff, are competent evidence for the plaintiff.—Splahn v. Gillespie, 48 Ind. 397.

[g] (Sup. 1881)

In a suit to recover possession of land, a power of attorney to lease, mortgage, sell, and convey real estate, and dispose of personal property for the payment of debts of the persons by whom it was executed, was not admissible in evidence to show a right to possession by the

person to whom it was given, as it was made to him to aid in the preservation of the property, and not to enable him to deprive the owner of it in opposition to his wishes, and in a manner prejudicial to his interests.—*Goss v. Meadors*, 78 Ind. 528.

[h] (Sup. 1881)

Where, in an action to recover possession of real estate and to quiet title, a paragraph of the complaint alleged that defendant had no valid claim of title under a deed from the grantee in a tax deed, the admissibility of the deed from the grantee in the tax deed, when offered in evidence as proof of title, was not promoted by such averment.—*Woolen v. Rockafeller*, 81 Ind. 208.

[i] (Sup. 1884)

Where a complaint alleged that defendant, who had leased land, remained in possession after his term, keeping plaintiff, who had a lease out of possession, it was proper to permit the introduction of evidence as to the contract between the landlord and each of the parties.—*Boyce v. Graham*, 91 Ind. 420.

[j] (Sup. 1884)

A will devised real estate to a devisee for life, with power to sell the same, and pass a title in fee to the purchaser. The devisee conveyed the real estate by a deed of general warranty, purporting to convey the fee to a purchaser. Subsequently the devisee executed a deed reciting that the prior conveyance was intended to convey a fee by executing the power of disposition conferred by the testator's will. *Held*, in a suit by one claiming under the will to recover the property, that the second deed was admissible as against the objection that it was immaterial and irrelevant.—*Downie v. Buennagel*, 94 Ind. 228.

[k] (Sup. 1887)

A decree of foreclosure of a mortgage, and public notice of sale, otherwise admissible in evidence, are not rendered inadmissible merely because the county in which the land is situated is not stated in either; it appearing that the decree was rendered by the Clinton circuit court, that no objection was made to the jurisdiction of that court, that the mortgage described the land as in Clinton county, and that the land was described in such decree and notice as lying in a township and range found in no other county in the state.—*Bryan v. Scholl*, 100 Ind. 367, 10 N. E. 107.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 254-277.

See, also, 15 Cyc. pp. 134-143.

§ 91. — Possession and ouster.

Parol evidence, see EVIDENCE, § 400.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 278.

See, also, 15 Cyc. p. 143.

§ 92. Weight and sufficiency of evidence.

Effect of tax deeds as evidence, see TAXATION, §§ 787-789.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 279-298.

See, also, 15 Cyc. pp. 144-154.

§ 95. — Title and right to possession.

Instructions, see post, § 110.

[a] (Sup. 1813)

The appearance of a defendant, naming himself executor, when admitted in ejectment, instead of the tenant in possession, is no evidence in the suit of the death of his alleged testator, under whom he claims, nor is his previous recovery, though so named, in a forcible detainer against the plaintiff's lessor, any evidence of it.—*Buntin v. Doe ex dem. Duchane*, 1 Blackf. 26.

[b] (Sup. 1847)

Evidence in ejectment examined, and held to show title in plaintiff sufficient to warrant a verdict in his favor.—*Grimes v. Doe ex dem. Shute*, 8 Blackf. 371.

[c] (Sup. 1848)

Plaintiffs offered in evidence a deed, made in 1834, by M., conveying all his interest, and, as attorney in fact for K. and S., all their interest, in the demanded premises, to G., a quitclaim deed from G. to the tenant, reciting that the land was conveyed to him in 1834 by M., and proof that the plaintiffs were the heirs of K. and S., and that K. and S. died before the deed was made in 1834. No other testimony was offered, and judgment was rendered for plaintiff by the court to whom the cause was submitted. *Held*, that the evidence was not sufficient to sustain the judgment.—*Goodwin v. Doe ex dem. Kensett*, 1 Ind. 302, Smith, 126.

[d] (Sup. 1850)

Defendant claimed under sheriff's deed, which he produced, and proved a judgment in favor of A. against B., an entry by C., the lessor, as replevin bail, and a revival of the judgment in favor of A.'s administrator. He also proved the issuing of a venditioni exponas, and that, under it, he purchased the land; the rents and profits having been first offered for sale without effect. *Held*, that this evidence was sufficient, prima facie, to warrant a verdict for the defendant.—*Roe ex dem. Weirick v. Ross*, 2 Ind. 99.

[e] (Sup. 1850)

Where plaintiff in ejectment traces title to a person in possession under a deed, and to the same source from which the defendant derives title, such plaintiff need not show a patent from the United States to sustain his title.—*Pierson v. Doe ex dem. Turner*, 2 Ind. 123.

[f] (Sup. 1850)

In an action of ejectment commenced in 1848, A. introduced a general warranty deed to himself from B., made in 1843, and it was ad-

mitted that the grantor was in possession at the time of making the deed. *Held*, that B.'s deed, and his possession at the time it was executed, were sufficient evidence, *prima facie*, of the lessor's title.—*Applegate v. Doe ex dem. Hall*, 2 Ind. 160.

[g] (*Sup.* 1881)

In an action of ejectment by heirs, an entire failure of proof that the intestate's grantor entered the land or had possession, or that his grantee had possession, and of the contents, tenor, or delivery of the deed to the intestate, and a conflict of evidence as to its execution, justify a finding for defendant.—*Brandenburg v. Seigfried*, 75 Ind. 508.

[h] (*Sup.* 1881)

In an action of ejectment, evidence showed that plaintiff derived title by purchase from the purchaser at foreclosure sale to the property mortgaged by the ancestor of defendant, and that defendant had been a party to the suit to foreclosure, and had made default. Defendant claimed that he had made valuable improvements on the lot, that it had been included in the mortgage by mistake, and that plaintiff in the foreclosure suit had notice of his adverse possession, but his evidence failed to show this. *Held*, that a finding for defendant was not sustained by the evidence.—*Burkhard v. Schneider*, 80 Ind. 140.

[i] (*Sup.* 1882)

In ejectment, wherein plaintiffs claimed as heirs of a certain person, evidence *held* sufficient to show that such person had parted with his title in his lifetime.—*Hagenbuck v. McClaskey*, 81 Ind. 577.

[j] (*Sup.* 1882)

In an action to recover possession of land, evidence on defendant's part showing the decree of a court of competent jurisdiction, the issue and delivery of a certified copy thereof to the sheriff, the advertisement and sale, payment of the purchase money, and the execution of a certificate and deed was abundantly sufficient to show title in defendant.—*Lovely v. Speishoffer*, 85 Ind. 454; *Schlarb v. Simons*, Id. 601.

[k] (*Sup.* 1887)

Where the plaintiff establishes by an unbroken line of record evidence, from the United States government down to himself, that he is the owner in fee simple of the land, and the defendants, who are his daughter and her husband, show no title and no right to the possession except what they got from an agreement under which the plaintiff, in consideration of his daughter living with him, was to deed the daughter the land, reserving to himself the control, possession, and use during his life, there is no evidence to support a verdict in favor of the defendants.—*Zenor v. Johnson*, 111 Ind. 42, 11 N. E. 616.

[l] (*Sup.* 1890)

In ejectment, evidence that plaintiff derives title from a grantor whose ancestor had acquired the fee by adverse possession establishes the ownership of the fee in plaintiff.—*McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743.

[m] (*Sup.* 1890)

In ejectment against one claiming under a tax deed, plaintiff must trace his title to the government, or to one who had possession of the premises.—*Grayson v. Schlamm*, 126 Ind. 142, 25 N. E. 810.

In ejectment to recover certain land, evidence that plaintiff's ancestor at one time surveyed the land, but never resided thereon, that he at one time sold the same to another and died in another state, but leaving the exact date of his death in doubt and being conflicting as to whether the grantee ever occupied the land, was insufficient to prove possession on the part of such ancestor.—*Id.*

[n] (*App.* 1904)

Evidence in a suit for the recovery of the possession of land by one claiming the legal title in fee simple examined, and *held* insufficient to show a fee-simple title in plaintiff, essential to a recovery.—*Coppock v. Austin*, 72 N. E. 657, 34 Ind. App. 319.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 280-295.

See, also, 15 Cyc. pp. 145-153.

## § 96. — Possession and ouster.

[a] (*Sup.* 1842)

If the consent rule in ejectment require the defendant to confess on the trial the possession of the premises, as well as the lease, entry, and ouster, it is evidence of such possession as well as of the lease, entry, and ouster.—*Rawley v. Doe ex dem. Beachamp*, 6 Blackf. 143.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 296-298.

See, also, 15 Cyc. pp. 153, 154.

## IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

Admission by appearance of possession of land, see APPEARANCE, § 12.

Conclusiveness of judgment, see JUDGMENT, §§ 634-749.

Lis pendens, see LIS PENDENS, § 11.

Merger and bar of causes of action and defenses, see JUDGMENT, §§ 540-633.

Right to trial by jury, see JURY, § 14.

Statutory new trial as right, see NEW TRIAL, § 176.

Time of trial in general, see TRIAL, § 5.

## § 104. Proceedings preliminary to trial.

[a] (*Sup.* 1881)

During an action of ejectment, the court cannot order a sheriff to take possession with-

out giving the oath or bond required of a receiver.—*College Corner & R. Gravel Road Co. v. Moss*, 77 Ind. 139.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 299, 300.

See, also, 15 Cyc. pp. 154, 155, 157–159.

**§ 107. Submission of issues.**

[a] (Sup. 1872)

In an action to recover the possession of real estate and for damages for buildings removed from the same, where it was admitted by the pleadings, and by the defendants after the evidence was closed, that the plaintiff was the owner of the real estate, and that the buildings were removed at a time when the defendants had no legal right to occupy the premises, it was unnecessary for the court to submit to the jury any questions of fact, except the assessment of the amount of damages sustained by the plaintiff.—*Cromie v. Hoover*, 40 Ind. 49.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. § 311.

See, also, 15 Cyc. p. 163.

**§ 108. Dismissal or nonsuit at trial.**

Persons entitled to dismiss, see DISMISSAL AND NONSUIT, § 21.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. § 316.

See, also, 15 Cyc. p. 165.

**§ 110. Instructions.**

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 296.

[a] (Sup. 1818)

A refusal in ejectment by a lessee against a third person to instruct that plaintiff, to recover, must prove a clear legal title in his lessor to the land is reversible error.—*Jared v. Goodtitle ex dem. Hill*, 1 Blackf. 29.

[b] (Sup. 1850)

In an action of ejectment, an instruction that, "to make a line between the parties on the supposed fence by consent and agreement, it must be shown that this fence, or pretended line, had a fixed, certain, and established locality, and, if the pretended fence or line was shifting, the jury should not find for the plaintiff," was correctly refused, as, if the parties once agreed on a fence line between them, the fence might be afterwards removed, under circumstances which would not affect the line as agreed upon.—*Wiley v. Doe ex dem. Meynecke*, 2 Ind. 230.

[c] (Sup. 1878)

Where defendants in ejectment claim title by adverse possession, but show no paper title, save what may have been derived through certain tax deeds which convey no title to the defendants whatever, a charge that the defendants claim the land in dispute by virtue of a

title raised and created alone by taking and holding possession thereof for at least 20 years before the suit was commenced, and not through or by virtue of any paper title, was not erroneous.—*Steeple v. Downing*, 60 Ind. 478.

[d] (Sup. 1884)

In an action to recover land, an instruction that, if the evidence shows that the deed read in evidence executed to the plaintiffs was executed when the defendant was in adverse possession of the land and claimed it as his own, then such deed was void as to the defendant, and conveyed to the plaintiffs no title whatever and they could not recover under such deed, was not erroneously modified by adding, "Unless the jury further find that the grantors of plaintiffs while in possession of the land sold it and gave title bond and surrendered the possession to the purchaser, who then took possession, and afterwards the grantors executed to the plaintiffs a deed in pursuance of the sale."—*Burk v. Andis*, 98 Ind. 59.

[e] (Sup. 1906)

Where, in ejectment, plaintiff established a valid record title, except for an outstanding tax title in defendant, the court properly charged that the record evidence introduced by plaintiff showed a legal title to the land in him, and that he would be entitled to recover unless defendant by other evidence had shown that such title had been divested.—*May v. Dobbins*, 77 N. E. 353, 166 Ind. 331.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 319–326.

**§ 111. Verdict and findings.**

[a] (Sup. 1872)

In ejectment, plaintiff moved "for a judgment on the special findings of the jury, for the reason that the parol contract referred to in said findings contradicts the record under which the defendant claims title to the land in controversy." Held not such a motion for judgment on the special findings notwithstanding the general verdict as is contemplated by 2 Gav. & H. St. p. 206, § 337, providing that, when the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.—*Farley v. Eller*, 40 Ind. 319.

[b] (Sup. 1882)

Where the proof of the facts alleged in the cross-complaint in a suit to recover realty would necessarily disprove the facts alleged in the complaint, the finding of the jury on the cross-complaint in favor of the defendant was by implication a finding against the plaintiff on the complaint, and the verdict therefor substantially covered the issues.—*Chambers v. Butcher*, 82 Ind. 508.

[c] (Sup. 1888)

Where the complaint claims 120 acres, while the other pleadings show that only a strip of 100 feet wide is in controversy, a verdict that the jury find for plaintiff, and assess his dam-

ages at \$42, cannot be sustained under Rev. St. 1881, §§ 564-579, which provide that the judgment shall conform to the verdict, and clearly specify the relief granted.—*Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524.

[d] (**Sup. 1891**)

Where, in an action of ejectment, the answers to special interrogatories are not irreconcilable with the general verdict in favor of defendant, and do not find all the facts entitling plaintiff to recover, the general verdict will prevail.—*Barnes v. Turner*, 28 N. E. 322, 129 Ind. 110.

[e] (**Sup. 1895**)

A special finding by the court in an action of ejectment that "plaintiff purchased tract B," and that he "became the grantee of tract B by conveyance from D.," is too indefinite to sustain a conclusion of law that plaintiff is the owner and entitled to the possession of said tract, when there were two persons mentioned in the finding by that name, only one of whom owned said tract, and it did not appear of which one plaintiff was the grantee.—*Mitchell v. Brawley*, 140 Ind. 216, 39 N. E. 497.

[f] (**Sup. 1897**)

In an action to recover possession of land, in which plaintiff alleged that she "is the owner in fee simple," etc., a judgment in her favor was not supported by a special finding that she was the owner in fee in 1854, about 40 years before the trial.—*Craig v. Bennett*, 146 Ind. 574, 45 N. E. 792.

A finding that plaintiff is entitled to possession is necessary to sustain a judgment for plaintiff.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 327-345; 46 CENT. DIG. Trial, §§ 787, 877, 928.  
See, also, 15 Cyc. pp. 166-172.

**§ 112. New trial on ground of error or irregularity.**

Presumptions as to refusal or grant of new trial on appeal, see **APPEAL AND ERROR**, § 933.

Statutory new trial as of right, see **NEW TRIAL**, §§ 176, 178, 181.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 346-351.  
See, also, 15 Cyc. pp. 172-174.

**§ 113. Judgment.**

Actions or other proceedings for review, see **JUDGMENT**, § 335.

Arrest of, see **JUDGMENT**, § 263.

By default, see **JUDGMENT**, § 103.

Collateral attack on judgment, see **JUDGMENT**, § 501.

Conclusiveness, see **JUDGMENT**, §§ 634-749.

Equitable relief against, see **JUDGMENT**, §§ 436, 459.

Merger and bar of causes of action and defenses, see **JUDGMENT**, §§ 540-633.

Nunc pro tunc entry, see **JUDGMENT**, § 273.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 352-379.

See, also, 15 Cyc. pp. 174-183.

**§ 114. — Form and requisites in general.**

[a] (**Sup. 1821**)

An omission of the quod recuperet terminum, in a judgment in ejectment, is only a clerical mistake, and may be amended in the court below after error brought.—*Fite v. Doe ex dem. Bingham*, 1 Blackf. 127.

[b] (**Sup. 1831**)

In ejectment, where there was a verdict and judgment for defendant, judgment for costs was rendered against the lessor, instead of against the nominal plaintiff. *Held*, that such judgment, being defective only in form, may be amended on motion in the court below.—*Doe ex dem. Brown v. Owen*, 2 Blackf. 452.

[c] (**Sup. 1844**)

Judgment cannot be rendered against the casual ejector until after the tenant in possession has made default.—*Jackson v. Goodtitle ex dem. Bromley*, 7 Blackf. 129.

[d] (**Sup. 1849**)

Where defense is made as to only a part of the land claimed by the lessor of the plaintiff in his declaration, the plaintiff should, in any event, recover the land as to which no defense is made.—*Doe ex dem. Hutchinson v. Horn*, 1 Ind. 363, Smith, 242, 50 Am. Dec. 470.

[e] (**Sup. 1868**)

Where one of plaintiffs holds the legal title in his own right and as trustee of his co-plaintiffs, he is entitled to recover the entire property.—*Adler v. Sewell*, 29 Ind. 598.

[f] (**Sup. 1882**)

A clause, in a judgment for defendant, to the effect that the judgment shall not prejudice the rights of the parties as to any other action, practically nullifies the judgment, and should be stricken out on motion.—*Evans v. Schafer*, 86 Ind. 135.

[g] (**Sup. 1883**)

In ejectment, the judgment must follow the complaint as to the description of the property and the writ of possession of the judgment.—*College Corner & R. Gravel Road Co. v. Moss*, 92 Ind. 119.

[h] (**Sup. 1883**)

Partition cannot be awarded in ejectment where the answer is a general denial.—*Roberts v. Lanam*, 92 Ind. 380.

[i] (**Sup. 1885**)

If plaintiff in ejectment recovers, he is entitled to growing or cut crops which were planted after the action was begun.—*McCaslin v. State ex rel. Auditor of State*, 99 Ind. 428.

[j] (Sup. 1886)

The evidence cannot be considered in determining a motion for judgment on the special findings notwithstanding the general verdict; and in ejectment, when the facts specially found establish an apparent absolute title in plaintiff, this will not overthrow the general verdict, because defendant may be entitled to the possession.—*Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5.

[k] (Sup. 1889)

Where the complaint contains proper averments to entitle plaintiffs to possession, and a general prayer for relief, and there are an appearance, trial, and finding that plaintiffs are the owners and entitled to possession, and defendant is in the unlawful possession, judgment for possession is proper, though there is no specific prayer therefor.—*Evans v. Schafer*, 119 Ind. 49, 21 N. E. 448.

[l] (Sup. 1889)

Where the facts found in ejectment show the plaintiff to be the owner in fee of the land sued for, and a proper judgment is rendered thereon, such judgment will not be reversed because the conclusions of law merely state that plaintiff was seised of a good and sufficient title.—*Sphung v. Moore*, 120 Ind. 352, 22 N. E. 319.

[m] (Sup. 1891)

Where, in ejectment, it appears that defendants hold possession as purchasers at a mortgage foreclosure sale, that plaintiffs' title is subject to the mortgage, but that the foreclosure was void as to them, it is proper to decree a foreclosure of the mortgage as against plaintiffs.—*Goodell v. Starr*, 127 Ind. 198, 26 N. E. 793.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 352-370, 372, 374-378.

See, also, 15 Cyc. pp. 174-178.

§ 115. — Partial recovery.

[a] (Sup. 1821)

In ejectment, on several demises of separate tracts of land, laid in different counts, if there be proof of one count only, the verdict should be in favor of the plaintiff on that count, and of the defendant on the others; but if, in such a case, there be a general verdict of guilty, judgment may be taken on the count proved, and a nolle prosequi entered as to the others.—*Fite v. Doe ex dem. Bingham*, 1 Blackf. 127.

[b] (Sup. 1845)

In ejectment for an entire tract of land, any undivided portion of it may be recovered.—*Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442.

[c] (Sup. 1882)

If a defendant, in an action for the recovery of real estate, desires to present the question whether, upon the facts found, there should

be a recovery of a certain tract conveyed to him, which is part of the land in suit, he should move for judgment against the plaintiff in respect to that tract, or should except specially to the judgment in favor of the plaintiff in so far as it affects such tract.—*Holman v. Elliott*, 86 Ind. 231.

[d] (Sup. 1890)

In an action to recover land which the complaint alleged was owned by plaintiff in fee simple, the answer put the ownership in issue. It appeared that plaintiff owned an undivided one-third of the land only. *Held*, that plaintiff could recover only that portion of the property.—*Martin v. Neal*, 125 Ind. 547, 25 N. E. 813.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 373, 407.

See, also, 15 Cyc. p. 181; note, 54 Am. Dec. 415.

§ 117. — Operation and effect.

Conclusiveness, see JUDGMENT, §§ 634-749.

Merger and bar of causes of action and defenses, see JUDGMENT, §§ 540-633.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. § 379.

See, also, 15 Cyc. p. 183; notes, 39 Am. Dec. 311, 85 Am. Dec. 187.

§ 118. Execution and enforcement of judgment.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 380-404.

See, also, 15 Cyc. pp. 184-189; note, 30 L. R. A. 129.

§ 120. — Writ of possession.

Restraining interference with execution of writ of possession, see INJUNCTION, § 3.

[a] (Sup. 1847)

The associate judges of one county have no authority in vacation to restrain by injunction the execution of a writ of habere facias possessionem directed to the sheriff of another county.—*State v. Michaels*, 8 Blackf. 436.

The general rule that, where a sole defendant dies after judgment and before execution, an execution issued without a revivor of the judgment by scire facias is void, is applicable to the action of ejectment.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 380-395, 398-404.

See, also, 15 Cyc. pp. 184, 185; note, 15 Am. St. Rep. 56.

§ 121. Appeal and error.

Estoppel to take appeal, see APPEAL AND ERROR, § 161.

Necessity of formal judgment to authorize review, see APPEAL AND ERROR, § 123.



Presentation and reservation in lower court of grounds of review, see **APPEAL AND ERROR**, § 193.

Presumptions on appeal, see **APPEAL AND ERROR**, § 933.

[a] (**Sup.** 1822)

In ejectment, a writ of error will not lie in the name of the casual ejector.—*Stiles v. Jackson* ex dem. *Nelson*, 1 Blackf. 214.

[b] (**Sup.** 1841)

The omission to insert in the declaration in ejectment the name of the defendant who appears to the action, instead of the casual ejector, cannot be assigned for error.—*Stackhouse v. Doe* ex dem. *Reynolds*, 5 Blackf. 570.

[c] (**Sup.** 1897)

Where, in ejectment, judgment is rendered against one defendant and in favor of the other, the overruling of a motion to apportion the costs cannot be reviewed, unless the latter defendant is a party to the appeal.—*Laughery Turnpike Co. v. McCreary*, 147 Ind. 526, 46 N. E. 906.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 405-418.

See, also, 15 Cyc. pp. 190-194.

**§ 123. Costs.**

[a] (**Sup.** 1831)

If in ejectment there be a verdict and judgment for the defendant, the judgment for the costs must be entered against the nominal plaintiff, and not against the lessor.—*Doe* ex dem. *Brown v. Owen*, 2 Blackf. 452.

[b] (**Sup.** 1872)

After judgment in ejectment, and until a new trial has been granted, there is nothing to try in that action, and the party then making costs must pay them.—*Whitlock v. Vancleave*, 39 Ind. 511.

[c] (**Sup.** 1889)

Where defendant in a suit for wrongful withholding possession of real estate owned by plaintiff refuses to yield possession in defiance of the judgment in favor of plaintiff, and in opposition to his disclaimer, and thus compels plaintiff to take out a writ of ouster, he will burden himself with all costs.—*McAdams v. Lotton*, 20 N. E. 523, 118 Ind. 1.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 431-435.

See, also, 15 Cyc. pp. 197-200.

**V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.**

Jurisdiction of equity to recover mesne profits, see **EQUITY**, § 46.

**§ 126. Nominal damages in action of ejectment.**

[a] (**Sup.** 1831)

In an action of ejectment, where there is a defense, the plaintiff can only recover nominal damages, unless he proves that defendant received the rents or occupied the premises in person or by tenants.—*Dobbins v. Baker*, 80 Ind. 52.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. § 437.

See, also, 15 Cyc. p. 209.

**§ 127. Recovery of actual damages or mesne profits in action of ejectment.**

[a] (**Sup.** 1862)

Where the court finds that there would have been no rents on lands without the improvements made thereon by the occupants, it is error to charge such occupants with rents which are but the result of their own labor.—*Adkins v. Hudson*, 19 Ind. 392.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 438-443, 453.

See, also, 15 Cyc. p. 206.

**§ 128. Actions for mesne profits.**

Conclusiveness of judgment in ejectment, see **JUDGMENT**, § 747.

[a] (**Sup.** 1844)

In trespass for mesne profits, after judgment in ejectment, the defendant, to prevent a recovery of profits that accrued before service of the declaration in ejectment, may prove that he had not occupied the premises before such service.—*Vance v. Inhabitants of Congressional Tp.*, 7 Blackf. 241.

[b] (**App.** 1900)

An action to recover mesne profits from one in wrongful possession of real estate may be maintained independently of an action for the possession of the property.—*O'Reilly v. Long*, 58 N. E. 563, 25 Ind. App. 529.

[c] (**App.** 1900)

*Burns' Rev. St.* 1894, § 1062 (*Horner's Rev. St.* 1897, § 1052), authorizes an action to recover real estate by one having an interest therein and a right to possession. *Burns' Rev. St.* 1894, § 1070 (*Horner's Rev. St.* 1897, § 1068), authorizes the recovery of possession of such property, and damages for the wrongful use and occupation thereof, in the same action. *Burns' Rev. St.* 1894, § 1071 (*Horner's Rev. St.* 1897, § 1059), provides that, if the right of possession expires before the claimant can be put in possession, he shall only obtain a judgment for damages. *Held*, that an independent action for mesne profits for the wrongful use and possession of real estate may be maintained, although the plaintiff has recovered the posses-

sion in a former action of ejectment.—Hunch-  
 eon v. Long, 58 N. E. 563, 25 Ind. App. 530.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 438-440,  
 442, 443, 454, 456.

See, also, 15 Cyc. pp. 213-218.

**§ 132. Measure of damages or profits.**

[a] (Sup. 1862)

Under the occupying claimants' act (2 Rev. St. p. 172), providing that the fair value of the rents and profits which have accrued, without the improvements, to the time of rendering judgment, shall be assessed, does not mean the rendition of judgment in the original or ejectment suit, but the judgment for the improvements.—Adkins v. Hudson, 19 Ind. 392.

[b] (Sup. 1881)

A plaintiff who recovers, in an action for the possession of real estate, is also entitled to recover for the use and occupation of the premises for a period not exceeding six months, and in cases of wanton aggression of the defendant the jury may award exemplary damages.—Hill v. Forkner, 76 Ind. 115.

[c] (Sup. 1881)

In ejectment to recover certain premises, plaintiff on being held entitled to recover is entitled to the rents, profits, and interest up to the rendition of the judgment.—Dobbins v. Baker, 80 Ind. 52.

[d] (Sup. 1882)

In actions for the recovery of land, mesne profits may be allowed to the day of trial.—Hays v. Wiltach, 82 Ind. 13.

[e] (Sup. 1882)

In an action of ejectment, the damages recoverable are for the time of the tortious holding only.—Smith v. Wood, 83 Ind. 522.

[f] (Sup. 1884)

In an action to recover possession of land and damages for its detention, the damages may be recovered up to the rendition of the judgment.—Johnson v. Briscoe, 92 Ind. 367.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 444-447, 449-452.

See, also, 15 Cyc. pp. 205-209.

**§ 134. Allegations and prayers in pleadings as to damages or mesne profits.**

[a] (Sup. 1851)

In an action for mesne profits, every defense may be made under the general issue; the action being an equitable one.—Davis v. Doe, 2 Ind. 599.

[b] (App. 1900)

The complaint in an action to recover mesne profits, without the possession of the land, must allege that the complainant was entitled to the land during the time which defendant

was in wrongful possession, and for which the recovery is sought.—O'Reilly v. Long, 58 N. E. 563, 25 Ind. App. 529.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 457, 458.

See, also, 15 Cyc. pp. 214, 215.

**§ 135. Evidence as to damages, rents, or profits.**

[a] (Sup. 1882)

In a suit to recover possession of real estate and damages for its detention, begun in May, 1882, evidence of its rental value from September 1, 1881, to September 1, 1882, is admissible to show the amount of damage for its detention from September 1, 1881.—Cooper v. Robertson, 87 Ind. 222.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 459, 460.

See, also, 15 Cyc. pp. 215, 216.

**§ 139. Rights of parties as to improvements in general.**

[a] (Sup. 1832)

Defendant, in an action of trespass for mesne profits after a recovery against him in ejectment, cannot plead, in bar of the action, that the rents and profits did not exceed the value of his improvements, unless such value was assessed under the direction of the court in the action of ejectment.—Chesround v. Cunningham, 3 Blackf. 82.

The right of an occupying claimant to recover for the value of his improvements, on a recovery against him in ejectment, is not a common-law right, but is entirely of statutory origin.—Id.

[b] (Sup. 1853)

Semble, that an appeal by defendant from a judgment in ejectment could not be taken as a waiver of his claim as an occupying claimant.—Graham v. Doe ex dem. McDonald, 4 Ind. 615.

[c] (Sup. 1879)

In an action for possession of certain real estate, the defendant offered to prove that he had made permanent improvements thereon, subsequent to the date of a sheriff's sale to the plaintiff, under a decree of foreclosure. *Held*, that the evidence was properly rejected.—Osborn v. Storms, 65 Ind. 321.

**FOR CASES FROM OTHER STATES,**

SEE 17 CENT. DIG. Eject. §§ 468, 470-475, 477, 479-481.

See, also, 15 Cyc. pp. 218-232.

**§ 142. Grounds for compensation for improvements or taxes paid.**

[a] (Sup. 1885)

Defendant in ejectment is not entitled to an allowance for betterments unless it appears that he was a bona fide purchaser.—Bryan v. Uland, 101 Ind. 477, 1 N. E. 52.

[b] (Sup. 1893)

Where one claiming land under a tax deed makes permanent improvements, it is presumed that the improvements were made in good faith, until the contrary be shown.—Hilgeberg v. Northup, 134 Ind. 92, 33 N. E. 786.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 472, 476, 477, 483-501.

See, also, 15 Cyc. pp. 218-224.

**§ 143. Set-off of improvements or taxes against damages or mesne profits.**

[a] (Sup. 1837)

Where defendant in ejectment is entitled to compensation for improvements, complainant will be allowed the value of the rents without the improvements, a balance struck between defendant's claim for improvements and the value of such rents, and judgment given for the difference, either for complainant or defendant, as the case may be.—Elliott v. Armstrong, 4 Blackf. 421.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 502-508.

See, also, 15 Cyc. pp. 231-232; note, 9 Am. St. Rep. 795.

**§ 147. Evidence as to improvements or taxes.**

[a] (Sup. 1823)

A., having recovered in ejectment against B., sued him for mesne profits, and obtained judgment on demurrer. While that suit was pending, B. brought an ejectment against A. for the premises, and recovered. On A.'s executing his writ of inquiry, B. offered his judgment in evidence in mitigation of damages; but the record not showing the date of the demise, and that B.'s title had commenced before A.'s cause of action, it was considered inadmissible.—Buntin v. Duchane, 1 Blackf. 255.

[b] (Sup. 1858)

Where in a suit, under the occupying claimant law, to recover the value of improvements made on land, the case was at issue upon the making of the improvements, it seems that the plaintiff might prove the value.—McGill v. Kennedy, 11 Ind. 20.

A title bond introduced to show that plaintiff had no claim for improvements, or evidence that plaintiff had come into court and acknowledged that his claim had been paid, was inadmissible because not pertinent to the issue.—Id.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 520, 521.

See, also, 15 Cyc. pp. 235, 236.

**§ 148. Proceedings for allowance for improvements or taxes.**

[a] (Sup. 1853)

After judgment in ejectment in the circuit court for the lessor of the plaintiff, the defend-

ant filed a petition under the occupying claimant law, which was resisted; and, the president judge being absent, the associate judges, who were divided in opinion, placed the result of their deliberations upon the record as follows: "Being divided in opinion, we cannot agree upon the propriety of allowing or overruling said motion." Then followed the petition. No judgment was rendered, nor motion interposed at the proper time for a new trial, nor bill of exceptions taken, nor was the evidence inserted in the record. *Held* that, in legal contemplation, the petition was still pending in said court; and semble that, on motion, a judgment might yet be entered nunc pro tunc, or the petitioner might have the petition docketed and proceed de novo.—Graham v. Doe ex dem. McDonald, 4 Ind. 615.

[b] (Sup. 1869)

In an action to recover possession of real property under a claim of absolute title, the defendant in possession cannot have the value of his lasting improvements ascertained under the statute concerning occupying claimants until the determination of the question of title.—Wernke v. Hazen, 32 Ind. 431.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 509-515, 517-519, 522-524, 531.

See, also, 15 Cyc. pp. 232-239.

**§ 149. Verdict and findings as to improvements or taxes.**

[a] (Sup. 1872)

In an action under the law in regard to occupying claimants, in the absence of a general verdict, it is an essential fact for the jury to find whether the claimant had color of title.—Cain v. Hunt, 41 Ind. 466.

FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 525, 526.

See, also, 15 Cyc. p. 237.

**§ 150. Provisions of judgment as to improvements or taxes and enforcement thereof.**

[a] (Sup. 1825)

The statute providing that where an occupying claimant is willing to pay the value of the land without the improvements, where in ejectment proceedings it has been adjudged that he was not entitled to the land, in which case the successful claimant shall not be entitled to possession until he pays the occupant for improvements, is constitutional.—Armstrong v. Jackson ex dem. Elliott, 1 Blackf. 374.

[b] (Sup. 1892)

Rev. St. 1881, §§ 1074, 1075, provide that when an occupant of land, who has made valuable improvements, is afterwards found, in the proper action, not to be the rightful owner, he may file a complaint asking that his rights be adjusted, and no execution shall issue to put the real owner in possession except as hereinafter provided. Section 1076 provides that the is-

sues joined on the complaint shall be tried as in other cases, and that the court or jury shall assess the value of the improvements; the damages, if any, which the premises may have sustained; the value of the rents and profits; the value of the estate of the successful party; and the taxes paid by the occupant. Sections 1077, 1078, provide that, if the plaintiff in the principal action shall pay to the occupant the amount found to be due, he shall be entitled to a writ of possession, but that, if he fail to do this, the occupant may take the land upon paying the value thereof aside from the improvements. *Held*, that a judgment recovered by the occupant does not merge a judgment for damages in the principal action.—*Hollingsworth v. Stumph*, 131 Ind. 546, 30 N. E. 525.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 527, 528, 531, 532.

See, also, 15 Cyc. p. 237.

#### § 152. Appeal and error.

[a] (Sup. 1853)

Semble, that after judgment in ejectment a proceeding commenced under the occupying claimant law of 1843 is invested with the attributes of an independent action, and may, the judgment in ejectment being suffered to rest, be the subject of an appeal to the Supreme Court.—*Graham v. Doe ex dem. McDonald*, 4 Ind. 615.

#### FOR CASES FROM OTHER STATES,

SEE 17 CENT. DIG. Eject. §§ 466, 533, 534.

See, also, 15 Cyc. p. 239.

#### VI. EQUITABLE EJECTMENT.

[No paragraphs or references in this Digest.  
But see 17 Cent. Dig. Eject. §§ 536-550.]

#### EJUSDEM GENERIS.

See—

Ademption of legacies. WILLS, § 764.

Construction of Factory Act. MASTER AND SERVANT, § 121.

Of municipal charter. MUNICIPAL CORPORATIONS, § 58.

#### ELECTION.

See—

Acts of accused, proof of which is offered under one count. CRIMINAL LAW, § 678.

Avoidance of policy by. INSURANCE, §§ 268, 305, 310, 371, 390, 392, 640.

Causes of action, counts, or defenses. PLEADING, § 369.

Counts in indictment or information. INDICTMENT AND INFORMATION, § 132.

County or district for bringing suit. VENUE, § 16.

Dower and right of inheritance. DESCENT AND DISTRIBUTION, §§ 64, 65.

Jointure or settlement and dower. DOWER, § 58.

Purchase of premises by lessee. LANDLORD AND TENANT, § 92.

Renewal of lease. LANDLORD AND TENANT, § 86.

Rescission of contract of sale. VENDOR AND PURCHASER, § 101.

Of mutual benefit certificate. INSURANCE, § 815.

Suit in equity or at law. EQUITY, § 43.

Taking dismissal or nonsuit. DISMISSAL AND NONSUIT, § 30.

Termination of employment. MASTER AND SERVANT, § 20.

Testamentary provisions and other rights in general. WILLS, §§ 778-803.

Waiver of lien under conditional sale. SALES, § 477.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# ELECTION OF REMEDIES.

## Scope-Note.

[INCLUDES choice between different means of redress afforded by law for the same injury or different forms of proceeding on the same cause of action; when such election is allowed or required; and nature, requisites, operation, and effect of such election.

[EXCLUDES election between inconsistent or alternative rights, claims, etc. (see *Wills*; *Contracts*; *Principal and Agent*; *Equity*); election between remedies incident to particular transactions (see *Carriers*; *Insurance*; *Sales*; and other specific heads); and election between counts in pleadings (see *Pleading*) or in indictments (see *Indictment and Information*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

2. Causes of action and remedies subject to election.
3. Inconsistency of alternative remedies.
7. Acts constituting election.
8. Validity and finality of election.
11. — Mistake as to remedy.
12. — Want of jurisdiction or ineffectiveness of remedy.
13. Operation and effect.
14. — In general.
15. — Remedies barred.

## Cross-References.

<i>See—</i> Effect on limitations. LIMITATION OF ACTIONS, § 17. Remedies for review. APPEAL AND ERROR, § 12.  <b>Between, by or against particular classes of persons.</b>  <i>See—</i> Principal or agent, or both. PRINCIPAL AND AGENT, §§ 183, 184. Purchaser of land against vendor. VENDOR AND PURCHASER, § 342. Or grantees of mortgaged premises. MORTGAGES, § 292. Seller of goods against buyer. SALES, §§ 340, 479. Survivor and estate of deceased joint debtor. EXECUTORS AND ADMINISTRATORS, § 203. Vendor of land against purchaser. VENDOR AND PURCHASER, § 301.	<b>Particular causes or grounds of action.</b>  <i>See—</i> Abatement of nuisance. MUNICIPAL CORPORATIONS, § 623. Award. ARBITRATION AND AWARD, § 85. Breach of contract by buyer. SALES, §§ 340, 479. By purchaser. VENDOR AND PURCHASER, § 301. By vendor. VENDOR AND PURCHASER, § 342. Enforcement of assessments for municipal improvements. MUNICIPAL CORPORATIONS, § 525. Of execution and judgment in claimant's action of replevin or replevin bond. EXECUTION, § 204. Execution against debtor and surety for stay of former execution. EXECUTION, § 177. Recovery of trust property. TRUSTS, § 350.
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### § 2. Causes of action and remedies subject to election.

[a] (Sup. 1853)

A defendant may elect between claiming a set-off or recoupment in an action brought against him and bringing a cross-action for his demand.—Rankin v. Harper, 4 Ind. 585.

[b] (Sup. 1884)

A person who becomes replevin bail on a judgment rendered on a note secured by mort-

gage, and who is compelled to pay it, is entitled to be subrogated to all the rights of the mortgagee or any holder of the mortgage; and, since he has a remedy to foreclose the mortgage, or to collect by execution the judgment recovered against the mortgagor, or to enforce a promise made by a purchaser of the property for his benefit, he may pursue either, as the existence of one does not deprive him of the right to enforce either of the others.—Pence v. Armstrong, 95 Ind. 191.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

[c] (App. 1892)

Conceding that a sale of stock by a widow, who had only a life interest therein, conferred no better title on the purchaser than the widow had, still the remainderman was not bound to follow the stock, but could sue the widow's executor for its conversion.—*Moore v. Baker*, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203.

[d] (App. 1900)

Where there is no legal duty except that arising from a contract, there can be no election between an action on contract and one in tort, since in such case there is no cause of action in tort.—*Parrill v. Cleveland, C., C. & St. L. R. Co.*, 55 N. E. 1026, 23 Ind. App. 638.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. § 2.

See, also, 20 Cyc. p. 87.

## § 3. Inconsistency of alternative remedies.

[a] (Sup. 1892)

Where a town trustee deposited money arising from the sale of the town bonds in a bank to his account as "trustee," and the bank appropriated it for a debt of his own, held, that a suit on his bond for such of the money as could not be traced was not inconsistent with a suit against the bank for the money deposited.—*Bundy v. Town of Monticello*, 84 Ind. 119.

[b] (App. 1899)

By suing *ex contractu*, a party is not precluded from afterwards filing an additional paragraph in tort, based on the same facts, and taking judgment thereon by default, process having been duly served.—*Leach v. Adams*, 52 N. E. 813, 21 Ind. App. 547.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. §§ 3, 4.

See, also, 15 Cyc. pp. 257-259.

## § 7. Acts constituting election.

[a] (Sup. 1890)

Where there is no election compelled by the action of the adverse party, and nothing more is done than to file a complaint for rescission of a contract for the exchange of land and in the same proceeding so amend it as to make it a complaint for damages, there is no such act or conduct as concludes the plaintiff.—*Nysegander v. Lowman*, 24 N. E. 355, 124 Ind. 584.

[b] (Sup. 1890)

The mere bringing of a suit to rescind a contract is not such an election of remedies as to preclude plaintiff from amending the complaint so as to make it one for damages for false representations whereby the contract was induced.—*Nysegander v. Lowman*, 124 Ind. 584, 24 N. E. 355, distinguishing *Pursley v. Winkle* (1889) 118 Ind. 139, 19 N. E. 478.

[c] (Sup. 1897)

The fact that a person joins in a complaint as plaintiff does not constitute a conclusive election of remedies which will estop him, by leave of court, to dismiss his complaint, and join in a cross-complaint as a defendant.—*McCoy v. Stockman*, 46 N. E. 21, 146 Ind. 668.

[d] (App. 1908)

An action against an owner of property, upon coupons for the cost of municipal improvements, on the owner's personal waiver, and recovery of personal judgment therein, was not an election of remedies, precluding a subsequent enforcement of the liability against the property improved, since the personal liability of the owner to which resort was had was merely ancillary to the right to foreclose the assessment lien, which right continued as long as the assessment remained unpaid.—*City of Indianapolis v. City Bond Co.*, 42 Ind. App. 470, 84 N. E. 20.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. § 12.

See, also, 15 Cyc. pp. 259-261, 264, 265.

## § 8. Validity and finality of election.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. §§ 13-15.

See, also, 15 Cyc. pp. 261, 262.

## § 11. — Mistake as to remedy.

[a] (Sup. 1887)

A party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one.—*Bunch v. Grave*, 12 N. E. 514, 111 Ind. 351.

B., having title to the undivided one-third of certain real estate, the remaining two-thirds of which was purchased by G. at sheriff's sale, had the same set off to her by partition. The whole land was subject to a certain mortgage, upon foreclosure of which it was decreed that G.'s part be first sold. G. obtained an assignment of the decrees and mortgages, and declared his purpose to hold them alive until the principal and interest should equal the value of the whole tract, and then to sell it all to satisfy them. B., misconceiving her remedy, filed a petition to compel G. to sell the land according to the decrees, claiming that two-thirds would satisfy the whole. The petition was granted, and the order affirmed on appeal. Sale was had, and G. bid in his own land for a small sum. The first proceeding thus proved unavailing, because of the delay made by G. Held, upon petition by B. to quiet title, and have such mortgages canceled as to her, that she had not forfeited her right to that relief.—Id.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. § 14.

See, also, 15 Cyc. p. 262.

**§ 12. — Want of jurisdiction or ineffectiveness of remedy.**

[a] (Sup. 1887)

Neither an administrator de bonis non, nor a person holding a claim allowed against a decedent's estate, is estopped from prosecuting a proceeding for the sale of real estate by the fact that such claimant had first sued the original administrator and his sureties for wasting the personal estate, but failed to make anything because of their insolvency.—*Scherer v. Ingberman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. § 15.

**§ 13. Operation and effect.**

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. §§ 16, 17.

See, also, 15 Cyc. p. 262; note, 10 Am. St. Rep. 487.

**§ 14. — In general.**

[a] (App. 1910)

A party may not in the course of litigation or in dealings in pais occupy inconsistent

positions, and, where one has an election between several inconsistent causes of action, he is confined to that which he first adopts.—*American Car & Foundry Co. v. Smock*, 91 N. E. 749.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. § 16.

**§ 15. — Remedies barred.**

[a] (Sup. 1895)

Where a judgment creditor, who has purchased his debtor's land under execution issued on the judgment, sues to have a conveyance of the land by the debtor set aside, as in fraud of his judgment, and the land resold to satisfy it, under the belief that the prior sale was invalid, and the judgment therein rendered for him is satisfied by the grantee of the debtor, the creditor cannot afterwards assert title to the land under the former sale.—*Kitts v. Willson*, 140 Ind. 604, 39 N. E. 313.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elect. of Rem. § 17.

See, also, note, 1 Am. St. Rep. 626.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# ELECTIONS.

## *Scope-Note.*

[INCLUDES choice by popular vote at general or special elections of public officers, and determination by such vote of questions submitted thereto in general; nature of right of suffrage and regulation of its exercise in general; constitutional and statutory provisions relating thereto; qualifications and registration of voters; ordering or calling elections, regular or special, and notice thereof; election districts or precincts, election officers, and places and times of voting; nominations and ballots; conduct of elections; ascertaining results and making returns thereof; proceedings to contest result; and violations of election laws.

[EXCLUDES election or appointment of officers by legislative or other bodies, boards, etc. (see *States; Counties; Towns; Municipal Corporations; Officers*; and titles of particular bodies or officers); and election of officers of private corporations (see *Corporations*); and determination of particular questions by popular vote (see *Intoxicating Liquors; Schools and School Districts*); etc. For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### **I. Right of Suffrage and Regulation Thereof in General.**

- § 1. Nature and source of right.
- § 7. Constitutional provisions conferring or defining right.
- § 8. Statutory provisions conferring or defining right.
- § 9. — Constitutionality and validity.
- § 10. — Construction and operation.
- § 13. Discrimination on account of sex.
- § 18. Power to prescribe qualifications.
- § 23. Power to regulate conduct of election.
- § 27. — Mode of voting in general.
- § 28. — Secrecy as to vote.

### **II. Ordering or Calling Election, and Notice.**

- § 30. Constitutional and statutory provisions.
- § 32. Authority to call special election.
- § 33. Submission of specific questions.
- § 33½. Petition and proceedings thereon.
- § 37. Place for holding election.
- § 38. Time for holding election.
- § 39. Notice or proclamation.
- § 40. — Necessity.
- § 41. — Requisites and sufficiency.
- § 44. Irregularities and defects.

### **III. Election Districts or Precincts and Officers.**

- § 48. Creation and alteration of districts or precincts.
- § 54. Powers and proceedings of officers in general.
- § 55. Defects in appointment, ineligibility, or disqualification of officers.
- § 57. Liabilities of officers.

### **IV. Qualifications of Voters.**

- § 60. Constitutional and statutory provisions.
- § 62. Sex.
- § 63. — General elections.
- § 71. Residence.
- § 72. — Sufficiency in general.
- § 73. — Change in general.
- § 76. — Students.
- § 83. Payment of taxes.



**V. Registration of Voters.**

§ 95. Constitutional and statutory provisions.

**VI. Nominations and Primary Elections.**

- § 120. Constitutional and statutory provisions.
- § 126. Nomination by primary election.
- § 140. Nomination by electors.
- § 144. — Requisites of petition, certificate, or nomination papers.
- § 147. Nominations to fill vacancies.
- § 148. Objections and contests.
- § 153. — Determination by public officers.
- § 154. — Trial and determination by courts.
- § 155. Amendment of certificates or nomination papers.
- § 156. Certification of nomination by public officers.
- § 157. Publication of list of nominees.
- § 158. Irregularities and defects.

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**I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.****§ 1. Nature and source of right.****[a] (Sup. 1897)**

The right to vote is not given by the federal Constitution, but is the right of the states.—Gougar v. Timberlake, 46 N. E. 339, 148 Ind. 38, 37 L. R. A. 644, 62 Am. St. Rep. 487.

The right of suffrage is not an incident of citizenship.—Id.

**[b] (App. 1905)**

An elector has the right to cast a free ballot and to cast it for the candidate of his choice, provided the name of such candidate legally appears upon the official ballot.—Remster v. Sullivan, 36 Ind. App. 385, 75 N. E. 860.

**[c] (Sup. 1909)**

The right of suffrage is a political privilege, and not a vested or natural right, and may be limited by statute, except as prohibited by the Constitution.—Russell v. State ex rel. Crowder, 171 Ind. 623, 87 N. E. 13.

**[d] (Sup. 1909)**

The right to vote is a political privilege, and not a constitutional or inherent right.—State ex rel. Workman v. Goldthait, 172 Ind. 210, 87 N. E. 133.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 1.

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### § 10. — Construction and operation.

[a] (Sup. 1837)

Election laws are to be liberally construed when necessary to reach a substantially correct result, and to that end their provisions will, to every reasonable extent, be treated as directory rather than mandatory.—Duncan v. Shenk, 9 N. E. 690, 109 Ind. 26.

[b] (Sup. 1899)

All provisions of the election law are mandatory, if enforcement is sought before election, in a direct proceeding therefor; but after election all should be held directory only, in support of the result, unless obstructing the free and intelligent casting of the vote, or ascertainment of the result, or unless affecting an essential element of the election, or unless it is expressly declared by the statute that a particular act is essential to the validity of the election, or that its omission shall render it void.—Jones v. State ex rel. Wilson, 55 N. E. 229, 153 Ind. 440.

[c] (App. 1905)

Statutes that affect the franchise right of electors should receive a reasonable and liberal construction to the end that such rights should not be abridged, but such statutory provisions should be substantially complied with.—Remster v. Sullivan, 36 Ind. App. 385, 75 N. E. 860.

[d] (App. 1910)

Election laws are directory rather than mandatory, and must be liberally construed when necessary to effectuate the intention of the voters, unless they declare a particular act essential, or that its omission shall render the election void. They will be regarded as mandatory only where they affect the merits, and directory only where they do not.—Kunkle v. Coleman, 92 N. E. 61.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 7.

### § 13. Discrimination on account of sex.

[a] (Sup. 1897)

A provision denying the right of women to vote is not in violation of Const. U. S. Amend. 15, providing that "the right of the citizens of the United States to vote shall not be denied or abridged," etc.—Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 644, 62 Am. St. Rep. 487.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 9.

See, also, note, 21 L. R. A. 662.

### § 18. Power to prescribe qualifications.

[a] (Sup. 1871)

Under a constitutional provision requiring that a person shall have a residence in the township where he offers to vote, but not prescribing any length of residence, the Legislature cannot require residence for any definite previous term. Residence at the time of the election is enough.—Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754.

[b] (Sup. 1890)

The people by the adoption of the Constitution fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, and the Legislature cannot add an additional qualification.—Morris v. Powell, 25 N. E. 281, 125 Ind. 281, 9 L. R. A. 326.

[c] (Sup. 1901)

Rev. St. 1843, which was the law of the state at the time of the adoption of the constitution of 1851 (article 2, § 8), giving the general assembly power to deprive of the right of suffrage any person convicted of an infamous offense, declared certain crimes infamous, not including vote selling. *Held*, that, as corruption at elections has always been regarded as an infamous offense, Acts 1899, p. 381 (Burns' Rev. St. 1901, § 2329), declaring that whoever sells his vote may be disfranchised, is not a violation of such constitutional provision.—Baum v. State, 61 N. E. 672, 157 Ind. 282, 55 L. R. A. 250.

The act is not unconstitutional, as preventing the freedom and equality of elections.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 13.

See, also, 15 Cyc. p. 286.

### § 23. Power to regulate conduct of election.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 16-18.

### § 27. — Mode of voting in general.

[a] (Sup. 1892)

It is within the power of the Legislature to prescribe the manner of holding general elections, and to prescribe the mode in which the electors shall express their choice.—Parvin v.

Wimberg, 30 N. E. 790, 130 Ind. 561, 15 L. R. A. 775, 30 Am. St. Rep. 254.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 17.

See, also, note, 33 L. R. A. 441.

**§ 28. — Secrecy as to vote.**

[a] (Sup. 1871)

Acts May 13, 1869, § 2 (3 Davis' St. Supp. p. 235), requiring "the inspector of any election, on receiving the ballot of any voter, to have the same numbered with figures on the outside or back thereof to correspond with the number placed opposite the name of such voter on the poll lists," is void; being in conflict with Const. art. 2, § 13, which declares that "all elections by the people shall be by ballot." This provision implies that the voter is to be protected in absolute secrecy in regard to the vote which he casts. This is the general understanding throughout the country as to the meaning of the term "ballot," and is the result of the authorities defining the word.—Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 18.

**II. ORDERING OR CALLING ELECTION, AND NOTICE.**

Primary elections, see post, § 126.

**§ 30. Constitutional and statutory provisions.**

[a] (Sup. 1901)

Burns' Rev. St. 1894, §§ 6924-6934, as amended by Burns' Supp. 1897, §§ 6924, 6925, 6928, providing that the county commissioners, on petition of 50 freeholders in a township, may submit the question of improving designated roads to the voters of the township, either at a regular election or at a special election called for that purpose, is not unconstitutional in that it requires the question to be submitted to the voters at a regular election, or at a special election called for that purpose.—Lowe v. Board of Com'rs of White County, 59 N. E. 406, 156 Ind. 163.

The fact that Burns' Rev. St. 1894, §§ 6924-6934, which provide that the county commissioners may submit the question of improving roads to the voters of the township on the petition of 50 freeholders of the township, also contained a provision that the petition might designate the improvement of more than one road in the taxing district, and that the question of improving such roads might be submitted to the voters as a unit, did not render the act unconstitutional.—Id.

[b] (Sup. 1904)

Const. art. 6, § 2, declaring that "there shall be elected in each county," at the time of holding general elections, certain county officers, confers on the people the right to hold an elec-

tion for the election of the successors of the incumbents of the offices at the general election next preceding the expiration of the term of the incumbents, and the Legislature cannot postpone the choice of successors to a subsequent general election.—Gemmer v. State ex rel. Stephens, 71 N. E. 478, 163 Ind. 150, 66 L. R. A. 82.

Const. art. 15, § 3, providing that an officer shall hold his office until his successor is elected and qualified, being intended to prevent vacancies in public offices, does not confer on the Legislature the power to postpone the election of a successor, and create a condition authorizing the incumbent to hold over.—Id.

Acts 1903, p. 24, c. 13, postponing the election of successors to enumerated officers, is in conflict with Const. art. 6, § 2, authorizing the election of successors to such officers at the election next preceding the expiration of their term of office.—Id.

Acts 1903, p. 24, c. 13, postponing the election of successors to enumerated county officers until the general election in 1906, in effect continuing in the office the incumbents elected in 1902 until their successors are elected in 1906, is void so far as it may authorize a county treasurer elected in 1900, and re-elected in 1902, to hold the office for more than four years in a period of six years, in violation of the express provisions of Const. art. 6, § 2.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 20, 32.

See, also, 15 Cyc. pp. 317, 318.

**§ 32. Authority to call special election.**

Necessity of notice of special election, see post, § 40.

[a] (Sup. 1862)

Under 1 Rev. St. 1852, p. 260, an election to fill a vacancy cannot legally be held, where the vacancy does not occur long enough before the day of the election for a taking of the requisite statutory steps.—Beal v. Ray, 17 Ind. 554.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 22.

**§ 33. Submission of specific questions.**

[a] (Sup. 1881)

Under Acts 1875, Sp. Sess. pp. 70-72, providing that no township shall appropriate for railroad purposes an excess of 2 per cent. of the taxables of the township in any one period of two years, held, that an election which failed to appropriate was no bar to another election called within the two years.—Bish v. Stout, 77 Ind. 255.

[b] (App. 1905)

The policy incident to our system of government requires that matters of local concern be referred to and settled by the people directly interested therein who receive the benefits and bear the burdens.—Lincoln School Tp. v. Union

Trust Co. of Indianapolis, 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272.

**FOR CASES FROM OTHER STATES.**

SEE 18 CENT. DIG. Elections, §§ 30-32.

See, also, 15 Cyc. pp. 318-320.

**§ 33½. Petition and proceedings thereon.**

Submission of question as to county aid to corporations, see COUNTIES, § 154.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 23.

See, also, 15 Cyc. p. 319.

**§ 37. Place for holding election.**

Polling places, see post, §§ 200-204.

**[a] (Sup. 1874)**

Although a trustee must be elected for each district of an incorporated town, each trustee must be elected by the voters of the whole town at one voting place or poll, and the preceding board of trustees, or a majority thereof, must act as inspectors at the election, and the election certificates must be signed by the trustees present at the election who have acted as inspectors.—*Millikin v. Town of Bloomington*, 49 Ind. 62.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 26.

See, also, 15 Cyc. pp. 343, 344.

**§ 38. Time for holding election.**

Judicial notice of, see EVIDENCE, § 45.

**[a] (Sup. 1859)**

The first general election for city officers in the incorporated cities of Indiana was to be held, under the amendatory act of 1859, on the first Tuesday in May of that year.—*Williams v. Connelly*, 13 Ind. 502.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 27.

See, also, 15 Cyc. p. 341; note, 49 L. R. A. 244.

**§ 39. Notice or proclamation.**

On submission of question of county aid to corporations, see COUNTIES, § 154.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 33-39.

See, also, 15 Cyc. pp. 320-326.

**§ 40. — Necessity.**

**[a] (Sup. 1860)**

A general election, fixed by law, is not vitiated by a failure of the officer to make the publication required by law.—*Carson v. McPhetridge*, 15 Ind. 327; *Covington v. Ross*, Id. 318; *Denny v. Canthorn*, Id.

**[b] (Sup. 1862)**

Where the occupant of an office retired therefrom less than 20 days before the annual general election, an election to fill the vacancy caused thereby at such general election is

void, if not noticed as required by law.—*Beal v. Morton*, 18 Ind. 346.

**[c] (Sup. 1862)**

An election for county auditor is not void by the omission to give notice that it was to take place.—*State ex rel. Leal v. Jones*, 19 Ind. 356, 81 Am. Dec. 403.

**[d] (Sup. 1879)**

As all persons interested are bound to take notice of the existence of an act creating certain offices, and providing for an election to fill such offices, the failure to give notice of the election will not invalidate it.—*City of Lafayette v. State ex rel. Jenks*, 69 Ind. 218.

The election of a board of trustees of waterworks in the city of Lafayette at the regular annual election following the creation by Act March 25, 1879, of boards of waterworks in all cities and incorporated towns having a waterworks was valid, though no notice of the election of such board was given, and though the passage of such act was not generally known by the electors of the city.—Id.

**[e] (Sup. 1896)**

The giving of notice is essential to the validity of a special election.—*Demaree v. Johnson*, 49 N. E. 1062, 50 N. E. 376, 150 Ind. 419.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 33-35.

See, also, note, 120 Am. St. Rep. 794.

**§ 41. — Requisites and sufficiency.**

**[a] (Sup. 1880)**

Where the notices of an election to determine whether a township should make an appropriation in aid of a railroad, and the proof thereof, are insufficient, and the board of county commissioners decides that they are sufficient, the proper remedy is to appeal from the decision of the board, and not to seek to enjoin a tax levied to raise such appropriation.—*Faris v. Reynolds*, 70 Ind. 359.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 36, 37.

See, also, 15 Cyc. pp. 323-325.

**§ 44. Irregularities and defects.**

**[a] (Sup. 1898)**

Rev. St. 1894, § 5342 (Rev. St. 1881, § 4047), providing that in elections to decide on appropriations in aid of railroads the sheriff shall post printed handbills giving notice of such election, is directory as to the manner of giving notice, and a special election is not void where it does not appear that the failure to give notice in the required manner resulted in preventing such a number of electors from participating as would have changed the result had they voted.—*Demaree v. Johnson*, 49 N. E. 1062, 50 N. E. 376, 150 Ind. 419.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 29.

See, also, note, 83 Am. Dec. 749.

### III. ELECTION DISTRICTS OR PRECINCTS AND OFFICERS.

Canvassing boards, see post, § 258.

Injunctions against election officers, see INJUNCTION, § 80.

Mandamus to election officers, see MANDAMUS, § 74.

Offenses by officers, see post, § 314.

Primary election officers, see post, § 126.

#### § 48. Creation and alteration of districts or precincts.

[a] A change in the boundaries of a township, made by a board of county commissioners, under sections 4686, 5987, Rev. St. 1881, which allows such changes, if not made after the June term of said commissioners next preceding an election, does not disfranchise the voters brought within the changed district, although the order changing the boundaries and voting places was made after the June session of the board of commissioners. The general intent of the election laws is that every qualified voter is entitled to vote at some precinct or voting place at every election, and any other construction would enable commissioners to disfranchise numbers of electors by changing the boundaries and voting places after the June term before an election.—(Sup. 1887) *Duncan v. Shenk*, 109 Ind. 26, 9 N. E. 690; (1892) *Parvin v. Wimbberg*, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254.

[b] (Sup. 1887)

Rev. St. 1881, § 4687, providing that the county commissioners of any county may change the boundaries of any precinct within the county, or divide any precinct into two or more precincts, or consolidate two or more precincts into one, etc., provided that no such change shall be valid without giving due notice at least one month before any election, either by publication in the newspapers having the largest circulation in the county or by posters put up in four of the most public places in each precinct, does not apply to a case where the readjustment of the election precinct becomes a necessity on account of a change in the boundary line between townships.—*Duncan v. Shenk*, 9 N. E. 690, 109 Ind. 26.

[c] (Sup. 1899)

Inmates and officers of a branch of the National Home for Disabled Volunteer Soldiers, located on territory the jurisdiction over which has been restored to the state by an act of congress, should be counted as other citizens of a township in the formation of election precincts.—*State ex rel. Cashman v. Board of Com'rs of Grant County*, 54 N. E. 809, 153 Ind. 302.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 42.

#### § 54. Powers and proceedings of officers in general.

[a] (App. 1895)

The county board of election commissioners is not a county officer within the purview of the Constitution or of the act of 1875 relating to the powers of certain county officers and of the board of county commissioners.—*Board of Com'rs of Washington County v. Menaugh*, 41 N. E. 605, 13 Ind. App. 311.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 51.

#### § 55. Defects in appointment, ineligibility, or disqualification of officers.

[a] (Sup. 1898)

The failure to appoint election sheriffs for an election to decide whether a town should levy a tax to aid a railroad will not invalidate the election, where it was not shown that any one was thereby deprived of his right to vote, or that other substantial rights were affected.—*Demaree v. Johnson*, 49 N. E. 1062, 50 N. E. 376, 150 Ind. 419.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 47, 48.

See, also, 15 Cyc. p. 311.

#### § 57. Liabilities of officers.

[a] (Sup. 1839)

An election officer who honestly and conscientiously rejects a legal vote is not responsible in damages for the consequences of his mistake. In order to sustain such a charge against an election officer, proof of malice is absolutely necessary.—*Carter v. Harrison*, 5 Blackf. 138.

[b] (Sup. 1877)

Under 1 Rev. St. 1876, p. 271, requiring the board of canvassers to determine the persons having the highest number of votes for each of the several offices voted for, they are liable to one who is injured through the wrongful performance of their duty, though it were unintentionally so.—*Moore v. Kessler*, 59 Ind. 152.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 53.

See, also, 15 Cyc. p. 314.

### IV. QUALIFICATIONS OF VOTERS.

Admissibility of evidence, see post, § 293.

At primary elections, see post, § 126.

Power to prescribe qualifications, see ante, § 18.

#### § 60. Constitutional and statutory provisions.

Abriding privileges of citizens of United States, see CONSTITUTIONAL LAW, § 206.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 56.

See, also, note, 97 Am. Dec. 263.

**§ 62. Sex.****FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 60-62.

See, also, 15 Cyc. pp. 298, 299.

**§ 63. — General elections.**

[a] (Sup. 1897)

Under Const. Ind. art. 2, § 2, which provides that, "in all elections not otherwise provided for by this constitution, every male citizen of the United States of the age of twenty-one years and upward \* \* \* shall be entitled to vote," sex is a qualification on the right to vote for public officers.—*Gougar v. Timberlake*, 46 N. E. 339, 148 Ind. 38, 37 L. R. A. 644, 62 Am. St. Rep. 487.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 60.

**§ 71. Residence.**

As affecting place for voting, see post, § 204.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 67-74.

See, also, 15 Cyc. pp. 290-294; note, 48 Am. St. Rep. 711.

**§ 72. — Sufficiency in general.**

[a] (Sup. 1857)

Residence in this state gives one no right to vote, unless accompanied by an intent to make the state a permanent domicile for an indefinite time.—*French v. Lighty*, 9 Ind. 477, note.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 67, 68, 70.

**§ 73. — Change in general.**

[a] (Sup. 1869)

Where a boy was apprenticed to a resident of the state, with whom he lived for ten years, when he went to Iowa for the purpose, as he wrote, of seeing the country, and remained there for three years, and then returned to Indiana, to the residence of his late master, to whom he had written that as soon as he could get money he should return home, he had not lost his residence in the state, so as to render a vote cast by him illegal.—*Maddox v. State*, 32 Ind. 111.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 69, 70.

See, also, 15 Cyc. p. 291.

**§ 76. — Students.**

[a] (Sup. 1887)

A college student may be both a voter and a student; and if he in good faith elects to make the place his home, to the exclusion of all other places, he may acquire a legal residence, although he may intend to remove from such place at some fixed time, or at some indefinite period in the future.—*Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 72.

See, also, 15 Cyc. p. 292; note, 23 L. R. A. 215.

**§ 83. Payment of taxes.**

[a] (Sup. 1890)

The clause of Acts 1889, p. 163, § 13 (*Elliott's Supp.* § 1335), which makes the exercise of the right of suffrage by one who has been absent from the state for six months or more, on business of the state or the United States, dependent on proof that he is a taxpayer of the county, and that his name has been continuously kept on the tax duplicate during his absence, is unconstitutional and void, as it requires a property qualification in this class of voters, in addition to the qualifications prescribed by Const. art. 2, § 2.—*Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 77-81.

See, also, 15 Cyc. pp. 296-298; note, 29 L. R. A. 404.

**V. REGISTRATION OF VOTERS.****§ 95. Constitutional and statutory provisions.**

Effect of partial invalidity of statute, see STATUTES, § 64.

[a] (Sup. 1872)

The statute under which an election was ordered provided that the last preceding registry of voters should govern; but, prior to the day of election, the law requiring a registry was repealed. *Held* that, although conducted without regard to said registry, the election was a valid one.—*Detroit, E. R. & I. R. Co. v. Bearss*, 39 Ind. 598.

[b] Act March 9, 1891, requiring the registration of voters who have absented themselves from the state for 6 months or more since last voting, or who have not resided at least 6 months in one county, is void under Const. art. 2, § 2, requiring a residence of only 6 months in the state, 60 days in the township, and 30 days in the ward or precinct, and also under Const. art. 1, § 1, and art. 2, § 14, providing for general registration and equal elections.—(Sup. 1890) *Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326; (1892) *Brewer v. McClelland*, 144 Ind. 423, 32 N. E. 299, 17 L. R. A. 845.

[c] (Sup. 1890)

Const. art. 2, § 14, which requires the general assembly to provide for the registration of "all persons entitled to vote," is an implied prohibition against providing for the registration of any one class or part of the voters; and hence Acts 1889, p. 163, § 13, which provides for the registration of only such persons as have been temporarily absent from the state for six months or more, and such as have not resided in any one county for six



months, is unconstitutional and void.—*Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 95, 96.

See, also, note, 23 Am. Dec. 642; note, 54 Am. Rep. 843; note, 28 Am. St. Rep. 260.

**VI. NOMINATIONS AND PRIMARY ELECTIONS.**

**§ 120. Constitutional and statutory provisions.**

Implied repeal of statute by act relating to same subject, see *STATUTES*, § 161.

**§ 126. Nomination by primary election.**

[a] (Sup. 1902)

Under Acts 1901, p. 495, relating to primary elections, and providing that all political parties, in counties having a city of 50,000 population, which at the last preceding election cast 10 per cent. of the total vote, desiring to nominate any candidates for office in any county, township, or municipality, shall make such nominations as therein prescribed, mandamus will not lie to compel the Republican central committee of a county to place on the ballots the name of a candidate for senator of a senatorial district composed of two counties, since the act does not apply to such a district.—*State ex rel. Minturn v. Elliott*, 63 N. E. 222, 158 Ind. 168.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 118.

See, also, 15 Cyc. pp. 332, 333.

**§ 140. Nomination by electors.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 121, 126, 127.

See, also, 15 Cyc. pp. 334–336.

**§ 144. — Requisites of petition, certificate, or nomination papers.**

[a] (App. 1905)

Acts 1903, pp. 5, 6, c. 3, § 1, provides for the election of school commissioners in certain cities, and declares that each candidate shall be proposed in writing by not fewer than 300 householders of the city, and that no more than one candidate may be named in any one petition and no person may sign more than one petition for any one election. *Held* that, where five school commissioners were to be elected for different terms, petitions of nomination failing to designate the term of office for which the candidates were nominated were void for uncertainty.—*Remster v. Sullivan*, 75 N. E. 860, 36 Ind. App. 385.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 126.

**§ 147. Nominations to fill vacancies.**

[a] (Sup. 1897)

Rev. St. 1894, § 6222, provides that the board of election commissioners shall cause the names of all candidates to be printed on one ballot; all nominations of any party "being placed under the title and device of such party, \* \* \* as designated by them in their certificate." Section 6215 provides that in case of death, resignation, or removal of any candidate subsequent to nomination, "unless a supplemental certificate or petition for nomination be filed, the chairman of the \* \* \* committee shall fill such vacancy." *Held*, that where two parties nominate a separate set of candidates, and, a part of each set having declined the nomination, each party completes its list at a subsequent convention, and files a supplemental certificate, the election commissioners have no right to ignore such certificates, and print, under the title and emblem of each party, only the names of those nominated at the first conventions.—*Board of Election Com'rs of Gibson County v. State ex rel. Sides*, 48 N. E. 220, 148 Ind. 675.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 122.

See, also, 15 Cyc. p. 330.

**§ 148. Objections and contests.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 131–136.

See, also, 15 Cyc. pp. 338, 339.

**§ 153. — Determination by public officers.**

[a] (Sup. 1897)

It was the business of the election commissioners to print tickets as they were given to them by those who made the nominations, and such board was not a tribunal to try the right of individuals, but they must be left to the court to seek redress.—*Board of Election Com'rs of Gibson County v. State ex rel. Sides*, 48 N. E. 220, 148 Ind. 675.

[b] (Sup. 1906)

The determination of political questions, arising between factions of a political party, is within the jurisdiction of the regular party authorities, and cannot be determined by the courts.—*State ex rel. Garn v. Board of Election Com'rs of Marshall County*, 167 Ind. 276, 73 N. E. 1016.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 135.

See, also, 15 Cyc. pp. 339, 340.

**§ 154. — Trial and determination by courts.**

[a] (Sup. 1906)

Courts have jurisdiction to determine which of conflicting lists of candidates claimed to be made by a political party is entitled to be placed on the official ballot under the emblem of such party.—*State ex rel. Garn v. Board of*

Election Com'rs of Marshall County, 167 Ind. 276, 78 N. E. 1016.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 136.

See, also, 15 Cyc. pp. 340, 341.

#### § 155. Amendment of certificates or nomination papers.

[a] (App. 1905)

Acts 1903, pp. 5, 6, c. 3, § 1, provides for the nomination of school commissioners in certain cities by petition, and requires that such petitions shall be filed not later than 40 days before the election in the office of the comptroller, where they shall remain in the public files for 5 days, the last of which shall not be less than 30 days before the election, when he shall publish the names proposed and at the time required by law certify such nomination to the board of election commissioners for the preparation of ballots. *Held* that, where nominating petitions were fatally defective for failure to specify the term for which the candidate was nominated, they could not be amended 40 days prior to the election, so as to cure the defect, but on the expiration of the 40 days became functus officio.—*Remster v. Sullivan*, 75 N. E. 860, 36 Ind. App. 385.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 128.

See, also, 15 Cyc. p. 339.

#### § 156. Certification of nomination by public officers.

Nomination of school officer, see SCHOOLS AND SCHOOL DISTRICTS, § 53.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 129.

#### § 157. Publication of list of nominees.

[a] (App. 1905)

Acts 1903, pp. 5, 6, c. 3, § 1, provides for the nomination of candidates for the office of school commissioners in cities by petitions to be filed with the comptroller, and requires that after 5 days, the last of which shall not be less than 30 days before the election, such comptroller shall publish the names proposed in two daily newspapers in the city. *Held*, that such provision requires publication of both the names of the candidates and the office or offices for which they have been nominated.—*Remster v. Sullivan*, 75 N. E. 860, 36 Ind. App. 385.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 130.

#### § 158. Irregularities and defects.

[a] (Sup. 1899)

Though a town clerk, acting as a board of election commissioners, may refuse to accept a nomination certificate when it is not acknowledged by the president and secretary of the convention, his acceptance thereof without objec-

tion cures the defect.—*Jones v. State ex rel. Wilson*, 55 N. E. 220, 153 Ind. 440.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 123.

### VII. BALLOTS.

Admissibility in evidence, see post, § 203.

Appropriations for printing, see COUNTIES, § 162.

Mode of voting by ballot, see post, §§ 215, 221.

Power to contract for preparing ballots, see COUNTIES, § 114.

Primary elections, see ante, § 126.

#### § 163. Authority and duty to make and furnish.

[a] (App. 1905)

The duty of the board of election commissioners of a city to prepare ballots to be used at an election of school commissioners required by Acts 1903, pp. 5, 6, c. 3, § 1, and to have the same printed and distributed, is wholly ministerial.—*Remster v. Sullivan*, 75 N. E. 860, 36 Ind. App. 385.

The city board of election commissioners is a creature of legislative enactment, and its duties to prepare, print, and distribute ballots, to be used in an election, are wholly ministerial.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 139.

#### § 165. Form and contents of official ballots.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 140-150.

See, also, 15 Cyc. pp. 345-362.

#### § 166. — In general.

[a] (App. 1905)

Under Acts 1903, pp. 5, 6, c. 3, § 1, providing for the nomination of candidates for the office of school commissioners in certain cities, and requiring the board of election commissioners to prepare ballots containing the names of all candidates nominated in the manner prescribed by such section, where commissioners were to be elected for different terms and petitions of nomination did not specify any term, such election commissioners had no authority to designate the term or terms for which such candidates were nominated.—*Remster v. Sullivan*, 75 N. E. 860, 36 Ind. App. 385.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 140.

See, also, 15 Cyc. p. 345.

#### § 167. — Order and arrangement of tickets and names.

[a] (Sup. 1906)

Burns' Ann. St. 1901, §§ 6215, 6222, provides that where a list of candidates is composed of the nominees of a convention which had

been held at the time and place designated in the call of the regularly constituted party authorities, it is the duty of the board of election commissioners, on presentation of a regular certificate of nomination, to set out the list of names under the regular party name and title the candidates of the Democratic Party in the first column on the left hand side of the ballot and of the Republican Party in the second column. *Held*, that where certificates of nomination have been properly filed under such sections, the duty of the election commissioners to arrange the ballot as provided is mandatory.—*State ex rel. Garn v. Board of Election Com'rs of Marshall County*, 167 Ind. 276, 78 N. E. 1016.

*Burns' Ann. St.* 1901, § 6215, provides for the preparation of ballots by the election commissioners, and the filing of certificates of nominations made by a convention or primary election. It also declares that, in case of a division in a party, and claim by two or more factions to the same party name, etc., the election commissioners shall give preference of name to the convention held at the time and place designated in the call of the regularly constituted party authorities, etc. *Held*, that where the nominees of two factions of the Republican Party in a county claim to be the regular Republican nominees, preference should be given to the nominees of the convention called by the chairman of the Republican county central committee.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 141.

See, also, 15 Cyc. p. 350.

#### § 168. — Party names, emblems, or devices.

[a] (*Sup.* 1868)

In an election of councilmen in a city, the words "City Union Ticket" printed at the top of the ballots for one candidate was not such a distinguishing mark as was prohibited by Acts 1867, p. 113, § 23, requiring all ballots to be printed on plain white paper, without any distinguishing mark thereon.—*Drulliner v. State*, 29 Ind. 308; *Steighley v. Same*, *Id.* 312.

[b] (*Sup.* 1871)

The words "Republican Ticket" printed at the head of a ballot, and on the same side that the names of candidates are printed upon, is not such a distinguishing mark or embellishment as to require the inspector to refuse it when offered.—*Stanley v. Manly*, 35 Ind. 275.

[c] (*Sup.* 1872)

The words "Republican Ticket," or "Republican County Ticket," or "Republican Township Ticket," upon the face of a ballot, do not authorize the rejection of the ballot, under section 23 of the registry law of 1867 (Acts 1867, p. 113), which requires all tickets to be written or printed on "plain white paper, without any distinguishing marks or other embellishments

thereon," and makes it the duty of inspectors of elections to refuse all ballots of any other description.—*Millholland v. Bryant*, 39 Ind. 363.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 142.

See, also, 15 Cyc. p. 346.

#### § 171. — Names and designations of offices.

[a] (*App.* 1905)

Where school commissioners are to be elected, some for a term different from that of the others, a complaint for injunction, showing that the board of election commissioners is threatening to print upon the official ballots the names of all of the candidates for school commissioners, without designating for what terms such candidates are running, is good.—*Remster v. Sullivan*, 36 Ind. App. 385, 75 N. E. 860.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 145.

See, also, 15 Cyc. pp. 347-349.

#### § 172. — Names and designations of candidates.

[a] (*App.* 1905)

Under the Australian ballot system, a legal ballot can only be prepared and printed when it is done in substantial compliance with a certificate or petition of nomination and the requirements of the statutes governing such proceedings, and when the certificate or petition is defective in not designating the office to be filled, or the term of office, where different terms of the same office are to be filled at the same election, a candidate thus named and placed thereon is not entitled to be voted for, and a ballot cast for him is a nullity.—*Remster v. Sullivan*, 36 Ind. App. 385, 75 N. E. 860.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 146.

See, also, 15 Cyc. pp. 348, 349.

#### § 177. — Indorsement.

[a] (*Sup.* 1892)

Election Law March 6, 1889, § 34, provides that "at the opening of the polls," after the ballots have been delivered by the inspector, the poll clerks shall write their initials in ink on the lower left-hand corner of the back of each of said ballots, without any distinguishing mark of any kind. Section 49 provides that no election officer "shall deposit any ballot upon which the initials of the poll clerks do not appear, or any ballot on which appears externally any distinguishing mark." *Held* where, on the backs of all the ballots of a certain precinct, the initials of the poll clerks were by honest mistake indorsed in the lower right-hand corner, that such ballots were properly counted; the provision with reference to indorsement being directory only.—*Parvin v. Wimberg*, 130 Ind. 561.

30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 149.

See, also, 15 Cyc. pp. 350-352.

**§ 180. Indication of choice by voter.**

Distinguishing marks, see post, § 194.

[a] (Sup. 1892)

Election Law March 6, 1889, § 45 provides that the voter shall "indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names," or, in case he desires to vote for all the candidates of a party, "he may place the stamp on the square preceding the title under which the candidates of such party" are printed. *Held*, that this provision is mandatory; the stamping of the square being the only method prescribed, by which the voter can indicate his choice.—*Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 151-155, 157.

See, also, 15 Cyc. pp. 353-356; note, 47 L. R. A. 806.

**§ 185. Irregularities, errors, and omissions.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 159, 161-163.

See, also, 15 Cyc. pp. 355, 358, 359.

**§ 186. — In general.**

[a] (Sup. 1899)

Failure of a town clerk, acting as a board of election commissioners, to have directions how to vote a straight ticket printed on the official ballot, or the improper designation of candidates for trustee of a ward as candidates for councilman, will not justify declaring an election of a trustee null; it being otherwise fairly conducted and free from fraud, and no objection having been made before the election.—*Jones v. State ex rel. Wilson*, 55 N. E. 220, 153 Ind. 440.

Where but two political parties participate in an election, and there are but two lists of candidates on the official ballot, and the party emblem required by law to be at the head of each list is at the head of one only, its absence from the head of the other could not mislead voters, and would not invalidate votes cast for a candidate on that list.—*Id.*

That the poll clerks of an election wrote their initials on the outside, upper, right-hand corner of each ballot before it was delivered to the voter, instead of on the outer, lower, left-hand corner, as the statute prescribes, will not nullify the election, which was otherwise properly conducted.—*Id.*

[b] (Sup. 1900)

Under Burns' Rev. St. Supp. 1897, § 6248c, prescribing the manner in which ballots shall be marked, and providing that a mark on a ballot in violation thereof shall be treated as a distinguishing mark, and section 6248g, providing that any ballot or part of a ballot from which it is impossible to determine the elector's choice of candidates shall not be counted as to the candidates affected thereby, where a ballot is marked with a cross in the square opposite the names of two candidates for the same office, and is properly executed in other respects, such mark will not invalidate the entire ballot, but it may be counted for the candidates for other offices as to whom it is properly marked.—*Borders v. Williams*, 57 N. E. 527, 155 Ind. 36.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 159.

**§ 191. Illegality.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 165-167.

**§ 192. — In general.**

[a] (Sup. 1907)

Voters are not presumed to have voted for a candidate for county assessor who was not a freeholder, "willfully and obstinately."—*State ex rel. Clawson v. Bell*, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. (N. S.) 1013, 124 Am. St. Rep. 203.

**§ 193. — Variation as to material, dimensions, color, or typography.**

[a] (Sup. 1879)

Under a statute providing that ballots used at elections should be printed on plain white paper, without any distinguishing marks, except the names of candidates, etc., *held*, that the fact that certain ballots cast were so printed that, when folded, the names, etc., printed thereon could be seen through the paper, did not render such ballots illegal.—*State ex rel. Julian v. Adams*, 65 Ind. 393.

[b] (Sup. 1885)

Rev. St. § 4701, requires election tickets to be printed on plain white paper. *Held*, no special grade, quality, or thickness of paper being specified, that it was a question of fact for the jury whether certain paper used was plain and white.—*State ex rel. Heiney v. Wasson*, 99 Ind. 261.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 165.

**§ 194. — Distinguishing marks.**

[a] (Sup. 1868)

Registry Law 1867, § 23, requiring all tickets to be written or printed on plain white paper without any distinguishing marks or other embellishments thereon, must be construed as requiring all ballots to be uniform

in external appearance only, and not to prohibit a distinguishing mark on the inside of the ticket.—*Druliner v. State*, 29 Ind. 308; *Steighley v. Same, Id.*, 312.

[b] (*Sup.* 1893)

*Elliott, Supp.* § 1374, provides that any ballot which has any distinguishing mark shall be void, and any ballot from which it is impossible to determine the elector's choice of candidates shall not be counted as to the candidate or candidates affected thereby. Section 1367 provides that the voter may indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names, provided that if he shall desire to vote for all candidates of one party he may stamp the square preceding the title under which the candidates of such party are printed. *Held*, that where the stamps are made on ballots at varying distances from the squares indicated thereon, but not touching the same, the stamp becomes a distinguishing mark, and invalidates the ballot.—*Bechtel v. Albin*, 134 Ind. 193, 33 N. E. 967.

[c] (*Sup.* 1894)

Act March 6, 1891, § 45, provides that a voter shall indicate his candidates by stamping the square immediately preceding their names, provided, if he desires to vote for all the candidates of one party, he may place the stamp in the large square at the head of its list; that, if he places the stamp in the large square, he shall not stamp the ballot elsewhere, unless there be no candidate for some office on the list of such party, when he may indicate his candidate for such office by a stamp on another list, in the square opposite the name of a candidate for such office; that a stamp in violation of the act shall be a distinguishing mark. Section 52 provides that a ballot bearing any distinguishing mark or mutilation shall be void, and not counted. *Held*, that the act was mandatory, and that a ballot marked in violation of it would not be counted, though there was no evidence of corrupt motive.—*Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; *Same v. State ex rel. Stoddard*, 136 Ind. 700, 36 N. E. 208.

A ballot having a pencil mark across the name of a candidate violates such statute, as does one properly stamped, except that a stamp opposite the name of a candidate was erased so that a hole was made through the ticket.—*Id.*

A ballot having, in addition to stamps in the squares opposite the names of candidates, a stamp in a square opposite to which there is no candidate, but merely a blank left for a certain office, or having more than one stamp in the square at the head of a party's list, is void.—*Id.*

A ballot stamped at the head of a list and opposite the name of a candidate on the same list, or stamped in the square at the head of one list containing candidates for all offices,

and stamped in the square opposite a candidate on another list, is void.—*Id.*

[d] (*Sup.* 1895)

Where, in the preparation of a ballot, there is such departure from the strict letter of the law as that, if purposely done, the ballot could be known by the voter after casting it, such ballot will be rejected in the count, though the departure was innocently made.—*Zeis v. Passwater*, 41 N. E. 796, 142 Ind. 375.

That the stamp was not placed on a ballot with such precision as to make a single, perfect impression will not render the ballot invalid.—*Id.*

A ballot bearing within one of the large squares a distinct marking, as with a pencil, about one-fourth of an inch wide and five-sixteenths of an inch long, in addition to the voter's stamp, contains a distinguishing mark, and cannot be counted.—*Id.*

A ballot with two separate and distinct impressions of the stamp will be rejected, as bearing a distinguishing mark, within *Rev. St.* 1894, § 6248 (*Elliott's Supp.* § 1374).—*Id.*

[e] (*Sup.* 1901)

A ballot, otherwise properly stamped, showing three slight parallel streaks, apparently made by a careless movement of the stamp across the ballot, was not defective, as bearing a distinguishing mark, since it did not fairly import design; and the exclusion of such ballot from the evidence in a contested election case was reversible error.—*Tombaugh v. Grogg*, 59 N. E. 1060, 156 Ind. 355.

Under Acts 1891, p. 133, § 13, declaring that if a voter stamps the large square on a ballot, inclosing the party device, he shall not stamp elsewhere on the ballot, and that a stamp on a ballot in violation of this provision shall be treated as a distinguishing mark, a ballot containing a faint impression of the regular stamp above the party device in the large square, and an irregular daub four times as large as the face of the stamp, was properly rejected, as bearing a distinguishing mark.—*Id.*

#### FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Elections, §§ 166, 167. See, also, 15 Cyc. pp. 357-360; notes, 13 L. R. A. 761, 47 L. R. A. 820; note, 49 Am. St. Rep. 240.

#### VIII. CONDUCT OF ELECTION.

Laws permitting recovery of penalty for bribery of voter as authorizing imprisonment for debt, see *CONSTITUTIONAL LAW*, § 83. Of county superintendent of schools, see *SCHOOLS AND SCHOOL DISTRICTS*, § 48. Power to regulate, see ante, §§ 23-28. Primary elections, see ante, § 126.

### § 198. Constitutional and statutory provisions.

[a] (Sup. 1892)

The courts will not ignore a construction of an election statute accepted and acted upon by the officers whose duty it is to administer the law, unless it is palpably wrong.—*Parvin v. Wimberg*, 30 N. E. 790, 130 Ind. 561, 15 L. R. A. 775, 30 Am. St. Rep. 254.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 170.

See, also, 15 Cyc. pp. 362, 363.

### § 199. Application of requirements to special elections.

[a] (Sup. 1904)

*Burns' Ann. St.* 1901, § 5341, requires the question of township appropriations in aid of the construction of railroads to be submitted to popular vote; section 5343 provides that the vote shall be conducted in the manner provided by law for general elections; section 6214 creates a board of election commissioners, and enjoins upon it the duty of preparing and distributing ballots, for the election of officers to be voted for in the county, other than those to be elected by all voters of the state; section 6258 provides that, where local questions are submitted to the electors of a district, the board of election commissioners of the county including the district shall cause a brief statement of the question presented to be printed on the ballot, and the words "Yes" and "No" to be printed under the same; section 6260 provides that, when a township holds an election at a time other than the time of a general election, the election shall be held in conformity with the act relative to general elections, and local officers shall perform the same duties as in case of general elections. *Held*, that ballots used in a special township election on the question of railroad aid appropriations must be printed and delivered to the proper officers by the election commissioners, as prescribed by the statute relative to elections, and the preparing and distributing of ballots by persons other than the officers prescribed by law, and the use of such unauthorized ballots, render the election void.—*Current v. Luther*, 72 N. E. 556, 164 Ind. 252.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 171.

See, also, 15 Cyc. p. 363.

### § 200. Polling places.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 176–181.

### § 201. — Establishment and alteration in general.

[a] (Sup. 1870)

Where there is no fraud no legal voter prevented from voting, and no illegal voter permitted to vote, the fact that the county commissioners changed the places of voting in one

township two days before the election, and gave no notice thereof, will not avoid a railroad-aid election.—*Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 176, 177.

See, also, note, 4 L. R. A. (N. S.) 571.

### § 202. — Number.

[a] (Sup. 1883)

An election to vote funds for a railroad, at which the polls were not opened in one of the two voting precincts, is void, under *Rev. St.* 1881, § 4048, requiring that "the polls shall be opened at the several voting places in the township."—*State ex rel. Sigler v. Board of Com'rs of Madison County*, 92 Ind. 133.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 178.

### § 204. — Residence as affecting place for voting.

[a] (Sup. 1857)

No elector can vote, except in the township or precinct where he resides.—*French v. Lighty*, 9 Ind. 477, note.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 180, 181.

### § 215. Voting by ballot.

Effect of errors and irregularities, see post, § 227.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 186–191.

See, also, 15 Cyc. p. 345.

### § 219. — Preparation of ballots by voters.

[a] (Sup. 1893)

*Acts* 1889, § 45, providing that the voter may indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names, provided that, if he shall desire to vote for all the candidates of one party or group of petitioners and none other, he may place the stamp on the square preceding the title under which the candidates of such party or group of petitioners are printed, are not unreasonable, and must be strictly observed, and the voter has no greater right to stamp his ballot in a manner different from that prescribed than he has to decline to go into the booth to stamp it.—*Bechtel v. Albin*, 33 N. E. 967, 134 Ind. 193.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 189.

### § 220. — Assistance to voters.

[a] (Sup. 1895)

*Rev. St.* 1894, § 6244, provides that any voter who declares that, through inability to read, he is unable to mark his ballot, may have

it prepared by the poll clerks. *Held*, that where a voter who could not read stated that he could, but asked the poll clerks to prepare his ballot, and they did so, the ballot was properly received.—*Montgomery v. Oldham*, 143 Ind. 34, 42 N. E. 474.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 190.

See, also, 15 Cyc. p. 366.

**§ 221. — Deposit of ballots in boxes.**

[a] (*Sup.* 1892)

Election Law March 6, 1889, § 10, provides that two ballot boxes shall be provided,—one for ballots for state officers, and another for ballots for local officers. In canvassing the votes, some local ballots were found in the box provided for state ballots. *Held*, that these local ballots were entitled, *prima facie*, to be counted; the presumption being that they were placed in the wrong box by mistake of the election officers.—*Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 191.

See, also, 15 Cyc. p. 366.

**§ 223. Challenges to voters and proceedings thereon.**

[a] (*Sup.* 1857)

The oath of the voter is, to the election board, conclusive evidence of right to vote.—*French v. Lighty*, 9 Ind. 477, note.

[b] (*Sup.* 1861)

1 Rev. St. 1852, p. 263, § 21, precludes the board of election officers from taking testimony relative to the right of any person to vote who may offer to take the oath therein provided.—*State v. Robb*, 17 Ind. 536.

Election officers are justified in receiving the vote of one who has taken the oath, unless it can be shown that they acted corruptly, or with a knowledge that he was not a legal voter.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 192, 194.

See, also, 15 Cyc. p. 367.

**§ 224. Rejection of vote by election officers.**

[a] (*Sup.* 1861)

The refusal of the election officers to swear a person offering to vote, or to take his vote after he has sworn, is at their peril of being able to show that he is not a legal voter, if they are prosecuted for their action.—*State v. Robb*, 17 Ind. 536.

No penalty can attach for refusing to allow one to vote who offers to take the oath, if the officers can show that he was not a legal voter.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 193.

**§ 227. Irregularities and errors.**

[a] An election is not invalidated by an irregularity which is not shown to have affected the result.—(*Sup.* 1870) *Gass v. State ex rel. Clark*, 34 Ind. 425; (1883) *Irwin v. Lowe*, 89 Ind. 540.

[b] (*Sup.* 1870)

Statutes regulating the mere mode of conducting elections are directory, and any departure from the prescribed mode will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it.—*Gass v. State ex rel. Clark*, 34 Ind. 425.

The reason and spirit of the statutory provision, on the subject of contesting elections (1 Gav. & H. Rev. St. p. 318, § 15) that "no irregularity of misconduct of any member or officer of a board of judges or canvassers shall set aside the election of any person, unless such irregularity or misconduct were such as to cause the contestee to be declared elected when he had not received the highest number of legal votes," are applicable to an election to a city office, as well as to a state, county, or township office, and said provision announces a principle of law which prevails independently of the statute.—*Id.*

[c] (*Sup.* 1892)

If a statute expressly declares any particular act to be essential to the validity of an election, or that its omission shall render the election void, the courts must so hold, whether the particular act in question goes to the merits or affects the result of the election or not; for such a statute is mandatory, and the court cannot enter into the question of its policy.—*Parvin v. Wimberg*, 30 N. E. 790, 130 Ind. 561, 15 L. R. A. 775, 30 Am. St. Rep. 254.

If a statute simply provides that certain things shall be done within a particular time or in a particular manner, and does not declare that their performance shall be essential to the validity of an election, they will be regarded as mandatory if they affect the merits of the election, and as directory only if they do not affect its merits.—*Id.*

Mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, does not vitiate the election.—*Id.*

A departure from the mode of holding an election as prescribed by statute, which does not deprive legal voters of their right to vote, or permit illegal voters to participate in the election or cast uncertainty on the result, does not affect the validity of the election.—*Id.*

[d] (*Sup.* 1892)

Statutes regulating the mere mode of conducting an election are directory, and a departure from such mode will not generally defeat

the successful candidate.—*Enos v. State ex rel. Goder*, 31 N. E. 357, 131 Ind. 560.

[e] (Sup. 1904)

Provisions of law in regard to the preparation and distribution of ballots by designated officers are mandatory, and must be strictly obeyed.—*Current v. Luther*, 72 N. E. 556, 164 Ind. 252.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 197–200.

See, also, 15 Cyc. pp. 372, 373.

§ 229. **Illegal votes.**

[a] (Sup. 1892)

In a proceeding to contest defendant's election to an office, the fact that illegal votes were cast for him will not entitle plaintiff to a judgment, where it also appears that there were sufficient illegal votes cast for plaintiff to give defendant a majority of the legal votes after excluding all that were illegal.—*Ilacker v. Conrad*, 131 Ind. 444, 31 N. E. 190.

[b] (Sup. 1895)

Under Rev. St. 1894, § 6313, providing that no election shall be set aside for illegal votes unless the number thereof given to the contestee, if taken from him, would reduce the number of his legal votes below the number of legal votes given to some other person, an election will not be set aside because, by adding to the number of votes counted for contestant votes which were improperly rejected, the result would be a tie. *Gimbel v. Green* (1893) 33 N. E. 964, 34 N. E. 217, 134 Ind. 628, distinguished.—*Montgomery v. Oldham*, 42 N. E. 474, 143 Ind. 34.

[c] (Sup. 1907)

Where a candidate for office was disqualified therefor, but had it within his power to remove the disqualification before he took the office, the voters had a right to assume that, if elected, he would do so, and it cannot be asserted that in casting their votes for him they were guilty of willful obstinacy and misconduct so that their votes should be treated as nullities.—*Hoy v. State ex rel. Buchanan*, 168 Ind. 506, 81 N. E. 509.

Where a party duly declared elected to the city council was disqualified for the office, but had it within his power to remove the disqualification before taking the office, the electors were not bound to take notice of his disqualification, but the burden was upon the one opposing his title to the office to show that the electors at the time they cast their votes had actual notice or knowledge of the facts that made him ineligible.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 201.

See, also, 15 Cyc. p. 371.

§ 230. **Bribery.**

As an offense, see post, § 316.

[a] (Sup. 1897)

Where the election of a township trustee is contested, on the alleged ground "that the contestee is ineligible to said office," evidence that contestee, on the day of his election to such office, gave one J. P. three dollars to vote for him (contestee) at said election is competent. under Const. art. 2, § 6, providing that "every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward, to secure his election," and Rev. St. 1894, § 6312 (Rev. St. 1881, § 4756, subsec. 2), which provides that an election may be contested "when the contestee was ineligible"; the term "disqualified," as used in the constitutional provision quoted, meaning the same thing that the word "ineligible" means as used in the statute authorizing a contest.—*Carroll v. Green*, 47 N. E. 223, 148 Ind. 362.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 202.

See, also, 15 Cyc. p. 369.

§ 231. **Illegal expenditures and corrupt practices.**

[a] (Sup. 1904)

An agreement by a candidate at a primary for nomination as county auditor by which he gave his note for \$300 to the opposing candidate in consideration of the latter's withdrawal, and of his promise and that of two of his supporters to aid in securing the maker's nomination and to discourage other candidacies, is within Burns' Rev. St. 1901, § 2327, providing that any person being a candidate for nomination to any office of trust, who promises to pay money to any person to secure his vote or influence, shall on conviction be fined, and, if nominated, shall be ineligible to hold such office.—*Gray v. Seitz*, 69 N. E. 456, 162 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 203.

**IX. COUNT OF VOTES, RETURNS, AND CANVASS.**

Judicial notice of vote cast, see EVIDENCE, § 45.

Primary elections, see ante, § 126.

§ 235. **Determination and declaration of result in general.**

[a] The fact that the candidate who stood highest on the list is ineligible gives the election to the next highest.—(Sup. 1860) *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; (1873) *Price v. Baker*, 41 Ind. 572, 13 Am. Rep. 346; (1878) *Jeffries v. Rowe*, 63 Ind. 592; (1884) *State ex rel. Morley v. Johnson*, 100 Ind. 489; (1886) *Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164; (1890) *Copeland v. State ex rel. Davis*, 126 Ind. 51, 25 N. E. 866.



[b] (Sup. 1860)

Citizens of a county must take notice as to who hold county offices, and also of the constitutional provision that incumbents of certain of those offices are not eligible to certain other offices, and votes cast in disregard thereof are void; and the candidate receiving the greatest number of legal votes, although not a majority of the whole number thrown, will be elected.—*Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49.

[c] (Sup. 1860)

Where a person voted for, for the office of clerk, recorder, or auditor, is ineligible by reason of having already served 8 years in a period of 13, the disability is one of which the voters are bound to take notice.—*Carson v. McPhetridge*, 15 Ind. 327; *Covington v. Ross*, Id. 318; *Denny v. Canthorn*, Id.

[d] (Sup. 1886)

Appellant and M. were opposing candidates for the office of township trustee. M. held a commission as justice of the peace for a term of four years from April 17, 1882. The term of trustee began April, 16, 1886. The Constitution (Rev. St. 1881, § 176) provides that no person elected to any judicial office shall during the term for which he shall have been elected be eligible to any office other than judicial. *Held*, that M.'s term as justice of the peace did not expire until midnight of April 16, 1886; that he was therefore ineligible; and appellant, having received the next highest number of votes, was entitled to the office.—*Vogel v. State ex rel. Land*, 107 Ind. 374, 8 N. E. 164.

[e] (Sup. 1907)

Though the candidate for an office who receives the most votes is ineligible, the eligible candidate receiving the next highest number of votes is not elected, unless the votes for the ineligible candidate were cast for him without full knowledge or notice of his ineligibility.—*State ex rel. Clawson v. Bell*, 169 Ind. 61, 82 N. E. 60, 13 L. R. A. (N. S.) 1013, 124 Am. St. Rep. 203.

[f] (Sup. 1908)

Where a candidate for an office who receives the most votes is ineligible, the eligible candidate receiving the next highest number of votes is not entitled to the office in the absence of a showing of knowledge of the electors casting their votes for the ineligible candidate of his ineligibility.—*State ex rel. Heston v. Ross*, 170 Ind. 704, 84 N. E. 150.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 206-209.  
See, also, note, 12 Am. Rep. 341.

#### § 236. Constitutional and statutory provisions.

Prospective construction of retrospective laws, see STATUTES, § 278.

#### § 237. Number of votes necessary to choice.

[a] (Sup. 1860)

Although Acts 1859, p. 61, § 2, requiring that a majority of legal voters petition for the formation of a new county, provides that the number constituting a majority shall be ascertained by reference to the votes cast at the last preceding congressional election, yet, when this method is not practicable, some other may be used to ascertain what constitutes a majority.—*Allen v. Hostetter*, 16 Ind. 15.

[b] (Sup. 1894)

Section 4208 et seq., Rev. St. 1894 (section 3233, Rev. St. 1881), provide for the union of a town and city, when a "majority of the qualified voters of the city and a majority of the qualified voters of the town vote therefor," at such time as the city and town shall jointly specify, and declare that, if "a majority of the votes given in the city and in the town are in favor of union," the officers of the city and town shall, by resolution, declare them annexed. *Held* that, when the day set for the election was the day of the general city election, the proposition for annexation required only a majority of the votes cast for or against it, and not a majority of all the votes cast at the city election.—*City of South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986.

Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at "such election," a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question.—*Id.*

Where a measure is proposed to the people, and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote.—*Id.*

Where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition shall cast an affirmative vote and that those electors opposed to the proposition shall cast a negative vote, and that a "majority of the votes given" shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not are those which are given on the particular question involved.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 210-215.  
See, also, 15 Cyc. pp. 388-391.

#### § 238. Tie votes.

Mandamus to compel special election on tie vote, see MANDAMUS, § 74.

[a] (Sup. 1891)

A statutory provision (Rev. St. 1881, § 4736) that, when in any election there is a

tie vote, the judges of election shall determine by lot to which of the opposing candidates the certificate of election should be given, is not in violation of Const. art. 2, § 13, providing that all elections shall be by ballot, since it deprives no elector of his vote, and gives to each vote its full force and weight.—*Johnston v. State ex rel. Sefton*, 128 Ind. 16, 27 N. E. 423, 12 L. R. A. 235, 25 Am. St. Rep. 412; *Wills v. State ex rel. Hughes*, 128 Ind. 350, 27 N. E. 423; *Kimerer v. State ex rel. Black*, 129 Ind. 589, 29 N. E. 178.

[b] (Sup. 1891)

The duties of election officers being prescribed by a public law, the fact that relator requested them not to determine the election when the vote was a tie in the manner prescribed by Rev. St. 1881, § 4736, will not operate as an estoppel to prevent him from maintaining a petition for mandamus to compel them to do so.—*Johnston v. State ex rel. Sefton*, 128 Ind. 16, 27 N. E. 422, 12 L. R. A. 235, 25 Am. St. Rep. 412; *Wills v. State ex rel. Hughes*, 128 Ind. 359, 27 N. E. 423.

Under a statutory provision (Rev. St. 1881, § 4736) that when in any election there is a tie vote the judges of election shall determine by lot to which of the opposing candidates the certificate of election should be given, the election officers cannot escape the duty of settling a tie vote by adjourning without taking action, and a mandamus will lie to compel such a determination by them.—Id.

[c] (Sup. 1891)

It is no defense to the proceeding for mandate that an illegal vote was counted without the board's knowledge at the time, and without which one of the candidates would have received a majority.—*Kimerer v. State ex rel. Black*, 129 Ind. 589, 29 N. E. 178.

In issuing the mandate to an election board to reassemble and determine which of two rival candidates is entitled to an office, it is proper for the court to fix the time for the meeting of the board.—Id.

Where a member of the election board, pending mandate proceedings to compel them to reassemble and determine which of two rival candidates is entitled to a town office, removes from the town, it is not error for the court to direct the board to meet, and the inspector to select an elector of the town, of the same political faith as the member moving away, to act in his place.—Id.

An election board may be compelled by mandate to reassemble and determine by lot which of two rival candidates for a township office, who have received an equal number of votes, shall be entitled to the office.—Id.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 216, 217.  
See, also, 15 Cyc. p. 392; note, 47 L. R. A. 551.

§ 239. Votes to be counted.

[a] (Sup. 1894)

Where at a general election a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law under which it is submitted to the contrary.—*City of South Bend v. Lewis*, 37 N. E. 986, 138 Ind. 512.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 218.

§ 246. Returns.

Impeaching or contradicting returns on election contest, see post, § 294.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 223-230.  
See, also, 15 Cyc. pp. 375-379.

§ 247. — In general.

[a] (Sup. 1870)

That the inspectors of two of the townships in a county made no return of the votes therein will not avoid a railroad aid election where the whole number of votes of the two townships could not have changed the result of the election.—*Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 223.

§ 248. — Form and contents.

[a] (Sup. 1877)

Returns failing to state for what office parties named are voted for are void for uncertainty, and should be rejected by the board of canvassers.—*Moore v. Kessler*, 59 Ind. 152.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 224.  
See, also, 15 Cyc. p. 376.

§ 251. — Forwarding and custody.

[a] (Sup. 1887)

Under the provisions of the constitution and statutes, certified copies of the returns of the votes cast for lieutenant governor are required to be transmitted to the speaker of the house of representatives, in the care of the secretary of state, and the courts have no authority to stop, by injunction, these certified returns in the hands of the secretary of state, as he is the mere custodian thereof, and is bound by positive law to deliver them to the speaker of the house of representatives, whose duty it is to open them in the presence of both houses of the general assembly.—*Smith v. Myers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375.

The jurisdiction to restrain the secretary of state from delivering to the speaker of the house of representatives certified copies of the return of votes cast for lieutenant governor is one over the subject-matter, and, if it

does not exist, cannot be conferred by the consent of any public officer.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 227.  
See, also, 15 Cyc. p. 377.

**§ 252. — Compelling return.**

[a] (Sup. 1892)

Rev. St. 1881, § 3309, requires inspectors of elections to make a certified statement of the persons elected, and file the same with the clerk of the circuit court, within 10 days from the day of election. *Held*, that the filing of such certificate will be compelled by mandate, though there was but one inspector, and he the opposing candidate.—*Enos v. State ex rel. Goder*, 131 Ind. 560, 31 N. E. 357.

A complaint to compel an election inspector to certify the result of an election to the circuit court, pursuant to Rev. St. 1881, § 3309, which alleges that the "election was duly and legally held," is not defective for failing to allege that the election board made a certified return of the number of votes cast for each candidate; for, if such return be required, it is presumed, in the absence of a showing to the contrary, that the board did its duty.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 228.  
See, also, 15 Cyc. p. 379.

**§ 253. — Irregularities and errors.**

[a] (Sup. 1879)

Where an election was held under 1 Rev. St. 1876, p. 736, to determine whether public aid should be given for the construction of a railroad, the fact that the inspectors of election of several townships holding simultaneous elections for the same purpose met together as a single board and declared the result of the election in each township, instead of forming separate boards from the officers of the townships, respectively, was immaterial.—*Mustard v. Hoppess*, 69 Ind. 324.

[b] (Sup. 1881)

The fact that election judges of different townships and precincts united in canvassing and certifying the vote of each precinct in an election held on the question of granting township aid to a railroad does not vitiate the election.—*Goddard v. Stockman*, 74 Ind. 400.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 229.  
See, also, 15 Cyc. p. 378.

**§ 255. Preservation or disposition of ballots.**

[a] (Sup. 1895)

Rev. St. 1894, § 6248 (Elliott's Supp. § 1374), provides that all ballots that are questioned shall be preserved and delivered to the county clerk in sealed packages, and that the poll clerk shall record on the tally sheet mem-

oranda of such ballots, and in any contest such ballots and seals may be submitted in evidence. *Held*, that the failure of such duty by the poll clerk will not preclude inquiry into the validity of ballots returned by the inspector.—*Zeis v. Passwater*, 41 N. E. 796, 142 Ind. 375.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 231.

**§ 256. Canvass of returns.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 232-239.  
See, also, 15 Cyc. pp. 379-386.

**§ 258. — Canvassing boards or officers.**

[a] (Sup. 1850)

The clerk of the circuit court is *ex officio* clerk of the board of canvassers.—*Brower v. O'Brien*, 2 Ind. 423.

[b] (Sup. 1879)

An election was held in four townships of a county, on the same day, as to an appropriation by each to aid in the construction of a railroad. One of these townships had only one voting precinct, and under 1 Rev. St. 1876, p. 736, the inspector and judges thereof, or any two of them, were constituted the board of canvassers. After the election, the inspectors of each township met jointly with the county auditor, and canvassed the vote of each township. *Held*, in a suit to enjoin the collection of the tax levied under such appropriation, that the case stood precisely as if the inspector of the township which had but one precinct had been the only member of the board of canvassers, with the auditor as his clerk, and that the assessment of the tax was not void, on the ground that the board of canvassers for that township was composed of one member only of the election board, when the law required two.—*Mustard v. Hoppess*, 69 Ind. 324.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 233.

**§ 259. — Powers and proceedings of canvassers as to returns.**

[a] Canvassing boards, in casting up the returns of an election, act in a purely ministerial capacity, and have no power to go behind returns, or reject those regular on their face and not shown to be spurious.—(Sup. 1850) *Brower v. O'Brien*, 2 Ind. 423; (1862) *State ex rel. Leal v. Jones*, 19 Ind. 356, 81 Am. Dec. 403; (1877) *Moore v. Kessler*, 59 Ind. 152.

[b] Boards of canvassers have no authority to pass upon the regularity of an election or the qualifications of persons voting thereat.—(Sup. 1850) *Brower v. O'Brien*, 2 Ind. 423; (1877) *Moore v. Kessler*, 59 Ind. 152.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 234, 235.  
See, also, 15 Cyc. pp. 379-382, 385, 386.

**§ 261. — Compelling canvass.**

Persons entitled to appeal in mandamus proceedings, see **APPEAL AND ERROR**, § 151.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 237.

See, also, 15 Cyc. p. 384.

**§ 264. Certificate of election.**

Certificate as documentary evidence, see **EVIDENCE**, § 334.

Certificate of election of town trustees as prerequisite of organization of board, see **MUNICIPAL CORPORATIONS**, § 83.

Grounds for collateral attack in proceedings to enforce assessments, see **MUNICIPAL CORPORATIONS**, § 136.

Impeaching or contradicting certificates on election contest, see *post*, § 204.

Validity of ordinance passed by board of trustees before filing of certificate of election, see **MUNICIPAL CORPORATIONS**, § 111.

Validity of retrospective laws, see **CONSTITUTIONAL LAW**, § 193.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 240-244.

See, also, 15 Cyc. pp. 386-388.

**§ 265. — In general.**

[a] (**Sup.** 1872)

1 Gav. & H. St. p. 312, § 38, providing that when any person is elected to an office by the voters of a county not to be commissioned by the governor, and the election is not contested, the clerk of the court shall, after 10 and within 20 days from the time the board of canvassers have made their return, make out and deliver on demand to such person a certificate of his election, does not apply to the case of a township trustee, and he may qualify within 10 days.—*De Armond v. State ex rel. Campbell*, 40 Ind. 469.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 240.

**§ 266. — Compelling issue.**

Mandamus to compel issue of certificate, see **MANDAMUS**, § 74.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 241.

See, also, 15 Cyc. p. 386.

**§ 266½. — Irregularities and defects.**

[a] (**Sup.** 1883)

The fact that the names of election officers certifying to the number of votes cast on the question of whether an appropriation should be made by a township to aid the building of a railroad preceded the statement of the vote cast was immaterial.—*Irwin v. Lowe*, 89 Ind. 540.

**§ 267. — Conclusiveness, operation, and effect.**

[a] (**Sup.** 1873)

A certified statement and declaration of the result of a general election by the board of canvassers is not conclusive evidence of any matter contained or referred to in such statement or declaration. They are merely prima facie evidence of the correctness of the result.—*Reynolds v. State ex rel. Titus*, 61 Ind. 392.

[b] (**Sup.** 1885)

The certificate of the election officers is not conclusive, but only prima facie evidence of an election.—*State ex rel. Waymire v. Shay*, 101 Ind. 36.

An election is ultimately decided not by the certificate of election, but by the ballots; and the eligible candidate receiving the highest number is entitled to the office.—*Id.*

[c] (**Sup.** 1907)

In a mandamus proceeding to compel the mayor to recognize the relator as a member of the city council, where the person, who was by the board of canvassers declared elected and received the certificate of election and hence was a claimant to the office adverse to relator, was not a party to the proceeding, the legally certified statement of his election by the board of canvassers is conclusive against the relator.—*Hoy v. State ex rel. Buchanan*, 168 Ind. 506, 81 N. E. 509.

A certificate of election is prima facie evidence of the holder's election on a direct attack on the validity of such election, and conclusive evidence of that on a collateral attack.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 242, 243.

See, also, 15 Cyc. p. 387.

**X. CONTESTS.**

Election to determine propriety of incorporation of town, see **MUNICIPAL CORPORATIONS**, § 12.

Of nomination, see *ante*, §§ 148-154.

Pendency of election contest as abating quo warranto proceedings, see **ABATEMENT AND REVIVAL**, § 8.

Quo warranto to determine rights in respect to exercise of public office, see **QUO WARRANTO**, §§ 3, 5.

Right to trial by jury, see **JURY**, § 19.

**§ 269. Nature and form of remedy.**

[a] (**Sup.** 1879)

Under 2 Rev. St. 1876, pp. 298, 299, a party claiming to have been elected to an office may contest his right thereto by information filed in the circuit court, in the name of the state, on his own relation, against the party holding the office.—*State ex rel. Julian v. Adams*, 65 Ind. 393.

[b] The right to an office may be contested and tried upon information, under 2 Rev. St.

1876, pp. 298, 299, §§ 749, 750, notwithstanding the special statutory provisions for the contest of elections.—(Sup. 1882) *State ex rel. Morley v. Gallagher*, 81 Ind. 558; (1884) *State ex rel. Waymire v. Shay*, 101 Ind. 36.

[c] (Sup. 1906)

Burns' Ann. St. 1901, § 6312, provides that any election may be contested on the ground that the contestee was ineligible. Const. art. 2, § 6, provides that one shall be disqualified for holding office during the term for which he was elected, who shall have given or offered a bribe for his election. Burns' Ann. St. 1901, § 2328, providing with particularity that one being a candidate, who gives or promises anything of value to an elector for the purpose of influencing him either as to his vote or his support "shall be fined," etc., contains also provisions looking to avoidance of the election. An original statement of contest alleged that the contestee gave and offered to give bribes to electors to secure the contestee's election. On objection by the contestee, the statement was made more specific and in the supplemental statement the allegations closely followed section 2328. *Held*, on a contention that section 2328 did not avoid the election until after a conviction of the contestee, that the contest was based on the constitutional provision.—*Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 245, 246.  
See, also, 15 Cyc. pp. 393-397.

## § 270. Constitutional and statutory provisions.

[a] (Sup. 1877)

The statute providing for contesting elections should be liberally construed by the courts, to the end that the will of the people, in the choice of public officers, may not be defeated by any merely formal or technical objections.—*Hadley v. Gutridge*, 58 Ind. 302.

[b] (Sup. 1893)

Act March 6, 1889, known as the "Australian Election Law," did not repeal Rev. St. 1881, art. 5, c. 50, §§ 4743-4768, giving the right and defining the mode of contesting elections.—*Bechtel v. Albin*, 134 Ind. 193, 33 N. E. 907.

Act March 6, 1889, was not designed to embrace all the subjects and incidents relating to elections, the holding of office, and the exercise of official functions, and it expressly repeals only such laws as are inconsistent with its provisions, and the subject of contests, not having been included in its terms, may not be said to be inconsistent with its provisions.—*Id.*

[c] (Sup. 1896)

Statutes providing for contesting elections should be liberally construed in order that the will of the people in the choice of the public officers may not be defeated by mere formal

or technical objection.—*Tombaugh v. Grogg*, 44 N. E. 904, 146 Ind. 99.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 247.  
See, also, 15 Cyc. pp. 394-397.

## § 271. Grounds.

[a] (Sup. 1875)

In the contest of any election, under Act May 4, 1852, whatever may be the ground of contest alleged, the true gravamen of the case is to determine who received the highest number of legal votes; and "malconduct" of a member or officer of the board of judges or canvassers, which does not affect the number of votes, is not a ground of contest.—*Dobyns v. Weadon*, 50 Ind. 298.

[b] (Sup. 1906)

Under Burns' Ann. St. 1901, § 6312, providing that any election may be contested on the ground that the contestee was ineligible, and Const. art. 2, § 6, providing that every one shall be disqualified to hold office who shall have given or offered a bribe to secure such election, an election may be successfully contested for bribery under the constitutional provision, without the contestee's prior conviction, though Burns' Ann. St. 1901, § 2328, making bribery by a candidate a crime, provides for an avoidance of the election in terms claimed to be operative only after conviction of the offense.—*Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 248.  
See, also, 15 Cyc. p. 398.

## § 272. Defenses.

[a] (Sup. 1874)

Where an election is contested on the ground that illegal votes were cast for the contestee equal to his declared majority, it is a sufficient answer that illegal votes were given and counted for the contestor, and that the contestee received a majority of the legal votes cast.—*Allen v. Crow*, 48 Ind. 301.

[b] (Sup. 1891)

Where one of two candidates, having an equal number of votes for an office, on account of which there is no election, requests the election officers not to determine the result of the election which they were by law unempowered to do, he is not estopped thereby to urge his claim to the office.—*Johnston v. State ex rel. Sefton*, 27 N. E. 422, 128 Ind. 16, 12 L. R. A. 235, 25 Am. St. Rep. 412.

## § 275. Jurisdiction.

[a] (Sup. 1887)

Const. art. 5, § 36, declaring that contested elections for Governor or Lieutenant Governor shall be determined by the General Assembly in such manner as may be prescribed by law, confers on the General Assembly exclusive power over a contest of the election

of Lieutenant Governor, and precludes a person claiming to have been elected to such office from maintaining quo warranto to determine his right to the office.—*Robertson v. State ex rel. Smith*, 10 N. E. 582, 643, 109 Ind. 79.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 250-256.

See, also, 15 Cyc. pp. 393-397.

**§ 276. Organisation and sessions of courts or boards.**

[a] (Sup. 1896)

Rev. St. 1894, § 1442 (Rev. St. 1881, § 1379), providing that if, at the expiration of any term of court, the trial shall be progressing, the court shall continue its sitting, and the term shall not end until the cause shall finally be disposed of, applies to the board of county commissioners when sitting as a court in the trial of an election contest.—*Tombaugh v. Grogg*, 44 N. E. 994, 146 Ind. 99.

Rev. St. 1894, § 6316 (Rev. St. 1881, § 4760), provides that the county auditor shall call a special session of the board of commissioners when a statement of election contest is filed, and notify the contestee thereof. *Held*, that where the auditor issues notices to the board and to the contestee, who is served, but the board fails to meet in special session, and the auditor does not call another such session before the next regular session of the board, the case may be tried at such regular session; and, if all contests are not disposed of at such regular session, it is the duty of the auditor to again call a special session to try the same.—*Id.*

If proper notice of a special session is given to members of the board, and before a meeting certain of them are succeeded by new members, who sit in the trial of the contest, no new or further notice need be served on the new members in order to give the board jurisdiction.—*Id.*

The members having thus waived the service of the notice, neither the contestor nor contestee can object to such want of service.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 304.

**§ 277. Venue.**

[a] (Sup. 1897)

Rev. St. 1894, § 416 (Rev. St. 1881, § 412), giving a right to a change of venue "in any civil action" on affidavit of local prejudice, applies to an election contest, in the absence of any provision in the special statute authorizing such contests prescribing a different procedure.—*Weakley v. Wolf*, 47 N. E. 466, 148 Ind. 208.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 257.

**§ 278. Limitations.**

[a] (Sup. 1882)

County commissioners will not have jurisdiction of contested election cases, unless it

appears affirmatively in the record that a statement of the grounds of contest was filed within the time required by 1 Rev. St. 1876, p. 450.—*Farlow v. Hougham*, 87 Ind. 540.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 258-262.

See, also, 15 Cyc. pp. 400, 401.

**§ 280. Process or service of notice.**

[a] (Sup. 1871)

In proceedings for the contest of an election to, a county office, a copy of the contest and notice must be served by the sheriff, under 1 Gav. & II. St. p. 319, § 18, by delivering to the contestee a copy of the notice and statement of contest, or by leaving a copy at his last usual place of residence.—*State ex rel. Combs v. Hudson*, 37 Ind. 198.

In proceedings for the contest of an election to a county office, a return on the notice citing, "Served on the within named A. B., by reading and delivering to him a copy of the order," is insufficient to show the service required by the statute.—*Id.*

[b] (Sup. 1877)

On the trial, before the proper board, of a proceeding to contest an election, a notice of a motion to quash the notice of contest or summons by which the proceeding has been commenced, alleging as the ground of motion only that the summons is irregular, defective, and insufficient, is too vague and indefinite; but, as in the case of a motion to set aside a summons or to correct a pleading the notice of motion to quash ought to apprise the adverse party of the grounds of objection.—*Hadley v. Gutridge*, 58 Ind. 302.

The summons or notice to commence proceedings to contest an election is sufficient if it, in substance, informs the party of the proceeding instituted against him; and the sufficiency of such notice must be tested by the same rule as applies to a summons in an action.—*Id.*

[c] (Sup. 1893)

Rev. St. 1881, § 4760, provides that a contestant for a county office shall file his statement with the county auditor, who shall notify the contestee to appear before the county commissioners at a time and place designated therein. Section 4767 provides that a contestant for a municipal office shall file his statement with the clerk of the circuit court, who shall perform the duties imposed on county auditors in other cases, and the contest shall be tried at the next term of the circuit court, in the manner provided for the trial of contests of county offices. *Held*, that a notice by the clerk, dated in July, 1890, directed to the contestee in a contest for a municipal office, reciting that the contest will be heard at the next term of the circuit court, beginning September 1, 1890, is a compliance with the statute, though the time and place of hearing is not otherwise stated in

the notice.—*Gimbel v. Green*, 134 Ind. 628, 33 N. E. 964, 34 N. E. 217.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 264.

See, also, 15 Cyc. pp. 398-402.

### § 283. Pleading.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 206-285.

See, also, 15 Cyc. pp. 404-415.

### § 285. — Complaint, petition, statement, or notice.

#### [a] (Sup. 1846)

The clerk of the circuit court in vacation is not authorized to administer an oath to an affiant in verification of a statement of the cause of contesting the election of a county officer before the board of county commissioners.—*Albee v. May*, 8 Blackf. 310.

The statement of the cause of contesting the election of a county officer must be verified, under Rev. St. 1843, p. 139, by the affidavit of the contestant, made before an officer duly authorized to administer the oath, before the board of county commissioners or the circuit court on appeal can proceed with the case.—*Id.*

#### [b] (Sup. 1866)

In a proceeding to contest an election, the county auditor, as clerk of the board of county commissioners, is authorized by law to administer to the contestor the oath required by law to be attached to the written statement of the grounds of his contest.—*Garrett v. Higgins*, 27 Ind. 162; *Wheat v. Ragsdale*, Id. 191.

#### [c] (Sup. 1866)

Where an election is contested on the ground that persons who were not qualified voters were permitted to vote, it is not necessary that a list of the names of the alleged illegal voters should be filed.—*Wheat v. Ragsdale*, 27 Ind. 191.

#### [d] (Sup. 1867)

The ground of contest filed in a proceeding to contest an election for sheriff stated that the contestor received 1,716 votes and the contestee 1,719 votes; that illegal votes were cast for the contestee in eight townships of the county, and that, but for such illegal votes, the contestor would have been elected. *Held* that, as illegal votes were cast for the contestee in eight townships, the number of such votes could not have been less than eight, and as these, taken from the vote of the contestee, would show the contestor entitled to the office, the grounds of contest were well stated.—*Nickols v. Ragsdale*, 28 Ind. 131.

#### [e] (Sup. 1869)

Under Act May 4, 1852 (1 Gav. & H. St. p. 316), requiring that the statement of grounds alleged for contesting an election shall be verified by the affidavit of the contestant, an affi-

davit on information and belief is sufficient.—*Curry v. Baker*, 31 Ind. 151.

#### [f] (Sup. 1873)

The county auditor has authority to administer the oath as to the truth of the matters stated as grounds for contesting an election to the office of county clerk.—*Curry v. Miller*, 42 Ind. 320.

#### [g] (Sup. 1874)

In a proceeding to contest the election of a county officer, the grounds of contest must be verified by the affidavit of the contestor. If the affidavit is made by any person other than the contestor, the proceedings should be dismissed.—*Holton v. Brown*, 46 Ind. 122.

#### [h] (Sup. 1875)

In the contest of an election for a county office, the written statement of the contestor, he and the contestee having been the only persons who received votes for said office, alleged, as the ground of contest, the misconduct of the judges, clerks and canvassers in certifying incorrectly, as they knew, a larger number of votes for the contestee than for the contestor, and in certifying that the contestee was elected, when in fact the contestor was elected. *Held*, that the statement of the contestor was sufficient.—*Dobyns v. Weadon*, 50 Ind. 298.

#### [i] (Sup. 1900)

Under Burns' Rev. St. 1894, §§ 6312, 6314, providing for the contest of elections on certain grounds, and requiring the contestor to present a written statement specifying the grounds of contest, an averment as a ground of contest that contestor received more votes than the contestee is insufficient, as tantamount to a general averment that the judgment of the county board of canvassers was erroneous.—*Borders v. Williams*, 57 N. E. 527, 155 Ind. 36.

In an election contest, the complaint must specifically set forth the particular facts counted upon as invalidating the election of the contestee.—*Id.*

#### [j] (Sup. 1903)

The specifications in an election contest, which alleged that contestant and contestee were opposing candidates for a county office, that in many of the precincts certain illegal ballots cast were counted for the contestee, and that certain legal ballots cast for the contestant were not counted for him, and that there were protested and preserved ballots sealed up and returned to the clerk of the circuit court, did not charge that the illegal ballots counted for the contestee or the legal ballots not counted for the contestant were protested and preserved and returned to the clerk of the circuit court.—*Hall v. Campbell*, 68 N. E. 892, 161 Ind. 406.

As the statute relating to the right to contest an election excludes grounds of contest relative to destroyed ballots, the specifications of contestant in an election contest must show that the contested ballots were protested, so as

to be preserved and returned to the clerk of the circuit court.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 266-277.  
See, also, 15 Cyc. pp. 404-410.

**§ 286. — Plea, answer, or reply.**

[a] (Sup. 1874)

Under 1 Gav. & H. St. p. 318, prescribing proceedings to contest an election, the answer of the contestee need not be verified.—Allen v. Crow, 48 Ind. 301.

[b] (Sup. 1875)

In an election contest for a county office, the contestor's statement alleged, as the ground of contest, the misconduct of the judges, clerks, and canvassers in certifying incorrectly, as they knew, a larger number of votes for the contestee than the contestor, and in certifying that the contestee was elected, when in fact the contestor was elected. The contestee's answer admitted a mistake in his favor as to the number of votes, as stated by the contestor, but relied on the fact that the contestor received a number of illegal votes greater than the number so wrongfully certified to the contestee. *Held*, that the answer was sufficient on demurrer.—Dobyns v. Weadon, 50 Ind. 298.

In an election contest for a county office, the contestor's statement alleged, as the ground of contest, the misconduct of the judges, clerks, and canvassers in certifying incorrectly, as they knew, a larger number of votes for the contestee than for the contestor, and in certifying that the contestee was elected, when in fact the contestor was elected. The contestee's answer admitted a mistake in his favor as to the number of votes, as stated by the contestor, but relied on the fact that the contestor received a number of illegal votes greater than the number so wrongfully certified to the contestee. *Held*, that a reply by the contestor, relying on the fact that as large a number of illegal votes were received by the contestee as by the contestor, was not a departure in pleading, under 1 Gav. & H. St. p. 318, § 15, providing that no irregularity or misconduct of any member or officer of the board of judges or canvassers shall set aside the election of any person unless it was such as to cause the contestee to be declared elected when he had not received the highest number of votes, nor shall any election be set aside for illegal votes unless the number thereof given to the contestee, if taken from him, would reduce the number of legal votes below the number of legal votes given to some other person for the same office, and Id. § 19, providing, if it be proved that any person other than the contestee has the highest number of legal votes, such board shall declare the person elected and certify the same to the proper officer.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 278, 279.  
See, also, 15 Cyc. pp. 410, 411.

**§ 287. — Demurrer and motions.**

[a] (Sup. 1873)

In proceedings to contest an election, a demurrer to the statement of grounds of contest, assigning for cause that sufficient facts are not stated, does not raise any question as to the sufficiency of the affidavit.—Curry v. Miller, 42 Ind. 320.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 284.  
See, also, 15 Cyc. p. 414.

**§ 289. — Issues, proof, and variance.**

[a] (Sup. 1877)

A mistake in the count of votes received by a candidate for an office, made by the board of canvassers, whether innocently or otherwise, is good ground for contesting an election; and evidence of the same is admissible, either under a special plea of such mistake, or under an allegation that the contestor had received a higher number of votes than his opponent.—Hadley v. Guttridge, 58 Ind. 302.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 285.  
See, also, 15 Cyc. pp. 414, 415.

**§ 290. Evidence.**

Right to cross-examine witness as to his purpose in receiving a bribe, see WITNESSES, § 270.

**FOR CASES FROM OTHER STATES.**

SEE 18 CENT. DIG. Elections, §§ 286-290.  
See, also, 15 Cyc. pp. 416-428.

**§ 291. — Presumptions and burden of proof in general.**

[a] (Sup. 1887)

Though the statute provides that, where a vote is illegally cast, the voter may be compelled to make disclosure, it is presumed that the voters were not guilty of an unlawful act, and, before they can be compelled to make disclosure, it is incumbent on the opposition to remove this presumption.—Pedigo v. Grimes, 13 N. E. 700, 113 Ind. 148.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 286.  
See, also, 15 Cyc. pp. 416, 417.

**§ 293. — Admissibility in general.**

Best and secondary evidence, see EVIDENCE, § 158.

[a] (Sup. 1885)

The certificate made by the commissioners conducting a recount, under the statute, is properly admitted in quo warranto proceedings in support of a defense based thereon.—State ex rel. Waymire v. Shay, 101 Ind. 36.

It is proper to show by the inspector that he did the proper acts to preserve the ballots and election papers.—Id.



## [b] (Sup. 1901)

Under Burns' Rev. St. 1894, § 6248, providing that, on protest of any member of an election board, any ballot bearing a distinguishing mark or mutilation shall be preserved by the inspector, and such ballot may be submitted in evidence in any contest of election, and that on completion of the count all ballots except those marked, mutilated, or otherwise defective shall be destroyed by the election board by fire, a ballot rejected by consent of the entire board was a protested ballot, and hence properly preserved and admissible in evidence in a contest of the election.—*Tombaugh v. Grogg*, 59 N. E. 1060, 156 Ind. 355.

## [c] (Sup. 1906)

In an election contest, evidence that some one representing himself as the contestee, offered witness a bribe in the dark, is admissible, though, at the time of its admission, the only identification of the person offering the bribe, is an assumption by the witness that he was the contestee, arising from the representation to that effect.—*Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 288-296.

See, also, 15 Cyc. pp. 418-428; note, 84 Am. Dec. 268; notes, 10 Am. St. Rep. 317, 11 Am. St. Rep. 798.

## § 294. — Impeaching or contradicting returns or certificates.

## [a] (Sup. 1887)

Where there is no evidence of fraud or corruption, the ballots of the electors constitute the best evidence; but where fraud is alleged, parol evidence that the ballots found in the box are not those cast by the electors is competent.—*Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700.

Evidence tending to show that ballots have been fraudulently put into the box, or corruptly taken out and changed, is competent, although the election officers, and all persons who have had the charge and custody of the election papers and ballot boxes, may have testified that the ballots were not disturbed, and that the seals of the boxes were not broken, or the papers changed.—Id.

## [b] (Sup. 1892)

In a proceeding to contest an election, it is competent for witnesses to testify that they were under 21 years of age at the time of voting, and that their votes were cast for the candidate receiving the largest number, to whom a certificate of election has been granted.—*Crabb v. Orth*, 133 Ind. 11, 32 N. E. 711.

## [c] (Sup. 1897)

The general election law, as amended by Act March 6, 1891 (Acts 1891, p. 124; Rev. St. 1894, § 6248), provides that in the canvass of the votes any ballot which bears any distinguishing mark is void, and any ballot from which it is impossible to determine the elector's choice shall not be counted, provided that on

protest of any member of the board any disputed ballot shall be preserved by the inspector, sealed in paper bags, and delivered to the county clerk; that the poll clerk shall also record on the tally sheets memoranda of such ballots, and in any election contest such ballots and seals may be submitted in evidence; that all other ballots shall be destroyed by such board before adjourning. *Held* that, on an election contest, parol evidence of marks on and mutilation of ballots counted, destroyed, and not protested, and showing for whom such ballots were cast and counted, is not admissible.—*Weakley v. Wolf*, 148 Ind. 208, 47 N. E. 466.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 288-296.

See, also, 15 Cyc. p. 418.

## § 295. — Weight and sufficiency.

## [a] (Sup. 1878)

In an election contest, the ballots cast by the electors, when preserved according to 1 Rev. St. p. 442, are the primary evidence whereby to determine the result of the election. The declaration of the board of canvassers of the result is, at most, but prima facie evidence thereof.—*Reynolds v. State ex rel. Titus*, 61 Ind. 392.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Election, §§ 297, 299.

See, also, 15 Cyc. p. 419.

## § 296. Dismissal before trial or hearing.

## [a] (Sup. 1891)

Under Rev. St. 1881, § 4761, which provides that in election contests the board of county commissioners may "adjourn or continue the trial from time to time, not exceeding 20 days altogether," the adjournment of the hearing of an election contest, on motion of the contestant, to a date more than 20 days after the board convened, constitutes a discontinuance of the contest, since the limitation of 20 days refers to the entire time spent in the contest.—*English v. Dickey*, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 300, 302.

See, also, 15 Cyc. p. 416.

## § 297. Scope of inquiry and powers of court or board.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 303-307.

See, also, note, 84 Am. Dec. 268.

## § 298. — In general.

## [a] (Sup. 1873)

In an election contest, it is for the commissioners to determine in the first instance whether the affidavit made to commence the proceedings is sufficient; and this power of hearing and deciding upon the validity of the affidavit constitutes jurisdiction.—*Curry v. Miller*, 42 Ind. 320.

**[b] (Sup. 1877)**

The provision of 1 Rev. St. 1876, p. 451, that proceedings before the board of county commissioners, to contest an election, shall be governed by the rules of law obtaining in circuit courts, intends that the board of commissioners, in the examination and determination of all questions, either of law or of fact, arising in the progress of a contested election case, should be governed by the rules of law applicable to such questions obtaining in the circuit courts.—*Hadley v. Guttridge*, 58 Ind. 302.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 303-305.

**§ 299. — Re-examination of ballots and recount.****[a] (Sup. 1885)**

In quo warranto between claimants to an office, both holding certificates of election, the ballots are properly resorted to to ascertain who was in fact elected.—*State ex rel. Waymire v. Shay*, 101 Ind. 36.

**[b] (Sup. 1900)**

Where, in an election contest, the issues joined are the board's failure to count for the contestor certain votes from a certain precinct, it is error for the court to receive and count for contestor other ballots rejected in another precinct, which was not within such issues.—*Borders v. Williams*, 57 N. E. 527, 155 Ind. 36.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 306, 307.  
See, also, 15 Cyc. pp. 429-431; note, 33 L. R. A. 386.

**§ 300. Trial or hearing.****[a] (Sup. 1886)**

On the trial of a contested election case before the board of county commissioners, the contestor filed a list of persons alleged to have voted illegally, and the contestee, by an entry of record, conceded, "for the uses and purposes of this trial," that such voters were "minors and nonresidents as charged." On the trial of the cause in the circuit court on appeal, the record of the proceedings before the county board was offered in evidence to prove the admission of contestee that the persons named were not legal voters. *Held*, that the record offered did not show an admission of the facts that the persons named were illegal voters, but simply a concession of that fact for the purposes of the trial before the board of commissioners.—*Wheat v. Ragsdale*, 27 Ind. 191.

**[b] (Sup. 1892)**

In an election contest, each ballot constituting a distinct written instrument, its construction is for the court.—*Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 308-313.  
See, also, 15 Cyc. p. 432.

**§ 302. Judgment.**

Collateral attack thereon, see JUDGMENT, § 514.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, §§ 315, 316.  
See, also, 15 Cyc. pp. 433, 434.

**§ 304. — Conclusiveness, operation, and effect.**

[a] A wrong decision of the board of commissioners in an election contest, holding an insufficient affidavit to be sufficient, is simply erroneous, and not void, and will be binding unless appealed from.—(Sup. 1860) *Evansville, I. & C. Straight Line R. Co. v. City of Evansville*, 15 Ind. 395; (1861) *Snelson v. Madison County Com'rs*, 16 Ind. 29; (1873) *Curry v. Miller*, 42 Ind. 320.

**[b] (Sup. 1896)**

A board of county commissioners in the trial of a contested election was governed by the rules of law obtaining in the circuit court and had the same power to make and correct its entries, and it will be presumed that a nunc pro tunc entry was made on proper evidence and stated the facts as they occurred.—*Tombaugh v. Grogg*, 44 N. E. 994, 146 Ind. 90.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Elections, § 316.  
See, also, 15 Cyc. p. 433.

**§ 305. Review.**

Appellate jurisdiction as dependent on nature of proceeding, see APPEAL AND ERROR, § 41.  
Right to trial by jury on appeal, see JURY, § 17.

**[a] (Sup. 1857)**

No appeal lies from the decision of the circuit court in a proceeding to contest an election.—*French v. Lighty*, 9 Ind. 475.

**[b] (Sup. 1870)**

A. contested the election of B. as county treasurer. The latter appealed from the decision of the county commissioners to the circuit court, and in proper time filed a bond which contained no penalty with the auditor, who failed to file a transcript and the papers in the cause in the office of the clerk of said court for more than 50 days after the bond was filed. In the circuit court B. moved to dismiss the cause, pending which motion A. moved to dismiss the appeal. The latter motion was sustained, after which B. tendered a proper bond, and asked to have the appeal reinstated, which the court refused. *Held*, that the fact that the appeal bond contained no penalty was good cause for dismissing the appeal.—*Barnett v. Gilmore*, 33 Ind. 190.

The motion to dismiss the appeal had precedence over said motion to dismiss the cause.—*Id.*

**[c] (Sup. 1870)**

On appeal to the circuit court from a decision of the county commissioners in a pro-

ceeding to contest an election to the office of county trustee, the circuit court cannot remand the case for trial, but must determine it as an original action.—*Mandlove v. Pavy*, 33 Ind. 505.

[d] (Sup. 1873)

The judgment of county commissioners in proceedings to contest an election cannot be questioned on an appeal on the ground of insufficiency in the affidavit to commence the proceedings, unless the objection has been properly taken below and brought up by the record. Insufficiency in such affidavit does not go to the jurisdiction of the commissioners.—*Curry v. Miller*, 42 Ind. 320.

[e] (Sup. 1877)

On the trial before the proper board of a proceeding to contest an election, after a motion to quash the summons, made on a special appearance, and overruled for vagueness of the notice, while a party may, on appeal, renew his motion, as made below, he cannot move anew for the same purpose, specifying grounds of objection.—*Hadley v. Gutridge*, 58 Ind. 302.

[f] (Sup. 1882)

Where the record in an election contest shows that an amended complaint was filed more than 10 days after the contestee had been declared elected, but there is no showing as to the original complaint nor that a statement of the grounds of contest had been filed with the auditor of the county, this was insufficient to show that the board of county commissioners or the circuit court had jurisdiction.—*Farlow v. Hougham*, 87 Ind. 540.

[g] (Sup. 1896)

It is harmless error to exclude evidence that certain votes counted for contestee were in fact cast for contestant, where, if they were counted in favor of contestant, contestee would still have a majority.—*Groff v. Clark*, 44 N. E. 803, 146 Ind. 52.

[h] (Sup. 1897)

Act May 4, 1852 (Rev. St. 1852, p. 269), provided for contests for county and township offices before the board of county commissioners, with the right of appeal to the circuit court, "as from other decisions of such board." Act March 2, 1859 (Acts 1859, p. 35), allowed a further appeal to the supreme court, "as in other civil cases." Such statutes were substantially re-enacted in Act April 21, 1881 (Acts 1881, p. 498; Rev. St. 1881, §§ 4743-4768; Rev. St. 1894, §§ 6299-6324). Section 90 of the latter act added a provision for contesting municipal offices, declaring that such contests should be tried before the circuit court "in the manner provided by law for the contest of county and township offices," etc. *Held*, that an appeal lies to the supreme court in contests in elections to municipal offices.—*Weakley v. Wolf*, 148 Ind. 208, 47 N. E. 466.

Such appeal lies, also, under Rev. St. 1894, § 644 (Rev. St. 1881, § 632), providing that ap-

peals may be taken from the circuit courts to the supreme court, "from all final judgments," except in certain actions originating before justices of the peace.—*Id.*

[i] (Sup. 1901)

On appeal in an election contest, the original ballots may be incorporated in the bill of exceptions.—*Tombaugh v. Grogg*, 59 N. E. 1060, 156 Ind. 355.

[j] (Sup. 1903)

Granting a motion to dismiss the assignments of grounds of an election contest without assigning as a reason therefor that the petition failed to state a cause of action was not prejudicial to contestant where the right result was reached, though the only method of questioning the sufficiency of the petition was by demurrer.—*Hall v. Campbell*, 68 N. E. 892, 161 Ind. 406.

[k] (Sup. 1903)

In an election contest, the burden of the issue being on contestor, and on appeal by him the findings of fact being insufficient to present any evidence whereby the appellate court could determine the question as to the legality of the ballots, and who they should be counted for, it will be presumed that the determination of the lower court adversely to contestor was warranted.—*Bolton v. Clark*, 68 N. E. 283, 162 Ind. 471.

Where, on appeal in an election contest, the findings of fact by the trial court consist merely of statements that certain ballots were cast, protested, and counted for one of the candidates, and the ballots are introduced into the special findings by attaching the original ballots to the findings and calling them "exhibits," but no facts are stated in regard to the ballots, there is no evidence before the appellate court whereby it can reach a decision as to whether the ballots were legal or illegal, or as to whom they should be counted for.—*Id.*

[l] (App. 1906)

It is not an abuse of discretion of the trial court to refuse an amendment to objections filed before the county board of commissioners, so as to show that the ballots, used in an election to determine whether a certain territory should be incorporated, as a town, were prepared by the county board of election commissioners; such question not being raised before the board because objectors were ignorant thereof.—*Fleener v. Johnson*, 38 Ind. App. 334, 77 N. E. 366.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 317-332.  
See, also, 15 Cyc. pp. 435-439.

§ 306. Costs.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 333, 334.  
See, also, 15 Cyc. pp. 440, 441.

**§ 307. — In general.**

[a] (Sup. 1861)

A contest of an election is a special proceeding, and the costs therein are regulated by the special statutes relating thereto.—*Knox v. Fesler*, 17 Ind. 254.

[b] (Sup. 1891)

Where an election contest is discontinued, costs should be taxed against the contestant, under Rev. St. 1881, § 4765, which provides that costs in election contests shall be taxed and collected as other costs are.—*English v. Dickey*, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40.

[c] (Sup. 1893)

Where one of the candidates for a municipal office contests the election on the ground that the contestee was not elected to the office, and that contestant was so elected, a judgment that there was a tie vote, and that contestee was not elected, entitles the contestant to costs.—*Gimbel v. Green*, 134 Ind. 628, 33 N. E. 964, 34 N. E. 217.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 333.

See, also, 15 Cyc. p. 440.

**XI. VIOLATIONS OF ELECTION LAWS.**

Laws relating to sale of votes as grant of special privileges and immunities, see CONSTITUTIONAL LAW, § 205.

Words charging violation of as constituting libel or slander, see LIBEL AND SLANDER, § 7.

**§ 314. Offenses by officers.**

[a] (Sup. 1866)

The mere refusal of an election inspector to receive the vote of a qualified elector is not indictable, where the person offering to vote did not insist on his right or offer to take the oath.—*State v. Tuibell*, 26 Ind. 264.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 340, 341.

See, also, 15 Cyc. pp. 443, 444.

**§ 315. Betting on election.**

[a] (Sup. 1851)

By Rev. St. 1843, p. 980, betting on the result of an election is an indictable offense.—*Parsons v. State*, 2 Ind. 499.

[b] (Sup. 1877)

Betting upon an election is by statute unlawful gaming; the offense being committed by mere betting, under 2 Rev. St. 1876 p. 468, note 2b, "to prevent betting on elections," but not being committed until the article bet is lost or won, under section 28 of the act defining misdemeanors (2 Rev. St. 1876, p. 468).—*Frazer v. State*, 58 Ind. 8.

[c] (Sup. 1878)

An indictment under 2 Rev. St. p. 468, for losing money by betting on an election,

charged that W. bought a gold ring of the value of \$10 to be paid for at that price when a certain candidate should be elected governor, etc.; otherwise, not to be paid for at all. *Held* to be insufficient. In either event, he would not "lose \* \* \* any article of value."—*Wagner v. State*, 63 Ind. 250.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 342.

See, also, 15 Cyc. p. 444; notes, 4 Am. Dec. 299, 14 Am. Dec. 399.

**§ 316. Bribery.**

Affecting validity of election, see ante, § 230.

[a] (App. 1896)

*Elliott's Supp.* § 1396 (*Burns' Rev. St.* 1894, § 6325; *Horner's Rev. St.* 1897, § 4768), provides that whoever hires or buys any person to vote or refrain from voting any ticket or for any candidate for any office at any election, etc., and all persons aiding such acts, shall become liable to the person hired in the sum of \$300. *Held* that, where a voter is hired to go away from the polls, and refrain from voting at the time he goes there for that purpose, the offense denounced by the statute is complete, though the voter subsequently returns, and casts his vote.—*Thompson v. State ex rel. McKinney*, 16 Ind. App. 84, 44 N. E. 763.

[b] (Sup. 1897)

Liability under Rev. St. 1894, § 2329, for giving or offering to give "any money, property, or other thing of value to any elector to influence his vote," is not affected by the fact that the elector's vote was not actually influenced by the gift.—*State v. Downs*, 47 N. E. 670, 148 Ind. 324.

[c] (Sup. 1906)

The word "bribe," as used concerning elections, means any gift, advantage, or emolument offered, given, or promised to an elector for the purpose of influencing his conduct or vote.—*Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 343.

See, also, 15 Cyc. p. 445.

**§ 321. Defenses.**

[a] (Sup. 1846)

The decision of the judges in favor of the defendant's right to vote, on his being challenged, is no defense to a prosecution for illegal voting.—*Morris v. State*, 7 Blackf. 607.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 348.

See, also, 15 Cyc. p. 460.

**§ 323. Penalties and actions therefor.**

[a] (Sup. 1893)

Under *Elliott's Supp.* § 1396, providing that whoever buys a vote thereby becomes liable to the person whose vote is bought for \$300 and attorney's fee, the common-law rule that one seeking damages for injury occasioned by

the fraud of another must be free from wrong does not prevail.—*State ex rel. Beedle v. Schoonover*, 135 Ind. 526, 35 N. E. 119; *State ex rel. Bartlett v. Schoonover*, 135 Ind. 701, 35 N. E. 121.

[b] (*App.* 1898)

Under *Burns' Rev. St.* 1894, § 6325 et seq. (*Hornor's Rev. St.* 1897, § 4768a et seq.), making any person who unlawfully influences a voter's exercise of his elective franchise liable in a civil action brought in the name of the state for the use of such voter, and providing that the rules of evidence shall be the same as in civil cases, proof must be by a preponderance sufficient to overcome defendant's evidence, coupled with the presumption of his innocence of the crime involved in the cause of action.—*Spurlin v. State ex rel. Vancleave*, 50 N. E. 777, 20 Ind. App. 342.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 350.

See, also, 15 Cyc. p. 448.

§ 324. Criminal prosecutions.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 351-369.

See, also, 15 Cyc. pp. 448-465.

§ 328. — Indictment or information.

Allegations as to time of offense, see INDICTMENT AND INFORMATION, § 87.

[a] (*Sup.* 1841)

An indictment for betting on the result of an election must state for what purpose the election bet on was held; that is whether it was for president of the United States, for governor of the state, etc.—*Bellair v. State*, 6 Blackf. 104.

[b] (*Sup.* 1842)

An averment, in an indictment for betting on the result of an election, that the defendant did unlawfully win of and take from one N. G. two notes, etc., by betting on the result of an election, shows with sufficient certainty that the bet was made with N. G.—*State v. Little*, 4 Blackf. 267.

On an indictment for unlawfully winning, etc., by betting on the result of an election, it was held that it was no objection to the indictment that the time when the bet was alleged to have been made was after the day of the election.—*Id.*

[c] (*Sup.* 1843)

An indictment for betting upon the result of an election for a member of Congress is not objectionable as too general; the sum of money won, and the person from whom won, being stated with sufficient certainty.—*State v. Toner*, 1 Blackf. 564.

[d] (*Sup.* 1859)

An indictment for winning money on the result of an election is properly laid as of the

day of the election, as that is the day the result is reached, though it may not be legally announced till later.—*Hizer v. State*, 12 Ind. 330.

[e] (*Sup.* 1867)

An information against an inspector of election for refusing a vote should state the purpose for which the election was held.—*Tip-ton v. State*, 27 Ind. 492, 493.

[f] (*Sup.* 1871)

An indictment against a person for voting when he was not a qualified elector must specify the qualification which he lacked.—*Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754.

[g] (*Sup.* 1877)

An indictment alleging that defendant, at a certain time and place, "lost and paid to" a certain person a specified sum of money, by "unlawfully betting and wagering" such sum with such person on a certain election, charges, in a single count, an offense, either under Act Aug. 24, 1857 (2 Rev. St. 1876, p. 468, note 2b), entitled "An act to prevent betting on elections," etc., or under section 28 of the act defining misdemeanors (2 Rev. St. 1876, p. 468), under which the offense is not committed until the article bet is lost or won; but that fact is not ground for quashing the indictment on motion.—*Frazee v. State*, 58 Ind. 8.

An indictment charging defendant with having "lost and paid" a certain sum by unlawfully "betting and wagering" on an election is not indefinite as to which of two statutes he is charged under, one of them (2 Rev. St. 1876, p. 468, § 28) requiring proof of either losing and winning the article, and the other (2 Rev. St. 1876, p. 468, note 2b) only requiring proof of mere betting, since under the indictment a conviction could not be had under either statute without proof that he had lost the money as charged.—*Id.*

[h] (*Sup.* 1878)

An indictment for winning, on September 14th, by betting on an election held on November 7th, is bad, as the time of winning is impossible.—*State v. Windell*, 60 Ind. 300.

[i] (*Sup.* 1888)

An indictment which alleges that defendant "did then and there unlawfully, willfully, purposely, and feloniously vote more than once upon said day at said election for the officers aforesaid, by then and there unlawfully, willfully, purposely, and feloniously handing to \* \* \* inspector of said election at the precinct aforesaid, two separate and distinct ballots, at the same time and place, then and thereby intending to and indicating his vote for the officers aforesaid, which said ballots and votes were then and there accepted and placed in the ballot box by said inspector," sufficiently charges the crime of voting twice.—*State v. Patterson*, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270.

## [l] (Sup. 1897)

An allegation in such indictment of a corrupt offer to give \$2 is sufficient, without a further allegation that the \$2 was of value.—*State v. Downs*, 47 N. E. 670, 148 Ind. 324.

An indictment for giving or offering "money, property or other thing of value" to influence a vote, in violation of Rev. St. 1894, § 2329, need not allege that the vote sought to be influenced was to be cast for a "candidate," rather than for a "ticket."—*Id.*

## [k] (Sup. 1901)

Horner's Rev. St. 1897, § 4688 (Burns' Supp. 1897, § 6200), provides that, if prior to an election the chairman of the county central committee of either of the two parties that cast the largest number of votes at the last general election shall designate a member of such party as judge he shall be appointed. *Held*, in a prosecution for attempting to bribe one who "had theretofore been designated as one of the election board" of a certain precinct before the election, that the information was defective in failing to state by whom the alleged election judge had been designated for appointment, or under or by what authority such designation had been made.—*Banks v. State*, 60 N. E. 1087, 157 Ind. 190.

## [l] (Sup. 1901)

In a prosecution under Acts 1899, p. 381 (Burns' Rev. St. 1901, § 2329), for selling a vote at an election, it is not necessary that the affidavit and information give the names of candidates and the purpose of the election.—*Baum v. State*, 61 N. E. 672, 157 Ind. 282, 55 L. R. A. 250.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 355-363.  
See, also, 15 Cyc. pp. 448-460.

## § 329. — Evidence.

## [a] (Sup. 1846)

On the trial of an indictment, under the act against fraudulent voting, the defendant's statements made under oath, at the polls, on being challenged, are not admissible evidence for him.—*Morris v. State*, 7 Blackf. 607.

## [b] (Sup. 1877)

The terms of a bet on an election were indorsed upon the envelope which held the stakes. *Held* that, in a prosecution for betting, parol evidence of the indorsement could not be given without accounting for the envelope.—*Frazee v. State*, 58 Ind. 8.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, §§ 364-366.  
See, also, 15 Cyc. pp. 461-463.

## § 331. — Appeal and error.

## [a] (Sup. 1859)

Where the trial of an indictment for winning money on the result of an election for governor takes place after the governor's inauguration, the court will take notice that the result of the election has been determined; hence evidence from common rumor, though illegitimate, is harmless.—*Hizer v. State*, 12 Ind. 330.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Elections, § 368.  
See, also, 15 Cyc. p. 465.

## ELECTRIC COMPANIES.

See ELECTRICITY, §§ 2, 3.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

# ELECTRICITY.

## Scope-Note.

[INCLUDES regulation of the production and use of electricity, and of machinery, structures, and apparatus employed therein, in general; supply of electricity as a motive power, or for illuminating, heating, or other purposes; and rights, duties, and liabilities incident thereto.

[EXCLUDES powers of municipalities (see *Municipal Corporations*); duties and liabilities of employers (see *Master and Servant*); and use of electricity in the operation of railroads (see *Railroads*; *Street Railroads*) and telegraph or telephone lines (see *Telegraphs and Telephones*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1½. Establishment of plant by public authorities.
- § 2. Electric companies.
- § 3. — Incorporation and organization.
- § 4. — Franchises and privileges in general.
- § 9. Conductors, poles, and subways.
- § 11. Supply of electricity, power, or light.
- § 12. Injuries incident to production or use.
- § 14. — Care required in general.
- § 15. — Licensees and trespassers.
- § 16. — Defects, acts, or omissions causing injury.
- § 17. — Companies and persons liable.
- § 18. — Contributory negligence.
- § 19. — Actions.

## Cross-References.

See—

Condemnation of property for production and supply of electric power or light as taking for public use. **EMINENT DOMAIN**, § 35.  
Delegation of power of eminent domain to electric companies. **EMINENT DOMAIN**, § 10.  
Electric railroads. **STREET RAILROADS**.  
Judicial notice of. **EVIDENCE**, § 9.

Power of municipality to make improvements in lighting. **MUNICIPAL CORPORATIONS**, § 272.  
Requiring railroad companies to maintain electric lights at crossings. **RAILROADS**, § 238.  
Telegraph and telephone lines. **TELEGRAPHS AND TELEPHONES**.  
Transmission of, as constituting public nuisance. **NUISANCE**, § 63.

### § 1½. Establishment of plant by public authorities.

Power of city council to appoint lineman for lighting plant, see **MUNICIPAL CORPORATIONS**, § 214.  
Power of city to issue bonds, see **MUNICIPAL CORPORATIONS**, § 911.  
Power of city to make expenditures, see **MUNICIPAL CORPORATIONS**, § 860.  
Power of city to sell lighting plant, see **MUNICIPAL CORPORATIONS**, § 225.

### § 2. Electric companies.

Appointment of receiver to operate electric light plant, see **RECEIVERS**, § 16.  
Power of municipality to grant right to use streets, see **MUNICIPAL CORPORATIONS**, § 680.

Public aid to. **MUNICIPAL CORPORATIONS**, § 286.

Supply to consumers, see post, § 11.

### FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Electricity, §§ 1-3.

See, also, 15 Cyc. pp. 467-481; note, 100 Am. St. Rep. 516.

### § 3. — Incorporation and organization.

[a] (*Sup.* 1902)

A corporation was organized for the purpose of manufacturing, storing, selling, delivering, and distributing electricity for light, heat, power, and all such other chemical and mechanical purposes as electricity can be applied to, and for the purpose of manufacturing and selling all kinds of electrical appliances,

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apparatus, and supplies. *Held* that, since the manufacture of electrical appliances, apparatus, and supplies is not a business incidental to the generation and sale of electricity, the powers of the corporation were broader than authorized by Burns' Rev. St. 1901, § 5051 et seq., and hence the organization did not become a de jure corporation.—*Burk v. Mead*, 64 N. E. 880, 159 Ind. 252.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Electricity, § 1.

**§ 4. — Franchises and privileges in general.**

Power of city to grant franchises in streets, see MUNICIPAL CORPORATIONS, §§ 680, 681. Publication of ordinance granting franchise for lighting plant, see MUNICIPAL CORPORATIONS, § 110.

Submission of ordinance granting franchise to popular vote, see MUNICIPAL CORPORATIONS, § 108.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Electricity, § 1; 36 CENT. DIG. Mun. Corp. §§ 1482-1485.

See, also, 15 Cyc. pp. 467, 469; note, 34 L. R. A. 369.

**§ 9. Conductors, poles, and subways.**

[a] (Sup. 1900)

Where, at the expiration of an electric lighting contract between a city and plaintiff, the council passed a resolution, the preamble of which recited the expiration of the contract, and declared that plaintiff's poles and wires were in the way of those to be erected by the city for street lighting, and directing that the city marshal should notify plaintiff to remove all his poles within 15 days, such resolution was explicit in its terms, and could not be controlled by its preamble so as to apply only to such poles and wires as were used for street lighting, and not to those used for commercial purposes.—*Coverdale v. Edwards*, 58 N. E. 495, 155 Ind. 374.

Burns' Rev. St. 1894, § 4303 (Horners' Rev. St. 1897, § 3106c), authorizes any city to grant the right to erect electric light poles in its streets under such restrictions as the council may enact, under which the Decatur city council granted a corporation the right to place poles and wires for lighting purposes on its streets, but reserved the right to revoke the grant and remove the poles in its discretion. The council subsequently contracted with plaintiff, to whom the corporation's rights had been assigned, to furnish light for the streets for three years, and at the expiration of the contract the council passed a resolution declaring that plaintiff's poles were in the way of poles about to be erected by the city in pursuance of plans for the erection of a municipal lighting plant, and ordered their removal. *Held*, that the council were entitled to require the removal of the

poles, since after the expiration of the lighting contract, plaintiff's only right to maintain the poles was under the resolution, which was a bare license, revocable at the will of the city council.—*Id.*

Under Burns' Rev. St. 1894, § 4303 (Horners' Rev. St. 1897, § 3106c), authorizing a city to grant the right to erect electric lighting poles and wires in streets under such restrictions as the council might deem proper, the right of the council to impose restrictions on a franchise to erect poles and wires was not limited to the manner in which the poles and wires should be used, but authorized the council to retain the right to revoke the license at pleasure.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Electricity, § 4.

See, also, 15 Cyc. p. 469.

**§ 11. Supply of electricity, power, or light.**

Duration of municipal contract, see MUNICIPAL CORPORATIONS, § 233.

Power of city to contract for lighting as dependent on limitation of amount of indebtedness, see MUNICIPAL CORPORATIONS, § 864.

Power of city to contract for lighting of streets, see MUNICIPAL CORPORATIONS, § 226.

Restraining breach of contract to supply electricity, see INJUNCTION, § 59.

Validity of municipal contract for lighting streets, see MUNICIPAL CORPORATIONS, § 244.

[a] (App. 1905)

A stipulation, in a contract for the purchase of electric current, providing that the applicant agrees to use enough current, if it is measured by the watt, to make a monthly bill of a dollar, or pay that amount, should sufficient current not be used, was a part of the direct obligation of the contract, and did not constitute an agreement for liquidated damages in case of breach.—*Beck v. Indianapolis Light & Power Co.*, 76 N. E. 312, 36 Ind. App. 600.

**FOR CASES FROM OTHER STATES,**

See 15 Cyc. pp. 470, 471.

**§ 12. Injuries incident to production or use.**

Liability of city for injuries resulting from negligence in operation of municipal lighting plant, see MUNICIPAL CORPORATIONS, §§ 733, 747.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Electricity, §§ 6-11.

See, also, 15 Cyc. pp. 471-480; notes, 31 L. R. A. 566, 32 L. R. A. 400.

**§ 14. — Care required in general.**

[a] (App. 1905)

Though a line of wire is maintained across private property, where the wire is allowed to



remain in a dangerous condition, the owner of the wire is liable to a person injured while on such property, if he had a right to be there.—*Central Union Tel. Co. v. Sokola*, 73 N. E. 143, 34 Ind. App. 429.

[b] (App. 1909)

While an electric company using a line of poles in common with a telegraph company owed the duty to a lineman of the latter to keep its wires properly insulated, it did not owe the duty to him, or to any one having occasion to do work on the poles, to give notice that it was using a strong current of electricity on its wires, or was about to do so.—*South Shore Gas & Electric Co. v. Ambre*, 87 N. E. 246.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Electricity, § 11.

See, also, 15 Cyc. pp. 471-475.

#### § 15. — Licensees and trespassers.

[a] (App. 1905)

The fact that a telephone wire which lay across a charged and insulated electric light wire and killed decedent was on private property will not preclude recovery, where it appears that decedent had a right to be on the property.—*Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429, 73 N. E. 143.

[b] (App. 1910)

Where a city granted to a number of telephone and electric companies permits to string their wires on poles erected in the streets, many of which crossed and ran near each other, the peculiar nature of the business of such companies and mutual interest of each to have any defects by the contact of their wires promptly remedied required that the employes of any company should have the right to ascend the poles of the other companies to remedy defects, and that each should exercise reasonable care to protect such employes while so engaged, they not being bare licensees, so that, where wires used by a city to facilitate the work of the fire and police departments were strung on a telephone pole near a number of telephone wires and a wire of high voltage attached thereto belonging to an electric lighting company, both companies were bound to anticipate the use of the telephone pole by the city's employes in inspecting its wires, and use reasonable care in constructing and maintaining their wires for the protection of such employes, their duty being the same whether the permission of the city's employes to use the telephone pole was express or implied.—*Beaning v. South Bend Electric Co.*, 90 N. E. 786.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Electricity, § 8.

See, also, 15 Cyc. p. 475; note, 3 L. R. A. (N. S.) 988.

#### § 16. — Defects, acts, or omissions causing injury.

[a] (App. 1905)

A telephone company which permits its wire to become broken and lie across a highly

charged electric light wire is guilty of want of ordinary care.—*Central Union Tel. Co. v. Sokola*, 73 N. E. 143, 34 Ind. App. 429.

A telephone company which permits its wire to remain in a broken condition is not relieved from liability for resulting damages by the fact that a recent storm caused the wire to come in contact with an electric light wire, which contributed to the injury complained of.—Id.

[b] (App. 1910)

Defendant telephone company maintained a pole to which was attached cross-arms, under which was a cable-box, and under that a wire cable seat supported by iron braces, and a cable of wire passed beneath the cable seat to which it was connected by a partially insulated wire, passing through a hole in the cable-box. Defendant lighting company maintained a pole about two feet from the telephone pole, carrying two wires of high voltage, one of which was attached to the telephone pole so near to one of the cable seat braces and iron steps of the pole that one climbing it was liable to come in contact with the wire and brace or step at the same time. The city maintained fire and police wires on the telephone pole and plaintiff, an employe of the city, while climbing the pole, came in contact with the electric company's wire while he was holding to the cable seat brace on the telephone pole, making a connection, which caused the current to pass through him from the electric wire. The complaint, in an action for resulting injuries, in addition to those facts, alleged that the telephone company was negligent in attaching the cable to the cable seat by a wire, thus grounding the cable seat and endangering persons rightfully on the pole who came in contact with the seat and the electric wire and that the electric company was negligent in not properly insulating their wire attached to the telephone pole. Held that the complaint was sufficient to make out the negligence charged against the lighting company, if it was likely that a grounded connection would be made between their defectively insulated wire and any conductor of electricity with which one climbing the pole might come in contact, and it was not necessary that the lighting company should have anticipated injuries from such cause, or that it knew that there was a metallic connection between the cable and cable seat.—*Beaning v. South Bend Electric Co.*, 90 N. E. 786.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Electricity, § 9.

See, also, 15 Cyc. pp. 472-474; note, 87 C. C. A. 3.

#### § 17. — Companies and persons liable.

[a] (Sup. 1899)

A complaint against a telephone company, alleging that plaintiff was injured by lightning on account of a dangerous condition of the wires of another company with which defendant had consolidated, and that the lightning was con-

ducted into the room where plaintiff was injured by defendant's wires, but does not connect defendant with the creation or maintenance of such condition before or at the time of injury, nor allege that defendant had an opportunity to put the wires of the second company into proper condition after consolidation, and before the accident occurred, does not state a cause of action.—*Scheiber v. United Tel. Co.*, 55 N. E. 742, 153 Ind. 609.

### § 18. — Contributory negligence.

[a] (Sup. 1890)

The failure of a traveler to notice in the daytime an electric light wire on the sidewalk, over which she stumbled and fell, is not contributory negligence as a matter of law, and will not prevent her from recovering for the injuries from the company.—*Brush Electric Lighting Co. v. Kelley*, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250.

#### FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Electricity, § 10.

See, also, 15 Cyc. p. 475; note, 1 L. R. A. (N. S.) 822.

### § 19. — Actions.

Opinion evidence, see EVIDENCE, § 472.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1902)

In an action by a traveler in a street against a street car company for injuries occasioned by the breaking and falling of a trolley wire, the jury returned a general verdict for plaintiff, but answered in the negative an interrogatory as to whether the evidence showed that the wire was subjected to more than "the ordinary usage of wires at that place," from the time it was put up till the accident. *Held* that, as this was not equivalent to a finding that the wire had been subjected to only ordinary usage in general, since the ordinary usage "at that place" might have been excessive, it left room for the inference that the wire had become crystallized from hard usage, whereby the company was put on notice of its condition; and consequently the general verdict was not overthrown by the finding.—*Citizens' St. R. Co. v. Batley*, 65 N. E. 2, 159 Ind. 368.

The jury found that the wire broke as plaintiff was passing under it, "without warning." *Held* that, as the term "warned" would apply rather to plaintiff than to the company, which might rather be said to be "advised" of the danger, the interrogatory would not be construed as negating notice to the company, and therefore would not overthrow the general verdict.—*Id.*

The jury were asked what method, if any, had ever been discovered by which to ascertain in advance when or where a wire might probably break, and answered, "No evidence." *Held* that this finding did not overthrow the general verdict.—*Id.*

In response to interrogatories as to what caused the wire to break at that particular time and at that particular place, the jury found there was no evidence. *Held* that, as it was immaterial what caused the breakage at the particular place and time, but the jury might nevertheless have been able to conclude that the wire for some distance and for some time had been in an unsafe condition, the general verdict was not overthrown by such findings.—*Id.*

[b] (App. 1906)

Whether deceased had knowledge that it was dangerous to come in contact with a telephone wire charged with electricity, and whether he had knowledge that the wire was so charged, were for the jury in determining the question of his negligence in coming in contact with the wire which caused his death.—*Central Union Tel. Co. v. Sokola*, 73 N. E. 143, 34 Ind. App. 429.

In an action for the death of a person coming in contact with an overcharged telephone wire, which was out of repair, the complaint sufficiently alleges notice to defendant of the condition of the wire by showing that it permitted the line to become out of repair and in a dangerous condition, and to remain in that condition for five months.—*Id.*

There is not necessarily a conflict between evidence that a telephone wire broke and fell across an electric light wire from October 3d until October 30th, and an answer to an interrogatory by the jury that the telephone wire came in contact with the electric light wire the night of October 29th, since the telephone wire may have lain across the insulation of the electric light wire and not come in contact with the wire itself.—*Id.*

[c] (Sup. 1906)

A complaint for the death of one coming in contact with a live electric light wire showed that the fall of the wire was the proximate cause of the death and that the wire had become weak and rotten, in which respect defendant was charged with negligence, but it was not alleged that the wire fell by reason of such defective condition. *Held*, that, though it was clear from a reading of the complaint that that was an assumed fact, the omission to so allege rendered the complaint insufficient on demurrer.—*Aiken v. City of Columbus*, 167 Ind. 139, 78 N. E. 657, 12 L. R. A. (N. S.) 416.

[d] (App. 1909)

In an action for injuries to a lineman from a current on a grounded wire, uncontradicted evidence of defendant's superintendent that insulation is for protection where the line carries a low voltage, but if wires carrying a high voltage should swing together insulation would not prevent their crossing, because there is no outside insulation made that is strung on poles that would keep the high current from getting through, was sufficient to warrant the answer "Yes" or "No" to the interrogatory as to wheth-

er there is any practical method of insulating the wires which would have prevented the escape of a current of 2,300 volts into a bare grounded wire touching the insulated wire.—*South Shore Gas & Electric Co. v. Ambre*, 87 N. E. 246.

[e] (App. 1910)

In an action against a telephone company and a lighting company for injuries to an employé of a city, which had wires strung on the telephone company's pole, by a connection between the telephone company's grounded cable seat and a defectively insulated wire of the lighting company attached to the telephone pole, whether the telephone company was negligent in attaching its cable to the cable seat with a wire, so as to ground the cable seat and permit injuries to persons coming in contact with it and the lighting wire, *held* for the jury.—*Beaning v. South Bend Electric Co.*, 90 N. E. 786.

In an action against a telephone company and a lighting company for injuries to an employé of a city, which had wires strung on the telephone company's pole, by the making of a connection between the telephone company's grounded cable seat and a defectively insulated wire of the lighting company, attached to the telephone pole, whether plaintiff was negligent in ascending the pole on the wrong side, and not observing that the cable seat was attached by a wire, *held* for the jury.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Electricity, § 11.

See, also, 15 Cyc. pp. 477-480.

## ELEEMOSYNARY CORPORATION.

See—

ASYLUMS.

CHARITIES, §§ 32-47.

Exemption from general taxation. TAXATION, § 241.

HOSPITALS.

## ELEGIT.

Writ of, see EXECUTION, §§ 60-104.

## ELEVATED RAILROADS.

Occupation or use of street as ground for compensation to abutting owners, see EMINENT DOMAIN, § 100.

## ELEVATORS.

See—

Court house elevators. COURTS, § 72.

Liability of master for injuries to servant from defects in. MASTER AND SERVANT, § 117.

Operators of, as carriers of passengers. CARRIERS, §§ 235, 280.

Regulating construction of. MUNICIPAL CORPORATIONS, § 601.

WAREHOUSEMEN.

## ELIGIBILITY.

Taking depositions, see DEPOSITIONS, § 53.

### Of particular classes of persons or officers.

See—

Administrators. EXECUTORS AND ADMINISTRATORS, § 18.

Applicants for admission to practice law. ATTORNEY AND CLIENT, § 4.

For admission to practice medicine or surgery. PHYSICIANS AND SURGEONS, § 4.

For liquor license. INTOXICATING LIQUORS, §§ 57-60.

Arbitrators. ARBITRATION AND AWARD, § 27.

Commissioners, appraisers, or viewers in condemnation proceedings. EMINENT DOMAIN, § 227.

Or viewers in proceedings to establish highways. HIGHWAYS, § 37.

Corporate officers. CORPORATIONS, § 282.

County officers. COUNTIES, § 64.

Deputy officers. OFFICERS, § 47.

Guardians. GUARDIAN AND WARD, § 10.

Ad litem. INFANTS, § 81.

Infants to hold office or public employment.

INFANTS, § 7.

Inmates of reformatories. REFORMATORIES, §§ 4-6.

Jurors—

GRAND JURY, §§ 5, 15.

JURY, §§ 40-56.

To assess compensation in condemnation proceedings. EMINENT DOMAIN, § 215.

Members of committee to make assessment for public improvement. MUNICIPAL CORPORATIONS, §§ 488, 489.

Of county board. COUNTIES, § 42.

Municipal officers. MUNICIPAL CORPORATIONS, §§ 137-142.

Petitioners for establishment of highway. HIGHWAYS, § 28.

Prison officers. PRISONS, § 7.

Prosecuting attorneys. DISTRICT AND PROSECUTING ATTORNEYS, § 2.

Public officers in general. OFFICERS, §§ 10-38.

Pupils. SCHOOLS AND SCHOOL DISTRICTS, §§ 149-154.

RECEIVERS, § 48.

REGISTERS OF DEEDS, § 2.

School officers. SCHOOLS AND SCHOOL DISTRICTS, § 48.

SHERIFFS AND CONSTABLES, § 3.

State officers in general. STATES, § 47.

Tax assessors. TAXATION, §§ 311-315.

Town officers. TOWNS, § 28.

Trustees. TRUSTS, § 159.

Voters. ELECTIONS, §§ 18, 62-83.

WITNESSES, §§ 36-223.

## ELISORS.

Appointment for purpose of summoning jurors, see JURY, § 67.

**ELONGATA.**

Return of, to writ of replevin, see **REPLEVIN**,  
§ 54.

**EMANCIPATION.**

See—  
Child—

INFANTS, § 9.

PARENT AND CHILD, § 16.

**EMBANKMENTS.**

See—

LEVEES.

Obstruction and detention of waters. **WATERS  
AND WATER COURSES**, § 54.

Street, liabilities for injuries to travelers. **MU-  
NICIPAL CORPORATIONS**, §§ 782-785.

**EMBEZZLEMENT.***Scope-Note.*

[INCLUDES fraudulent appropriation of personal property by one in possession thereof, to whom it has been intrusted by or for the owner, as bailee, servant, agent, trustee, public officer, etc.; nature and elements of the crimes of embezzlement, larceny by bailee, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES civil liability for conversion (see *Trover and Conversion*); and offenses of taking and removing, or fraudulently obtaining, property in possession of another (see *Larceny*; *False Personation*; *False Pretenses*). For complete list of matters excluded, see cross-references, post.]

*Analysis.*

1. Nature of offense in general.
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5. — Intent.
8. — Ownership of property.
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*Cross-References.**See—*

Assets by executor or administrator. EXECUTORS AND ADMINISTRATORS, § 117.  
 Civil liability for conversion. TROVER AND CONVERSION.  
 Discharge of bankrupt, effect on debts created by. BANKRUPTCY, § 426.  
 Extradition. EXTRADITION, § 41.  
 FALSE PRETENSES.

Former jeopardy. CRIMINAL LAW, § 190.  
 LARCENY.  
 Limitation of prosecution for. CRIMINAL LAW, § 149.  
 Receiving deposits after insolvency of bank. BANKS AND BANKING, §§ 83-85.  
 Township officers. TOWNS, §§ 29, 33.  
 Words imputing crime of, as libel or slander. LIBEL AND SLANDER, § 10.

**§ 1. Nature of offense in general.**

[a] (Sup. 1910)

Embezzlement is predicated on a wrongful conversion of property rightfully in possession.—*Axtell v. State*, 91 N. E. 354.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. § 1.

See, also, note, 98 Am. Dec. 123.

**§ 2. Statutory provisions.**

Implied repeal of statute by revision or codification, see STATUTES, § 167.

[a] (Sup. 1880)

Act March 21, 1879, § 3, amendatory of the law concerning embezzlement, provided "that all laws upon the subject of embezzlement, now in force, are hereby repealed," and contained the proviso that "all prosecutions now pending under the law as it now is, and all offenses already committed, may be prosecuted under the law now in force." Held that, by the proviso, the right to prosecute for offenses committed under the previous statute on the subject of embezzlement, and the right to continue prosecutions pending thereunder, were saved; the words "the law now in force" in the proviso referring, not to the act of 1879, but to the previous statute.—*State v. Smith*, 72 Ind. 549.

[b] (Sup. 1886)

Rev. St. 1881, § 1943, in regard to embezzlement by public officers, is repealed by implication by Act March 5, 1883, which covers the same subject-matter, and provides different penalties for substantially the same offense.—*State v. Mason*, 108 Ind. 48, 8 N. E. 716.

[c] (Sup. 1887)

Rev. St. 1881, § 1943, in regard to embezzlement by certain officers, by failing to pay over money at the expiration of their term, "or at any time during such term," is not repealed by Act March 5, 1883 (Acts 1883, p. 106), in regard to embezzlement by certain officers in failing to pay over to their successors moneys in their hands at the expiration of their terms, as to the liability of such officers, other than clerks, treasurers, or sheriffs, for fraudulently failing or refusing, during

their term, to account for, deliver, and pay over to the proper person any moneys, choses in action, or property which may have been received by them in their official capacity.—*State v. Wells*, 112 Ind. 237, 13 N. E. 722.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. § 2.

**§ 3. Elements of offenses.**

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 1, 3-10.

See, also, 15 Cyc. pp. 488-496.

**§ 5. — Intent.**

[a] (Sup. 1832)

Where one is charged with the embezzlement of money or property intrusted to him, an intent to feloniously appropriate it at the time of the appropriation is essential.—*Beatty v. State*, 82 Ind. 228.

[b] (Sup. 1892)

There can be no embezzlement under the statutes where there is no intent to defraud.—*Fowler v. Wallace*, 31 N. E. 53, 131 Ind. 347.

Where there is a willful and known wrongful taking, use or appropriation of money, the criminality of the act is not removed by an intention to make restitution.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. § 3.

See, also, 15 Cyc. p. 491.

**§ 8. — Ownership of property.**

Allegations in indictment, see post, § 30.

[a] (Sup. 1888)

Under Rev. St. 1881, § 1944, making appropriation by an employé of property to whose possession the employer is entitled, embezzlement, a consignee has sufficient ownership to sustain an indictment charging embezzlement from him as owner.—*Waterman v. State*, 116 Ind. 51, 18 N. E. 63.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. § 6.

See, also, 15 Cyc. p. 492.

### § 9. — Possession or custody of property.

[a] (Sup. 1867)

Act Sp. Sess. 1865, p. 204, makes the voluntary taking by a hired servant of the goods of his master embezzlement, and prescribes the punishment, which is different from that for larceny. Section 2 provides that, as "there is no law punishing the offense aforesaid, an emergency is hereby declared to exist for the taking effect of this act, therefore the same shall be in force from its passage." *Held*, that the act applies only where the servant has the custody of the goods, since, in cases where he had no such custody, the offense could have been punished as larceny before the passing of the statute.—*Smith v. State*, 28 Ind. 321.

[b] (Sup. 1883)

One who, while lawfully in the possession of goods, feloniously converts them to his own use, is guilty of embezzlement, and not of larceny, under Acts 1879, p. 126, making it embezzlement for any agent, employé, etc., having access to, or control over, money or goods, to the possession of which his employer is entitled, to convert it to his own use, etc.—*State v. Wingo*, 89 Ind. 204.

[c] (Sup. 1899)

Under Burns' Rev. St. 1894, § 2022, declaring that every servant or employé, having access, control, or possession of anything of value belonging to his employer, who shall appropriate to his own use any property so held, shall be guilty of embezzlement, such person must be in possession by reason of some special trust imposed; and accused, who boarded with a farmer, and occasionally did small jobs for him, and who, during the farmer's temporary absence, without his knowledge or consent, broke open his granary and sold wheat stored therein, was not guilty of embezzlement.—*Colip v. State*, 55 N. E. 739, 153 Ind. 584, 74 Am. St. Rep. 322.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. § 7.

See, also, 15 Cyc. p. 493.

### § 11. — Conversion or appropriation of property.

Allegations in indictment, see post, § 33.

[a] (Sup. 1887)

Where a county treasurer is charged with embezzling the public funds, no demand for such funds by his successor need be proved.—*Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490.

[b] (Sup. 1900)

Burns' Rev. St. 1894, § 2020 (Rev. St. 1881, § 1943; Horner's Rev. St. 1897, § 1943), provides that a justice of the peace who shall fail to account for fines collected by him, after a demand therefor by a person authorized by law to demand the same, shall be deemed guilty

of embezzlement. Defendant, a justice of the peace, in his docket entered the fines assessed and collected by him at much less than the amount actually assessed. A deputy of the attorney general, being authorized by law so to do, examined the justice's docket, and demanded that he pay over the amount shown thereby to be due. The justice paid each sum, but retained the excess sums received by him but not entered on his docket. *Held* that, since it was the duty of the justice to pay over all fines received by him, the demand of the deputy was, in legal effect, a demand for all fines received by the justice, and he was guilty of embezzlement, though he paid the amount demanded by the deputy.—*Crawford v. State*, 57 N. E. 931, 155 Ind. 692.

[c] (Sup. 1906)

To sustain a conviction of the auditor of the state of the crime of embezzlement, the prosecution must show that he converted money belonging to the state and that such money came to his hands according to law.—*Sherrick v. State*, 167 Ind. 345, 79 N. E. 193.

[d] (Sup. 1906)

The crime of embezzlement, as distinguished from larceny, does not include the element of trespass in obtaining possession of the property appropriated.—*Vinnedge v. State*, 167 Ind. 415, 79 N. E. 353.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 9, 10.

See, also, 15 Cyc. pp. 495, 496.

### § 12. Embezzlement by particular classes of persons.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 11-29.

See, also, 15 Cyc. pp. 496-505.

### § 13. — Servants, clerks, and employés in general.

Allegations in indictment, see post, § 32.

[a] (Sup. 1877)

Where a master intrusted his money to his servant, and the latter fraudulently appropriated it to his own use, he is not guilty of larceny, but of embezzlement, under 2 Rev. St. 1876, p. 449, providing that every clerk or person in the employment of another, who, while in such employment, fraudulently appropriates to his own use any of the moneys or other property of value belonging to, or deposited with, his employer, shall be deemed guilty of embezzlement, etc.—*Jones v. State*, 59 Ind. 229.

[b] (Sup. 1893)

The word "collector," as used in Rev. St. 1881, § 1943, in relation to embezzlement, means one making collections for others, a clerk, a servant, an employé or a keeper of accounts; the statute aiming at that class of persons who for fee or percentage collect generally for the

public.—*State v. Sarlls*, 34 N. E. 1129, 135 Ind. 195.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 11, 12.

See, also, 15 Cyc. pp. 496, 497.

**§ 14. — Agents.**

[a] (Sup. 1901)

Where a person entered a saloon kept by defendant, and requested him to keep money for him in the safe until a following day, and defendant appropriated the money to his own use, he was an agent of such person, within the meaning of *Burns' Rev. St.* 1901, § 2022, declaring that every officer, "agent," or employé who shall, while in such employment, take any money belonging to the person in whose employment said "agent" may be, shall be deemed guilty of embezzlement.—*Wynegar v. State*, 62 N. E. 38, 157 Ind. 577.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 13-15.

See, also, 15 Cyc. pp. 497-499.

**§ 15. — Partners.**

Allegations in indictment, see post, § 32.

[a] (Sup. 1864)

An unincorporated association, having charitable features, is not a partnership, within the rule that a partner cannot be guilty of embezzlement in appropriating the funds of the firm.—*Laycock v. State*, 136 Ind. 217, 36 N. E. 137.

[b] (Sup. 1891)

Under *Rev. St.* 1881, §§ 6046-6053, making the duties and liabilities of surviving partners, undertaking to settle the partnership affairs, similar to those of executors and administrators, such a surviving partner is a "person acting in a fiduciary capacity," within the meaning of section 1952, which provides that "whoever, being the administrator, \* \* \* executor, \* \* \* or guardian, \* \* \* or trustee, or other person acting in a fiduciary capacity, without good cause, fails or refuses, where legally required, \* \* \* to account for or pay over \* \* \* any money, choses in action, or other property which may have come into his hands by virtue of such office, duty, or trust, shall be deemed guilty of embezzlement."—*State v. Matthews*, 129 Ind. 281, 28 N. E. 703.

The assets of the partnership are in the surviving partner's possession by virtue of the trust, within the meaning of this section, when he has filed the inventory and bond required, and entered on the discharge of the duties imposed on him by sections 6046-6053 *Rev. St.* 1881.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. § 16.

See, also, 15 Cyc. p. 499.

**§ 18. — Guardians, administrators, or trustees.**

[a] (Sup. 1888)

The fact that a defaulting administrator is absent and secretes himself so that his successor cannot make a demand on him does not enable his sureties to subsequently make a demand which will render him guilty of embezzlement under *Rev. St.* 1881, § 1952.—*State v. Adamson*, 114 Ind. 216, 16 N. E. 181.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. § 20.

See, also, 15 Cyc. p. 501.

**§ 20. — Corporate officers or employés.**

[a] (Sup. 1894)

The treasurer of an unincorporated benevolent society, and drawing a salary for his services, is an employe of the society, within *Rev. St.* 1881, § 1944, which provides that any officer or employe of a corporation or association who misappropriates his employer's money is guilty of embezzlement.—*Laycock v. State*, 136 Ind. 217, 36 N. E. 137.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 22, 23.

See, also, 15 Cyc. p. 502.

**§ 21. — Public officers or employés.**

Allegations in indictment, see post, § 34.  
Statutory provisions, see ante, § 2.

[a] (Sup. 1887)

A drainage commissioner is an officer of the county for which he is appointed, within *Rev. St.* 1881, § 1934, providing that any officer or agent of any county, etc., who shall fraudulently fail or refuse at the expiration of his term, or at any time during such term when legally required by the proper authority, to account for and pay over moneys which may have come into his hands by virtue of his office, shall be deemed guilty of embezzlement, etc.; and where such officer resigns before the expiration of his term, and fraudulently fails or refuses to pay over to his successor money received by virtue of his office, and feloniously embezzles, retains, and converts the same to his use, he is criminally liable under said section.—*State v. Wells*, 112 Ind. 237, 13 N. E. 722.

[b] (Sup. 1906)

*Burns' Ann. St.* 1901, § 8477, requires foreign insurance companies to pay insurance taxes "into the treasury of the state," based on reports made to the State Auditor. *Held* that, since under such section the State Auditor had no authority to collect such taxes in his official capacity, a payment to him by the insurance companies operated as a payment to their own agent, so that the Auditor's failure to account therefor to the state did not constitute embezzlement, under *Acts* 1905, p. 670, c. 169, § 389, providing that whoever being charged or in any manner intrusted with the collection or disbursement of funds belonging to the state

converts the same to his own use shall be guilty of embezzlement.—*Sherrick v. State*, 167 Ind. 345, 79 N. E. 193.

Where a State Auditor collected certain foreign insurance taxes without authority, and converted the same to his own use, the institution of a suit by the state on his official bond to recover the money subsequent to the alleged conversion, did not constitute such a ratification by the state of the Auditor's act in collecting the money as would render the Auditor guilty of embezzlement in withholding the money from the state.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 24-29.

See, also, 15 Cyc. pp. 503-505.

#### § 23. Defenses.

##### [a] (Sup. 1882)

When an agent of a foreign insurance company is prosecuted for embezzling money of the company, received by him as agent, it is no defense that he has not filed the certificate necessary in order to enable him legally to do business in the state, and that therefore his transaction of business and receipt of the money was unlawful.—*State v. Tumey*, 81 Ind. 559.

##### [b] (Sup. 1885)

It is no defense to a prosecution for embezzlement of money collected by an agent that it was collected on a lottery ticket, in contravention of the law of the state.—*Woodward v. State*, 103 Ind. 127, 2 N. E. 321.

##### [c] (Sup. 1897)

Where defendant committed the offense of embezzlement, he could not thereafter avoid the crime, or bar a prosecution by a tender of the property embezzled, though made before the filing of the affidavit and information.—*Dean v. State*, 46 N. E. 528, 147 Ind. 215.

##### [d] (Sup. 1906)

Where the state had not been harmed by the unlawful collection of insurance taxes by the State Auditor and his conversion of such taxes to his own use, it was not entitled to claim, in the prosecution of such officer for embezzlement, that, as he collected the money in his official capacity, he was estopped to deny that he had any authority to collect the money, and that, therefore, he could not be guilty of embezzlement from the state.—*Sherrick v. State*, 167 Ind. 345, 79 N. E. 193.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 31-35½; 12

CENT. DIG. Corp. § 2560.

See, also, 15 Cyc. pp. 507-510.

#### § 24½. Venue.

Venue of offense partly in one county and partly in another, see CRIMINAL LAW, § 112.

#### § 25. Indictment or information.

Aider by verdict, see INDICTMENT AND INFORMATION, § 202.

Allegations as to time of offense, see INDICTMENT AND INFORMATION, § 87.

Bill of particulars, see INDICTMENT AND INFORMATION, § 121.

Election between counts, see INDICTMENT AND INFORMATION, § 132.

Pleading matter in avoidance of bar of statute of limitations, see INDICTMENT AND INFORMATION, § 67.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 37-59.

See, also, 15 Cyc. pp. 510-527.

#### § 26. — Requisites and sufficiency in general.

##### [a] (Sup. 1893)

Rev. St. § 1944, provides that any agent, clerk, servant, or employe, who shall appropriate moneys in his control, belonging to his employer, is guilty of embezzlement. Section 1945 provides that attorneys, and "persons engaged in making collections for others," who, having under their control moneys belonging to their employer or client, on reasonable demand, refuse to pay over the same, are guilty of embezzlement. An indictment charged that the accused, being the employe, clerk, servant, and collector of F. and M., for the collecting and keeping of the accounts of bills and accounts due belonging to said F. and M., did receive and take into his possession, from the moneys of said F. and M., etc. *Held* not bad for uncertainty as to which crime was charged, as the words "collector" and "collecting" did not charge a crime under section 1945, so as to make a demand necessary; that section applying to persons in the nature of independent contractors, not servants or employes.—*State v. Sarlls*, 135 Ind. 195, 34 N. E. 1120.

##### [b] (Sup. 1910)

Since larceny and embezzlement chiefly differ in the manner of obtaining possession, the facts necessary to constitute the offense charged, whether embezzlement or larceny, must be averred positively and unequivocally to enable the court to distinguish the offense charged and to test the legal sufficiency of the charge and to avoid a subsequent conviction for the same offense.—*Axtell v. State*, 91 N. E. 354.

An indictment, alleging that, "being an officer, agent, and employe" of a domestic corporation, receiving money on deposit and in payment of loans, accused had access to, control, and possession of a specified sum, and that accused, by virtue and because of his being an officer, agent, and employe of the corporation, fraudulently appropriated to his own use the sum, does not charge embezzlement.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 37, 38.

See, also, 15 Cyc. p. 510.



**§ 27. — Intent.**

Necessity of charging that act was done feloniously, see **INDICTMENT AND INFORMATION**, § 91.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. § 40.

See, also, 15 Cyc. p. 313.

**§ 28. — Description of property.**

[a] (Sup. 1885)

An indictment for embezzlement, charging the accused with having been the "agent and employé" of a certain person "for the purpose of collecting money on a certain lottery ticket," and properly charging the embezzlement of such money, is not bad, on motion to quash, for not describing the lottery ticket with sufficient certainty.—*Woodward v. State*, 103 Ind. 127, 2 N. E. 321.

[b] (Sup. 1887)

Under Act 1883 (Acts 1883, p. 106), an indictment against a county treasurer for embezzlement is not bad for failure to particularly specify each fund charged to have been embezzled, especially when attacked after verdict.—*Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490.

[c] (Sup. 1900)

*Horner's Ann. St. 1897*, § 1750, providing for mode of describing money, where an indictment described the amount as money simply, and alleged that a more particular description of the money was unknown to the grand jury, it was sufficient, though the allegation that a more particular description of the money was unknown to the grand jury was surplusage, and need not be proved.—*Crawford v. State*, 57 N. E. 931, 155 Ind. 692.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 41, 42; 27 CENT. DIG. Ind. & Inf. § 279.

See, also, 15 Cyc. pp. 514-516.

**§ 30. — Ownership of property.**

[a] (Sup. 1896)

The title of the county treasurer to money which he receives is limited except so far as is necessary for the safe-keeping of the funds; and in an indictment against a deputy for embezzlement it is proper to allege that they were funds of the county.—*Armstrong v. State*, 145 Ind. 609, 43 N. E. 866.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 44, 45.

See, also, 15 Cyc. pp. 517, 518.

**§ 32. — Capacity or character in which property was received or held.**

[a] (Sup. 1887)

An indictment under *Rev. St. 1881*, § 1944, defining and prescribing the punishment for embezzlement by an "officer, agent, attorney, clerk, servant, or employé of any person or persons,"

is not bad, upon motion to quash, for simply charging that the accused was an "employé" of a certain person, without stating the position held by him, or the capacity in which he was engaged.—*Ritter v. State*, 111 Ind. 324, 12 N. E. 501.

[b] (Sup. 1891)

An information for embezzlement, under *Rev. St. § 1952*, which alleges that the money came into defendant's hands as a surviving partner, is good on a motion to quash.—*State v. Matthews*, 129 Ind. 281, 28 N. E. 703.

[c] (Sup. 1897)

An allegation that defendant was the attorney and employé of prosecuting witness when he took possession of the certificate by virtue of his employment, and that he then feloniously appropriated it, sufficiently alleges that he was in the employ of such prosecuting witness at the time of the alleged embezzlement.—*Dean v. State*, 147 Ind. 215, 46 N. E. 528.

[d] (Sup. 1900)

Under *Burns' Rev. St. 1894*, § 2022 (*Horner's Rev. St. § 1944*), declaring that any agent or employé who, having access to, or control or possession of, money belonging to the employer, shall appropriate it, is guilty of embezzlement, an indictment which charged that defendants, being agents of a banking company, and having access to money, appropriated it while acting as such agents, but not stating that they had control of the money by virtue of their employment, was insufficient, as otherwise the appropriation would have been larceny.—*State v. Winsteadley*, 58 N. E. 71, 155 Ind. 290.

[e] (Sup. 1906)

In a prosecution for embezzlement, an allegation in the indictment that defendant, "as such employé, then and there had control and possession of" the money charged to have been embezzled, was not sufficient to show that defendant's possession and control of the money was by virtue of his employment.—*Vinnedge v. State*, 167 Ind. 415, 79 N. E. 353.

*Burns' Ann. St. 1901*, § 2022, provides that every officer, agent, clerk, servant, employé, etc., of any person, corporation, or association, who, having access to, control, or possession of any money, article, or thing of value, to the possession of which his or her employer or employers is or are entitled, who shall, while in such employment, take, purloin, secrete, or in any way appropriate the same to his own use, etc., shall be guilty of embezzlement. *Held*, that an indictment in the language of the statute, but failing to allege that defendant had control or possession of the money embezzled by virtue of his employment, was fatally defective.—*Id.*

[f] (Sup. 1907)

An affidavit, founded on *Acts 1905*, p. 671, c. 169, § 392, providing that every employé, who, having access to, control, or possession of

any money, to the possession of which his employer is entitled, shall, while in such employment, appropriate the same to his own use, shall be guilty of embezzlement, which avers that accused was the employé of a designated association, and "as such employé" had possession of money of the association, which he appropriated to his own use, is fatally bad for failing to aver that he obtained possession of the money by virtue of his employment.—*Wright v. State*, 168 Ind. 643, 81 N. E. 660.

[c] (Sup. 1910)

An indictment charging embezzlement in violation of Burns' Ann. St. 1908, § 2285, must show that at the time of the commission of the offense there existed between accused and prosecutor, by contract of employment or otherwise, the relation of special confidence, and that by virtue of such relation accused was intrusted by prosecutor with the property embezzled.—*Axtell v. State*, 91 N. E. 354.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 47-50.

See, also, 15 Cyc. pp. 519-521.

**§ 33. — Conversion or appropriation of property.**

[a] (Sup. 1890)

Under 2 Rev. St. 1876, p. 450, providing that a county treasurer who shall fraudulently fail or refuse, at the expiration of the term for which he was elected or appointed, or at any time during such term, "when legally required by the proper person or authority to account for and pay over to such person or persons as may be lawfully entitled to receive the same, all moneys which may have come into his hands by virtue of his office, will be deemed guilty of a felony," an indictment thereunder must charge directly that the term of defendant officer had expired when the money in his hands was demanded; and an averment that M. had been elected county treasurer, and, after being commissioned and qualified, entered and took possession of his office, and then and there demanded the money of defendant, is not the equivalent of an allegation that defendant's term had expired, and that M.'s had begun, when the demand was made.—*State v. Hebel*, 72 Ind. 361.

[b] (Sup. 1888)

Under Rev. St. 1881, § 1952, providing that an administrator who "without good cause fails or refuses, when legally required by the proper person or authority, to account for or pay over to such person or persons as may be lawfully entitled to receive the same, any money, choses in action, or other property which may come into his hands by virtue of his office \* \* \* shall be deemed guilty of embezzlement," an information charging that defendant, who had been an administrator, had failed to turn over certain money belonging to the estate to his successor, and that such money had been collected from his sureties, one of whom had

demanded the amount of defendant, who refused to pay it to any one, is insufficient, as failing to charge that he failed and refused to make payment when legally required by the proper person or authority.—*State v. Adamson*, 114 Ind. 216, 16 N. E. 181.

[c] (Sup. 1897)

An indictment charging that defendant, being an attorney, converted the proceeds of certificates of deposit given him by his client to be collected and applied on a certain judgment against her, charges a crime, within Rev. St. 1894, § 2022 (Rev. St. 1881, § 1944), under which section it is not necessary to allege or prove a demand.—*Dean v. State*, 147 Ind. 215, 46 N. E. 528.

[d] (Sup. 1900)

Burns' Rev. St. 1894, § 1515 (Rev. St. 1881, §§ 1447, 1448; Horner's Rev. St. 1897, §§ 1447, 1448), requires a justice on the first Monday in January and the first Monday in July of each year to make a report, and pay over to the county treasurer of his county all fines collected by him since the last previous report, provided that at the time of making such report the amount of the fines collected shall exceed three times the amount of mileage he would be entitled to for making his report. *Held*, that it is not error to refuse to quash an indictment charging a justice with having collected fines which he had failed to turn over to the county treasurer, though it does not allege that the sum collected by him was in excess of three times what he would have been entitled to for mileage in making his report, but such fact is a matter of defense.—*Crawford v. State*, 57 N. E. 931, 155 Ind. 692.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 51, 52.

See, also, 15 Cyc. pp. 521, 522.

**§ 34. — Against public officer.**

Conversion or appropriation of property, see ante, § 33.

[a] (Sup. 1880)

An indictment against a county treasurer for failing to pay over certain moneys to his successor in office, under 2 Rev. St. 1876, p. 450, must charge that at the expiration of such officer's term there remained in his hands, either actually or constructively, the sum received by him by virtue of his office, which on proper demand he fraudulently refused or failed to account for and pay over to his successor in office.—*State v. Hebel*, 72 Ind. 361.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Embez. §§ 53, 54.

See, also, 15 Cyc. pp. 523, 524.

**§ 35. — Issues, proof, and variance.**

[a] (Sup. 1906)

Where the evidence shows the offense to have been embezzlement, there can be no con-

viction of larceny.—Vinnedge v. State, 167 Ind. 415, 79 N. E. 353.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 55-59.  
See, also, 15 Cyc. pp. 525-527.

**§ 37. Admissibility of evidence.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 61-66.  
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**§ 38. — In general.**

Best and secondary evidence, see CRIMINAL LAW, § 400.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 61, 65, 66.  
See, also, 15 Cyc. p. 528.

**§ 44. Weight and sufficiency of evidence.**

[a] (Sup. 1906)

Where a State Auditor was indicted for embezzlement in converting to his own use money, securities, bonds, and choses in action belonging to the state, the state, though required to prove the receiving the trust, and the conversion of at least a part of the funds, was not required to prove the source or persons whence the money came, or the fund to which it belonged, and from which it was converted.—*Sherick v. State*, 167 Ind. 345, 79 N. E. 193.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 67-70.  
See, also, 15 Cyc. pp. 532, 533.

**§ 45. Trial.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 71-76.  
See, also, 15 Cyc. pp. 534-536.

**§ 48. — Instructions.**

[a] (Sup. 1897)

It is proper for the court in a prosecution for embezzlement to inform the jury on what section the information is based, and is not required to read to the jury all the sections of the statute concerning embezzlement, and then submit to them the question as to which section the prosecution was based on.—*Dean v. State*, 46 N. E. 528, 147 Ind. 215.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. §§ 72-75.  
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**§ 51. Appeal and error.**

Presumption as to effect of error, see CRIMINAL LAW, § 1163.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. § 78.  
See, also, 15 Cyc. p. 537.

**§ 52. Sentence and punishment.**

Implied repeal of statute by revision or codification, see STATUTES, § 167.

[a] (Sup. 1871)

A statute (Davis' Rev. St. Supp. 1870, p. 256) prescribed the punishment for embezzlement as a fine of not less than \$1 nor more than \$500, and imprisonment at hard labor for not less than two nor more than 20 years. The punishment prescribed for grand larceny is a fine not exceeding double the value of the goods stolen, imprisonment in the state prison not less than 2 nor more than 14 years, and "disfranchisement and incapacity to hold any office of trust or profit for any determinate period." *Held*, that a sentence of a fine of \$1 and imprisonment in the state prison for the term of two years, nothing being said about disfranchisement or incapacity to hold office, will be construed as a sentence under the count in the indictment for embezzlement, and not under the count for grand larceny.—*Griffith v. State*, 36 Ind. 406.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Embez. § 79.  
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Assets of estate of decedent. EXECUTORS AND ADMINISTRATORS, § 42.  
CROPS.

Rights and liabilities of heirs as to. DESCENT AND DISTRIBUTION, § 79.

Of parties in ejectment as to. EJECTMENT, § 114.

Of parties to mortgage. MORTGAGES, § 197.

Of purchaser at foreclosure sale. MORTGAGES, § 546.

Sales of, application of statute of frauds. FRAUDS, STATUTE OF, § 94.

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**EMBRACERY.**

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Misconduct of others affecting jurors as error at trial. CRIMINAL LAW, § 855.

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Excusing passage of ordinance without publication. MUNICIPAL CORPORATIONS, § 110.

## EMERGENCY CLAUSE.

See STATUTES, § 251.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EMINENT DOMAIN.

## *Scope-Note.*

[INCLUDES taking property from its owner for public use; nature, extent, and delegation of the power in general; constitutional and statutory provisions relating thereto; what property is subject thereto; for what uses or purposes the power may be exercised, and necessity therefor; necessity and sufficiency of compensation; proceedings for condemnation of property and for assessment of compensation; what constitutes taking of or injury to property, and rights and remedies of the owners; rights acquired by exercise of power of eminent domain, and effect of abandonment of property or of public use thereof.

[EXCLUDES voluntary dedication of property to public use (see *Dedication*); and taking or use of property for military purposes in time of war (see *War*). For complete list of matters excluded, see cross-references, post.]

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**§ 1. Nature and source of power.**

[a] (Sup. 1860)

The rights of eminent domain and taxation may be exercised for public purposes, where no

constitutional restriction forbids it.—Anderson v. Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

[b] (Sup. 1874)

The right of eminent domain lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise; and it should never be exercised, except when the public interest

clearly demands it, and then cautiously and in accordance with law.—*Allen v. Jones*, 47 Ind. 438.

[c] (Sup. 1833)

The Legislature in exercising the right of eminent domain has the power to determine the estate or quantity of interest in the lands which shall be taken, whether an estate for years, for life, or in fee, whether a right of reversion shall be left in the owner, or whether a mere easement shall be taken, without devastating the general ownership of the land.—*Cleveland, O., C. & I. R. Co. v. Coburn*, 91 Ind. 557.

[d] (Sup. 1832)

The right of eminent domain is limited only by the Constitution.—*Consumers' Gas Trust Co. v. Harless*, 29 N. E. 1062, 131 Ind. 446, 15 L. R. A. 505.

Eminent domain embraces all cases where by the authority of the state the property of the individual is taken without his consent for the purpose of being devoted to some particular use, either by the state or by some corporation or a citizen to whom such right has been granted by the state.—Id.

[e] (Sup. 1908)

Eminent domain implies a taking by the sovereign for some public benefit, and is a reserved right or an inextinguishable attribute of sovereignty that may be exercised by the state or its authorized agent, to effect a public good whenever public necessity requires it.—*Cincinnati, I. & W. R. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

[f] (Sup. 1909)

The power of eminent domain has been characterized as a very high and dangerous one and cannot be exercised unless clear legislative authority for so doing is shown.—*Kinney v. Citizens' Water & Light Co. of Greenwood*, 90 N. E. 129, 26 L. R. A. 195.

The right to take private property by eminent domain is inherent in the sovereign, and rests upon the theory that all property is held subject to the right of the public to demand its use when necessary for the general benefit.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 1, 2.  
See, also, 15 Cyc. pp. 557-562.

## § 2. Distinction between eminent domain and other powers.

When taking is complete, see post, § 63.

[a] (Sup. 1823)

A judgment of seizure of the franchise of a corporation for a violation of the charter at the suit of the state, is not repugnant to Const. art. 1, § 7, providing that no man's property shall be taken for public use without the consent of his representatives, whatever may be the effect on rights of stockholders in the corpora-

tion.—*President, etc. of Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234.

[b] (Sup. 1853)

So much of 2 Rev. St. 1852, p. 3, § 15, as requires an attorney at law, in the case of a poor person, to prosecute or defend such person upon his appointment by the court, without fee, is in conflict with Const. 1851, art. 1, § 21, which provides that no man's particular services shall be demanded without just compensation, and hence is void.—*Blythe v. State*, 4 Ind. 525.

[c] The clause of the Constitution which provides that the property of no person shall be taken for public use without just compensation therefor has respect to property taken by right of eminent domain, and has no reference to the power of taxation.—(Sup. 1857) *City of Aurora v. West*, 9 Ind. 74; (1877) *City of Logansport v. Seybold*, 59 Ind. 226.

[d] (Sup. 1859)

1 Rev. St. p. 462, relating to highways, and making it the duty of supervisors to report the damages caused in the construction or repair of highways and providing that the payment of such damages shall then be made, does not violate Const. art. 1, § 21, declaring that no man's property shall be taken without just compensation.—*Dronberger v. Reed*, 11 Ind. 420.

[e] (Sup. 1877)

Act March 14, 1867 (1 Rev. St. 1876, p. 311) §§ 85, 86, provide that if any city desires to annex contiguous territory not laid off in lots, and the owner will not consent to it, the common council shall present to the board of county commissioners a petition setting forth the reasons of such annexation, and at the same time present to such board an accurate description, by metes and bounds, accompanied with a plat of the lands desired to be annexed; that the common council shall give 30 days' notice by publication in some newspaper of the intended petition, describing the territory sought to be annexed; that such board, on reception of the petition, shall hear the testimony, and if, after inspection of the map, etc., it is of the opinion that prayer should be granted, they shall cause an entry to be made in the order book specifying the territory annexed, etc., according to the survey, and cause a copy to be filed with the county recorder. *Held*, that such statute is not unconstitutional, as authorizing the taking of private property for public use without compensation, or for any other reason.—*Stilz v. City of Indianapolis*, 55 Ind. 515.

The authority to annex territory to a city does not rest on the same ground as the power to take property by the right of eminent domain.—Id.

[f] (Sup. 1883)

Act April 14, 1881, relating to cities and incorporated towns, and providing for improvement of streets, but which makes no provision

for the assessment of benefits and damages occasioned by such improvement, is not in conflict with Const. art. 1, § 21, which provides that no man's particular services shall be demanded without compensation, and that no man's property shall be taken by law without just compensation, nor, except in case of the state, without such compensation first assessed and tendered.—*Ray v. City of Jeffersonville*, 90 Ind. 567.

[g] (Sup. 1886)

The regulation of private property devoted to public use by fixing the maximum charges to be made for telephone service is not the taking of property for public purposes, within Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation.—*Hockett v. State*, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; *Id.*, 105 Ind. 599, 5 N. E. 202.

[h] (Sup. 1890)

A city by taking water from a reservoir above a dam constructed by millowners does not condemn any provision made for water within the statute providing that no artificial provision made for water by any person shall be used or condemned without the consent of the owner, as such city took no part of the dam or any of its appurtenances, but merely the water.—*Bass v. City of Fort Wayne*, 23 N. E. 259, 121 Ind. 389.

[i] (Sup. 1892)

Assessments against abutting property owners to pay the expenses incident to sweeping streets do not amount to the taking of private property without compensation and without due process of law, as the abutting property owners derive a benefit from the sweeping, not enjoyed by the general public.—*Reinken v. Fuehring*, 130 Ind. 382, 30 N. E. 414, 30 Am. St. Rep. 247, 15 L. R. A. 624.

[j] (Sup. 1895)

A city ordinance providing penalties for permitting water from an overflowing well or spring to flow on any street or alley is not in conflict with section 21 of the bill of rights (*Burns' Rev. St. 1894*, § 66; *Rev. St. 1881*, § 66), which provides that no man's property shall be taken by law without just compensation.—*Skaggs v. City of Martinsville*, 140 Ind. 476, 39 N. E. 241, 49 Am. St. Rep. 209, 33 L. R. A. 781.

[k] (Sup. 1897)

The prohibition of the appropriation of private property under Bill of Rights, § 21, refers to the taking of such property by the state under the right of eminent domain, and in no sense does it extend to the raising of the revenue for public use by the means of legitimate taxation.—*Board of Com'rs of Jackson County v. State ex rel. Brown*, 46 N. E. 908, 147 Ind. 476.

[l] (Sup. 1900)

An allotment of the work of maintaining a public drain according to benefits received, made under *Burns' Rev. St. 1894*, §§ 5632, 5636, authorizing it, is not taking private property for public use without compensation.—*Roundenbush v. Mitchell*, 57 N. E. 510, 154 Ind. 616.

[m] (Sup. 1900)

Since Act 1895, p. 384, § 74, providing for the assessment of the costs of street improvements against the abutting property by the front-foot rule, is intended to make such assessment only prima facie correct, and is not exclusive of the right of any property owner to have an assessment made according to the benefits accruing from the improvement, it is not in conflict with Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation.—*City of Indianapolis v. Holt*, 57 N. E. 966, 988, 1100, 155 Ind. 222.

[n] (Sup. 1900)

Since the right to take natural gas is common to all the surface owners, and the gas does not become the property of any of such owners until reduced to actual possession at the surface, Acts 1891, p. 89, prohibiting the use of artificial means to increase the natural flow of gas from a well, is not unconstitutional, as a deprivation of property without due compensation, but is a valid regulation for the protection of common property from destruction, recognizing qualified ownership therein.—*Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 57 N. E. 912, 155 Ind. 461, 50 L. R. A. 768.

[o] (Sup. 1900)

*Burns' Rev. St. 1894*, § 2209 (*Horner's Rev. St. § 2107*), providing that whoever has in his possession any quails from the 1st of January of any year to November 10th of the same year, shall be fined, is not contrary to Const. art. 1, § 21, providing that no property shall be taken without just compensation, because it makes a person liable for retaining possession of quails in the closed season which were acquired in the open season, since property in game, being dependent on legislation, is acquired subject to all restrictions and limitations imposed by the state.—*Smith v. State*, 58 N. E. 1044, 155 Ind. 611, 51 L. R. A. 404.

[p] (Sup. 1901)

The act of 1889 known as the "Barrett Law" provides that expenses of street improvements may be assessed on property benefited thereby, in proportion to the benefit received, and without regard to the value of the property. *Held*, that the law is not repugnant to Const. art. 1, §§ 21, 23, providing that no man's property shall be taken without just compensation.—*Martin v. Wills*, 60 N. E. 1021, 157 Ind. 153.

[q] (Sup. 1902)

Though a railway company had no actual notice of the proceedings to establish a highway over its right of way, did not appear therein,

and was awarded no damages, the refusal to award damages to its successor, compelled to construct a highway crossing for the highway, is not a taking of its property for a public use without compensation, in violation of Const. Bill of Rights, § 21.—*Baltimore & O. S. W. R. Co. v. State ex rel. Greenwood*, 65 N. E. 508, 159 Ind. 510.

[r] (Sup. 1903)

Act March 11, 1901 (Burns' Rev. St. 1901, §§ 7231a, 7231t), defining transient merchants, and prohibiting the transaction of business by them without a license, and imposing a penalty for its violation, was not in conflict with Const. art. 1, § 21, as authorizing the taking of property without due compensation.—*Levy v. State*, 68 N. E. 172, 161 Ind. 251.

[s] (Sup. 1904)

Acts 1897, p. 184, c. 122 (Burns' Rev. St. 1901, §§ 6564–6569), providing for the erection of partition fences and proceedings for the foreclosure of a lien where a partition fence has been erected by the township authorities after default of a landowner, is not violative of Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation.—*Tomlinson v. Bainaka*, 70 N. E. 155, 163 Ind. 112.

[t] (Sup. 1904)

Burns' Ann. St. 1901, § 3927, giving a city power to require a license to sell intoxicating liquors within four miles of its corporate limits, does not contravene Const. art. 1, § 21, providing that no man's property shall be taken without just compensation.—*Jordan v. City of Evansville*, 72 N. E. 544, 163 Ind. 512, 67 L. R. A. 613.

[u] (Sup. 1906)

Acts 1901, p. 109, c. 71, authorizing an order for the inspection by the county assessor of a person's books to determine whether he has returned all his property for taxation is not in conflict with Const. U. S. Amend. 5, declaring that private property shall not be taken for public use without compensation, because authorizing, without compensation, the inspection by the assessor of the books of a national bank to determine whether a customer has returned all his property for taxation.—*Washington Nat. Bank v. Daily*, 77 N. E. 53, 166 Ind. 631.

A citizen is bound to give active aid to enforce the laws; their enforcement itself constituting a sufficient compensation.—*Id.*

[v] (Sup. 1906)

The provision of Acts 1905, p. 182, c. 109, § 2, declaring that the real estate, bank furniture, and fixtures of a bank shall not constitute more than one-third in amount of the entire capital of the bank, is not in conflict with Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation, though there may be bankers in business having real estate and bank furniture and fixtures amounting to the value of the

banking capital.—*State v. Richcreek*, 77 N. E. 1085, 167 Ind. 217, 5 L. R. A. (N. S.) 875, 119 Am. St. Rep. 491.

Const. art. 1, § 21, providing that property shall not be taken by law without just compensation, applies only to the taking of private property by the exercise of the power of eminent domain, and does not restrain the exercise of the police power of the state.—*Id.*

[vv] (Sup. 1907)

An ordinance compelling a street railroad company temporarily to raise its wires to permit a house to be moved along the street is not a taking of property by eminent domain, though expense may be incurred.—*Indiana R. Co. v. Calvert*, 168 Ind. 321, 80 N. E. 961, 10 L. R. A. (N. S.) 780.

[w] (Sup. 1907)

The enforcement of regulations enacted in the proper exercise of the police power of the state cannot be resisted as a taking of private property without compensation, in violation of Const. art. 1, § 21.—*Stone v. Fritts*, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. (N. S.) 1147.

[ww] (Sup. 1907)

A municipal ordinance requiring a railroad to maintain electric lights where its tracks intersect streets is not invalid as a taking of property without compensation, though it lays some expense and inconvenience on the company; the regulation being a just exercise of the police power.—*Pittsburgh, C., C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461.

[x] (Sup. 1908)

Uncompensated obedience to a regulation ordained to secure the public health and safety is not a taking of private property, within the inhibitions of the state or federal Constitutions.—*Cincinnati, I. & W. R. Co. v. City of Cincinnati*, 170 Ind. 316, 83 N. E. 503.

[xx] (Sup. 1908)

In enacting laws for the improvement of public highways of the state, the Legislature exercises the sovereign power of taxation, and not that of eminent domain.—*State ex rel. Board of Com'rs of Hendricks County v. Board of Com'rs of Marion County*, 170 Ind. 595, 85 N. E. 513.

[y] (App. 1908)

The right of township supervisors to enter on land and appropriate material for the repair of highways is the right of eminent domain, as to which the supervisor represents the state, and not the township.—*Posey Tp., Franklin County, v. Senour*, 42 Ind. App. 580, 86 N. E. 440.

[yy] (Sup. 1909)

Since professional services of an attorney cannot be demanded without just compensation, and he cannot be compelled under penalty of disbarment or of being in contempt to render gratuitous services for a pauper in a criminal

case, the attorney is not bound to accept an appointment to aid in the prosecution, and hence services rendered pursuant to such an appointment for which the county was under no legal obligation to pay because the appointment was made in advance of or in addition to an appropriation then available for that purpose could not be regarded as having been required without just compensation, within Const. art. 1, § 21, prohibiting taking of property for public use without just compensation.—Board of Com'rs of Clay County v. McGregor, 171 Ind. 634, 87 N. E. 1, transferred from the Appellate court (1908) 42 Ind. App. 688, 85 N. E. 736.

[s] (Sup. 1909)

Burns' Ann. St. 1908, § 7377 et seq., providing for the erection of a partition fence, giving a lien where built by the township trustee for default of the landowner, and prescribing the proceedings for foreclosure, do not violate Const. art. 1, § 21, forbidding the taking of property by law without just compensation.—Collins v. Wilbur, 89 N. E. 372.

[ss] (Sup. 1909)

An order of a railroad commission allowing a railroad a rate less than that which is necessary to save the road from loss in its operation, or to require of shippers a greater charge than is reasonable, amounts to a taking of property without just compensation.—Southern Indiana R. Co. v. Railroad Commission of Indiana, 87 N. E. 966.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 3-12;  
10 CENT. DIG. CONST. LAW, § 888; 36  
CENT. DIG. MUN. CORP. §§ 916, 1435,  
1454.

See, also, 15 Cyc. pp. 559-562.

### § 3. Constitutional provisions.

Construction of constitutional provision in accordance with judicial construction placed on similar provision in former constitution, see CONSTITUTIONAL LAW, § 18.

Statutes as grant of privileges and immunities, see CONSTITUTIONAL LAW, § 205.

[a] (Sup. 1893)

The statute providing for the condemnation of land by public cemeteries is not unconstitutional on the theory that no provision is made for trial, and determination of the question of public necessity.—Farneman v. Mt. Pleasant Cemetery Ass'n, 35 N. E. 271, 135 Ind. 344.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 13.

See, also, 15 Cyc. p. 359; note, 1 L. R. A. (N. S.) 605, 3 L. R. A. (N. S.) 404.

### § 4. Power of state in general.

[a] (Sup. 1866)

The Legislature by section 19 of the internal improvement law of 1836 declared that a release of a right of way was all that was required by the state for the purpose of con-

structing the public works contemplated by that act, and in the face of this declaration it was not in the power of the state to condemn a greater interest than a mere easement.—Edgerton v. Huff, 26 Ind. 35.

[b] (Sup. 1883)

It is within the power of the Legislature to authorize the seizure of the fee of land when that estate is required for a public purpose.—Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 14-18.

See, also, 15 Cyc. p. 565.

### § 6. Delegation of power.

Delegation of power to judiciary, see CONSTITUTIONAL LAW, § 61.

Exercise of delegated power, see post, §§ 54-59.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 24-50.

See, also, 15 Cyc. pp. 566-578.

### § 8. — Construction and operation of legislative acts in general.

Local and special laws, see STATUTES, § 79.

Strict construction of statutes authorizing taking of private property, see STATUTES, § 239.

[a] (Sup. 1866)

Where a simple servitude is sufficient to answer the public want, the courts should, when it is possible by reasonable construction, so limit the legislative enactment.—Edgerton v. Huff, 26 Ind. 35.

[b] (Sup. 1883)

The general improvement act of 1836 authorized the seizure of the fee of lands.—Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134, 46 Am. Rep. 580.

[c] (Sup. 1908)

The power of eminent domain is a special right delegated to individuals or to a corporation by the state, and can be exercised only on the terms and in the manner prescribed by statute.—Westport Stone Co. v. Thomas, 170 Ind. 91, 83 N. E. 617.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 25, 30,  
34, 43, 44.

See, also, 15 Cyc. p. 567.

### § 9. — To municipality.

[a] (Sup. 1872)

1 Gav. & H. St. p. 591, § 16, authorizing road supervisors to enter on land adjoining or near to any highway in a district and construct ditches, drains, and dams, and dig and remove any gravel, earth, sand, or stone, or cut or remove any wood or trees that may be necessary for the proper construction, repair, or preservation of highways, and providing for assessment

of damages, is constitutional.—*Jeffersonville, M. & I. R. Co. v. Daugherty*, 40 Ind. 33.

[b] (Sup. 1874)

A city has no implied power in the nature of eminent domain to condemn lands of individuals for local improvements. The right of eminent domain can only be exercised by a city in virtue of some express legislative grant.—*Allen v. Jones*, 47 Ind. 438.

The forty-third subdivision of the fifty-third section of the act of 1867 for the incorporation of cities, which provides that the common council may enforce ordinances "to construct and regulate sewers, drains, and cisterns, and provides for the payment of the cost of constructing the same," does not confer the power to condemn and appropriate property for the construction of sewers.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Em. Dom. §§ 27-34.

See, also, 15 Cyc. p. 568.

§ 10. — To private corporation.

[a] (Sup. 1856)

A charter provision for condemnation proceedings and assessment of benefits as well as injuries, being in derogation of common right, must be strictly construed.—*Eward v. Lawrenceburgh & U. M. R. Co.*, 7 Ind. 711.

[b] (Sup. 1877)

There is no authority of law for several railroad companies to agree that one of their number shall proceed to appropriate lands for the purpose of afterward dividing it for the benefit of all. Each company must proceed for itself.—*Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205.

[c] (Sup. 1880)

So much of the act entitled "An act to provide for the incorporation of railroad companies," approved May 11, 1852 (1 Rev. St. 1876, p. 696), as relates to the assessment of damages against railroad companies for the taking of land for the construction of their roads, and that part of article 41 of the Code (2 Rev. St. 1876, p. 281) relating to the same subject, must be construed in pari materia, and treated as one enactment.—*Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161.

[d] (App. 1903)

Under the statute declaring that telegraph companies incorporated thereunder shall have power to acquire such real estate and right of way as may be necessary for the purpose of erecting its lines of telegraph and buildings "under the writ of assessment of damages, as fully as if the act in relation to said writ were incorporated and made a part hereof," such corporations have the right and power to condemn land for right of way upon the assessment and payment of damages in the manner prescribed in such act.—*Postal Telegraph Cable*

*Co. of Indiana v. Chicago, I. & L. R. Co.*, 66 N. E. 919, 30 Ind. App. 854.

[e] (Sup. 1906)

Acts 1903, p. 125, § 1 (*Burns' Ann. St. 1905, § 5464a*), relating to the crossing of steam railroads by interurban, suburban, and street railroads, is supplemental to Acts 1901, p. 461, § 5 (*Burns' Ann. St. 1901, § 5468e*), providing generally for condemnation proceedings by interurban and other similar railroads, and the two sections are to be construed as if a part of the same act.—*Terre Haute & L. R. Co. v. Indianapolis & N. W. Traction Co.*, 167 Ind. 193, 78 N. E. 661.

[f] (Sup. 1907)

The word "acquire," as used in *Burns' Ann. St. 1905, § 5468a*, providing that any street railway company desiring to acquire or having acquired any street, interurban, or suburban railroad may exercise the power of eminent domain, includes the obtaining of such a road by lease.—*Mull v. Indianapolis & C. Traction Co.*, 169 Ind. 214, 81 N. E. 657.

A lessee of a railroad cannot condemn lands for a use appurtenant to a way of the lessor, unless expressly so authorized by statute.—*Id.*

Acts 1903, pp. 92, 94, c. 36, conferring the power of eminent domain, provides that any street railroad company having constructed or acquired any street railroad or interurban street railroad shall, in addition to the rights already given by law to street railroad companies, possess the power to receive, acquire, and take, by special proceedings hereinafter provided, lands and other property necessary for the construction of lines for transmission of electricity. *Held*, that it conferred the power upon lessees of street and interurban railroads.—*Id.*

Under the express provisions of Acts 1903, pp. 92, 94, c. 36, a street or interurban railroad company has the power to condemn land for a transmission line which may be on its line of road, or elsewhere, as the company may desire.—*Id.*

[g] (Sup. 1907)

A de facto corporation may exercise the power of eminent domain.—*Smith v. Cleveland, C., C. & St. L. R. Co.*, 170 Ind. 382, 81 N. E. 501.

A consolidated railroad company has a right to exercise the power of eminent domain, if the constituent companies had that power.—*Id.*

Corporations can exercise the power of eminent domain only where such right is expressly granted and the purpose of such right is public.—*Id.*

[h] (Sup. 1909)

The power of eminent domain may be delegated; and a company claiming a delegation of the power has the burden of showing affirmatively a grant of power for the specific purpose for which it proposes to use it.—*Kinney v. Citizens'*

Water & Light Co. of Greenwood, 90 N. E. 129, 26 L. R. A. 195.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 35-48.  
See, also, 15 Cyc. pp. 570-574; notes, 24 L. R. A. 327, 2 L. R. A. (N. S.) 144.

**§ 12. Public use.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 7, 51-54.  
See, also, 15 Cyc. pp. 578-583.

**§ 13. — In general.**

[a] (Sup. 1860)

The law of eminent domain will not authorize the taking of private property for any purpose other than that of public use.—Anderson v. Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

[b] (Sup. 1905)

In determining the ultimate question of public utility, it is necessary to consider all conditions and population, location of markets, the character of the soil, physical features of the locality, and other pertinent circumstances.—Speck v. Kenoyer, 164 Ind. 431, 73 N. E. 896.

[c] (Sup. 1907)

Corporations can exercise the power of eminent domain only where such right is expressly granted and the purpose of such right is public.—Smith v. Cleveland, C., C. & St. L. R. Co., 170 Ind. 382, 81 N. E. 501.

[d] (Sup. 1910)

The convenience necessary to the taking of private property for a public use must be a public convenience.—Glendenning v. Stahley, 91 N. E. 234.

Where the public utility of a proposed taking of property for the establishment of a highway is established, the mere fact that the road will be of special advantage or convenience to certain individuals does not destroy its public character.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 51-53.

**§ 14. — Extent of use or benefit.**

[a] (Sup. 1910)

It is not necessary to make a use public in the sense in which that term is used in condemnation proceedings, that the whole community or any large portion thereof may actually participate in it, but only that a right to its enjoyment exists in the general public; and, if a use is public in this sense, it does not lose this quality merely because of an incidental private advantage.—Sexauer v. Star Milling Co., 90 N. E. 474, 26 L. R. A. 609.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 54.

**§ 16. Particular uses or purposes.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 3, 6, 55-90.

See, also, 15 Cyc. pp. 585-602.

**§ 17. — In general.**

[a] (Sup. 1892)

The exclusive power granted the common council by Rev. St. 1881, § 3161, over the streets and alleys of a city, does not extend to authorizing the construction for private purposes of a log way or elevated platform upon land used in connection with a wharf, so as to obstruct the use of the said wharf, but such power is to be exercised only for the benefit of the general public.—Adams v. Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57.

[b] (App. 1909)

The statute authorizing a condemnation for highway purposes does not permit the taking of land for any other use.—Miller v. Cincinnati, L. & A. Electric St. R. Co., 43 Ind. App. 540, 88 N. E. 102.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 90.

See, also, 15 Cyc. p. 602.

**§ 19. — Highways or other roads or ways.**

[a] Power to establish private roads is not included in the right of eminent domain.—(Sup. 1873) Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; (1874) Stewart v. Hartman, 46 Ind. 331; (1890) Logan v. Stogsdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58.

[b] (Sup. 1880)

No person has a right to open and maintain a highway over the land of another without his consent, where such highway has been found not to be of public utility. So much, therefore, of 1 Rev. St. 1876, p. 533, § 24, as implies that after a contemplated highway, or a change in a highway, has been found not to be of public utility, it may nevertheless be opened or made and maintained by the petitioner therefor, at his own expense, is unconstitutional and void.—Blackman v. Halves, 72 Ind. 515.

[c] (Sup. 1881)

It is settled that unless a highway is of public utility, it cannot be opened across the lands of persons objecting, even though the petitioners are willing to open and maintain it at their own expense; and whether a highway is or is not of public utility is a matter of which the commissioners are informed by the report of the viewers.—Doctor v. Hartman, 74 Ind. 221.

[d] (Sup. 1890)

Act March 9, 1889, entitled, "An act providing for the establishment of branch highways," etc., assumes to provide for the establishment of branch highways to give any freeholder who has no outlet to a highway the

right to petition the board of county commissioners to establish a way, and provides that the owner of the land upon which it is proposed to establish a way may remonstrate on two grounds and no other: "First. That another convenient and less injurious route can be established over his said lands or the lands of another. Second. That the proceeding is wrongful, oppressive or malicious." *Held*, that such act is unconstitutional as it assumes to authorize the seizure of property of one citizen for the benefit of another.—*Logan v. Stogsdale*, 24 N. E. 135, 123 Ind. 372, 8 L. R. A. 58.

[e] (Sup. 1906)

A road is of public utility if required for the public convenience, and it is not required that the road should be absolutely necessary to the public.—*Speck v. Kenoyer*, 164 Ind. 431, 73 N. E. 896.

The taking of land for a public highway is an appropriation for a public use.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 56–58.

See, also, 15 Cyc. pp. 585, 586; note, 16 L. R. A. 81; note, 91 Am. Dec. 585.

§ 20. — Railroads.

[a] (Sup. 1857)

Railroad companies have implied power, under their charters, to make such side tracks, depots, and extensions of their roads as are necessary and reasonable for the accommodation of the company and the public, in the transaction of business, and for such purposes may take private property, making adequate compensation therefor.—*Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650.

[b] (Sup. 1907)

The fact that the predecessor of a railroad company had appropriated land for an embankment or fill on certain premises did not debar the present company from appropriating additional lands for the purpose of raising such embankment.—*Smith v. Cleveland, C., C. & St. L. R. Co.*, 170 Ind. 382, 81 N. E. 501.

Under the express provisions of Burns' Ann. St. 1901, § 5153, cl. 4, a railroad is empowered for purposes of cuttings, embankments, etc., to take as much land as may be necessary within the limits of its charter in excess of the six rods ordinarily allowed for right of way.—*Id.*

Acts 1903, p. 218, c. 121, provides that, "if at any time after the location of the line of any railroad \* \* \* it may appear to the directors \* \* \* that the line thereof is \* \* \* inconvenient or expensive to operate by reason of \* \* \* grades, \* \* \* such directors may make local alteration of the line," and may take possession of the lands embraced in the new location necessary for the construction of the altered line. *Held*, that improvements consisting of widening and raising an embankment

to eliminate a grade were local in character and authorized by the act.—*Id.*

[c] (App. 1909)

A steam railroad company has no authority to appropriate land for the use of an interurban street railway company.—*Miller v. Cincinnati, L. & A. Electric St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 59–67.

See, also, 15 Cyc. pp. 587–592; notes, 3 L. R. A. (N. S.) 512, 20 L. R. A. 434.

§ 23. — Canals.

[a] (Sup. 1877)

Section 9 of act of January 9, 1832, authorized the appropriation of real estate lying along a canal necessary for a wharf or basin.—*Nelson v. Fleming*, 56 Ind. 310.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 69.

See, also, 15 Cyc. p. 594, 6 Cyc. p. 269.

§ 25. — Wharves, piers, or docks.

In connection with canal, see ante, § 23.

[a] (Sup. 1866)

The right to erect a wharf is founded either in the ownership of the soil or the right of eminent domain.—*City of Jeffersonville v. Louisville & J. Steam Ferry Co.*, 27 Ind. 100, 89 Am. Dec. 495.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 71.

See, also, 15 Cyc. p. 600.

§ 31. — Drainage of lands.

[a] (Sup. 1887)

The drainage law of 1883 (Acts 1883, p. 173) is constitutional in the respect that the construction of a drain thereunder is not the taking of private property for a private purpose, nor without just compensation.—*Heick v. Voight*, 110 Ind. 279, 11 N. E. 306.

[b] (Sup. 1896)

The taking of private property for the improvement of drains, which is not authorized unless it be of benefit to either the public health, a public highway, or of public utility, is not a taking for private use, though private persons are especially benefited thereby.—*Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191.

[c] (Sup. 1906)

The taking of private property by condemnation for drainage purposes constitutes a taking for public use.—*City of Huntington v. Amiss*, 167 Ind. 375, 79 N. E. 199.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 77.

See, also, 15 Cyc. p. 594; notes, 49 L. R. A. 781, 1 L. R. A. (N. S.) 208.



**§ 32. — Sewers.**

[a] (Sup. 1874)

Act 1867, relative to the incorporation of cities, does not confer upon cities the power to take lands for the construction of sewers.—*Allen v. Jones*, 47 Ind. 438.

[b] (Sup. 1899)

A city has lawful authority to exercise the right of eminent domain in securing an outlet for its sewage, but no such authority exists as will permit it to seize upon a stream and its margins to relieve consequential damages.—*City of Valparaiso v. Hagen*, 54 N. E. 1062, 153 Ind. 337, 48 L. R. A. 707, 74 Am. St. Rep. 305.

[c] (App. 1908)

Under *Burns' Ann. St. 1901*, § 4443p, towns have a legal right to condemn private property for an outlet for a public sewer.—*Liebole v. Traster*, 41 Ind. App. 278, 83 N. E. 781.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 78.

See, also, 15 Cyc. p. 594.

**§ 34. — Production and supply of oil or gas.**

[a] (Sup. 1892)

The work of supplying natural gas to cities is a public one for which property may be appropriated under the right of eminent domain. Property thus employed is devoted to a public use, and is subject to regulation and control by the state, and the state may delegate such control in whole or in part to municipal corporations in so far as it relates to property thus devoted to such use within their limits. The right of control thus possessed and which may be so delegated includes the power to fix maximum rates that may be charged by the holder of the franchise, unless the state or municipality is restrained by some provision in the charter or grant of the license which amounts to a contract.—*City of Rushville v. Rushville Natural Gas Co.*, 28 N. E. 853, 132 Ind. 575, 15 L. R. A. 321.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 80.

See, also, 15 Cyc. pp. 600, 602.

**§ 35. — Production and supply of electric power or light.**

[a] (Sup. 1906)

*Burns' Ann. St. 1901*, § 4833, authorizing hydraulic companies to condemn land in order to erect dams, is not unconstitutional, on the ground that the use is not a public one.—*Stoy v. Indiana Hydraulic Power Co.*, 76 N. E. 1057, 166 Ind. 316.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 80.

See, also, 15 Cyc. p. 600; note, 2 L. R. A. (N. S.) 842.

**§ 37. — Mills.**

[a] (Sup. 1846)

A canal company might, consistently with the constitution of the state, be authorized by statute to take by eminent domain the land necessary for a site for grist mills, oil mills, carding machines, and woolen factories, on account of their being of public use, proper compensation being made therefor.—*Hankins v. Lawrence*, 8 Blackf. 266.

[b] (Sup. 1910)

*Burns' Ann. St. 1908*, § 927, authorizes the condemnation of land to be used in connection with the erection of milldams. Const. art. 1, § 21, provides that no property shall be taken for public use without a just compensation being made therefor. *Held*, that the taking of land to be overflowed by a dam, erected by a flour mill company, is a use that is of a public character, and land may be condemned for such use.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 82.

See, also, 15 Cyc. p. 596.

**§ 42. — Cemeteries.**

Persons entitled to raise question of constitutionality of statute, see CONSTITUTIONAL LAW, § 42.

[a] (Sup. 1893)

The appropriation of land for a public cemetery is an appropriation for a public use.—*Farneman v. Mt. Pleasant Cemetery Ass'n*, 135 Ind. 344, 35 N. E. 271.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 89.

See, also, 15 Cyc. p. 600.

**§ 44. Property subject to appropriation.****FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 91-130.

See, also, 15 Cyc. pp. 602-629; note, 9 Am. St. Rep. 137.

**§ 45. — In general.**

[a] (Sup. 1859)

The ground occupied by an existing corporation may be taken, if authorized by the legislature, by a subsequent chartered company on making compensation.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 94-100, 102, 106.

See, also, 15 Cyc. p. 602; note, 1 L. R. A. (N. S.) 605.

**§ 46. — Public property.**

[a] (Sup. 1852)

The legislature may take public property for any particular public use, or delegate an

authority to do so to a company, without making any provision for compensation.—*Indiana Cent. R. Co. v. State*, 3 Ind. 421.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 91-93.

See, also, 15 Cyc. p. 611.

**§ 47. — Property previously devoted to public use.**

[a] (Sup. 1852)

Section 16 of the charter of the Peru & Indianapolis Railroad Company, which declares that when said corporation shall have procured the right of way through land, either by voluntary release or condemning the same, it shall be seized in fee simple of the right to such land, and shall have the sole use and occupancy of the same, does not give the corporation the right to the exclusive possession of the land occupied by the road, but vests the fee simple subject to the right of the state to take the lands granted, on compensation made, for the public use.—*Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464.

The Newcastle & Richmond Railroad Company is authorized, under its charter, to have a sufficient quantity of the land over which the Peru & Indianapolis Railroad passes for the purposes of its road, and the fee simple vested in itself; but this will be held subject to the right of way of the Peru & Indianapolis Railroad Company.—*Id.*

[b] (Sup. 1832)

Land and buildings held by a township for school purposes may be appropriated for highways, the same as private property.—*Rominger v. Simmons*, 88 Ind. 453.

[c] (Sup. 1835)

Lands once taken for a public use cannot, under general laws, without an express act of the legislature for that purpose, be appropriated by proceedings in invitum to a different public use.—*Baltimore & O. & C. R. Co. v. North*, 3 N. E. 144, 103 Ind. 486.

[d] In the absence of express statutory authority therefor, a city has no right to condemn, for the purpose of a public street, land held and used by a railroad company for its depot and track.—(Sup. 1890) *City of Valparaiso v. Chicago & G. T. R. Co.*, 123 Ind. 467, 24 N. E. 249; (1891) *City of Seymour v. Jeffersonville, M. & I. R. Co.*, 126 Ind. 466, 26 N. E. 188.

[e] (Sup. 1891)

Land already appropriated to a public use cannot be appropriated to another public use, in the absence of a statute clearly conferring authority to make a second seizure.—*City of Seymour v. Jeffersonville, M. & I. R. Co.*, 26 N. E. 188, 126 Ind. 466.

[f] (Sup. 1892)

The rule which allows the construction of streets and other public highways across railroad tracks does not permit them to be so con-

structed, where, by so doing, the railroad would be unable to use its tracks at the point of the crossing for the purpose for which they were constructed, but the crossing must occur at a point where the use of the highway or street will not deprive the railroad of the use of its tracks.—*City of Ft. Wayne v. Lake Shore & M. S. R. Co.*, 32 N. E. 215, 132 Ind. 558, 18 L. R. A. 367, 32 Am. St. Rep. 277.

Private corporations acquire the right to construct roads subject to the dominant right of the state to cross the same whenever the public necessity demands that new roads or streets should be opened, but this right of the state does not authorize a municipal corporation in the absence of legislation expressly or by necessary implication authorizing it to take part of the right of way of the railroad company by the construction of a public street opened longitudinally therewith.—*Id.*

Where land is appropriated pursuant to legislative authority to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with and which in the actual circumstances must necessarily supersede the former use, unless such appear by express words or by necessary implication to be the legislative intent.—*Id.*

[g] (Sup. 1892)

A grant of authority to a city to appropriate lands for the purpose of a street will authorize the construction of a street across a railway.—*Lake Erie & W. R. Co. v. City of Kokomo*, 130 Ind. 224, 29 N. E. 780.

[h] (Sup. 1894)

A street cannot be extended through the yards, and across the tracks of a railroad company, where to do so would require the destruction and removal of a turntable, water tank, engine house, and coal dock, though such structures might be rebuilt and conveniently used on other land of the railroad in the vicinity.—*Cincinnati, W. & M. R. Co. v. City of Anderson*, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285.

Though under the general law, permitting suits to establish streets, a city has implied power to extend streets transversely across a railroad right of way if in so doing the uses for which such right of way is employed are not materially injured or destroyed, and the uses of the land for a street may coexist without impairment of the first uses, where such uses cannot coexist, or where the first use is materially impaired or destroyed, the second public use will be denied.—*Id.*

[i] (Sup. 1895)

The fact that property has already been appropriated for one public use is no objection to the appropriation, on a proper proceeding, for another public use not inconsistent with the former.—*Steele v. Empson*, 41 N. E. 822, 142 Ind. 397.

The objection that property taken for the construction of a public ditch under the drainage act has already been appropriated for a railroad can only be urged by the railroad company.—Id.

[j] (Sup. 1897)

Under Act March 6, 1891, providing that the common councils of cities may condemn the right of way or other lands of railroad companies, whether occupied or not, for use as streets, a city could appropriate property used by a railroad to a second public use, though the same was inconsistent with the first use.—City of Terre Haute v. Evansville & T. H. R. Co., 46 N. E. 77, 149 Ind. 174, 37 L. R. A. 189.

While the Legislature may not amend or otherwise materially modify the special charter of a corporation unless the power is expressly renewed, yet the property of the corporation devoted to the public use is subject to condemnation for a second public use at the will of the Legislature.—Id.

Land once appropriated to a public use by a railroad company cannot be condemned by a city to inconsistent public uses, unless the statute expressly or by necessary implication authorizes such second appropriation.—Id.

[k] (Sup. 1898)

A city may, for street purposes, appropriate the property of a railroad company used by it in the operation of its road.—Powell v. City of Greensburg, 49 N. E. 955, 150 Ind. 148.

[l] (Sup. 1898)

Lands appropriated to one public use are not, in the absence of special authority, subject to condemnation for another and inconsistent public use. A railroad company holding property for the uses of a railway may, however, part with the same for another public use. It may do so by express grant, and it may waive the protection of the law and become bound by the principles of waiver and estoppel under which an individual may surrender his lands to the easement of a street or highway arising from adverse user.—Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 50 N. E. 741, 150 Ind. 536.

[m] (Sup. 1900)

The rule that land once appropriated to a public use by virtue of the power of eminent domain cannot be subjected to a second appropriation for such use, unless authorized by the legislature, applies only when the second public use necessarily supersedes or destroys the former.—Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson County, 58 N. E. 837, 59 N. E. 856, 156 Ind. 260.

[n] (Sup. 1902)

An hydraulic company organized under Burns' Rev. St. 1901, § 4827 et seq. (Rev. St. 1881, § 3696 et seq.; Horner's Rev. St. 1901, § 3696 et seq.) authorizing the incorporation of such companies, and which files an instrument for the appropriation of real estate with the

clerk of court, as required by the act, may include therein and condemn lands purchased by a similar corporation incorporated prior to the corporation condemning the land for the purpose of constructing similar works, but which has failed to file an instrument of appropriation, though the water power in question is only capable of being utilized by one company.—Indiana Power Co. v. St. Joseph & E. Power Co., 159 Ind. 42, 63 N. E. 304, 64 N. E. 468.

[o] (Sup. 1902)

Every railroad corporation acquires its right of way subject to the right of the state to extend public highways and streets across such right of way.—Baltimore & O. S. W. R. Co. v. State ex rel. Greenwood, 65 N. E. 508, 159 Ind. 510.

[p] (App. 1903)

Under Rev. St. U. S. 1878, § 3964 (U. S. Comp. St. 1901, p. 2707), establishing as postroads all railroads, and section 5263 (U. S. Comp. St. 1901, p. 3579), declaring that any organized telegraph company shall have the right to construct and operate lines of telegraph over and along any postroads of the United States, but not so as to obstruct the ordinary travel thereon, and the statutes of the state giving to such companies the right to condemn land for right of way, a telegraph company incorporated in the state may acquire a right of way for its lines over and along the right of way of a railroad company, when such use will not materially interfere with the use for which the land was originally condemned by the railroad company.—Postal Telegraph Cable Co. of Indiana v. Chicago, I. & L. R. Co., 66 N. E. 919, 30 Ind. App. 654.

[q] (App. 1903)

Act 1901, p. 461 (Burns' Rev. St. 1901, § 5468a, subd. 5), which conferred authority upon an interurban street railway "to construct its road upon or across any stream of water, water course, road, highway, railroad or canal, \* \* \* which the route of its road shall intersect," does not purport to authorize it to appropriate a railroad right of way longitudinally in whole or in part.—Indianapolis & V. R. Co. v. Indianapolis & M. Rapid Transit Co., 67 N. E. 1013, 33 Ind. App. 337.

The condemnation of a railroad right of way for street railway purposes was not shown to be necessary so as to warrant a holding that it was conferred by necessary implication, where it was merely claimed that, unless the railroad way was condemned, the street railway would "be compelled to diverge from its right of way as surveyed and located to such an extent and in such a manner as it will render hazardous, dangerous, and impracticable the constructing of its lines and the operation of its cars."—Id.

To warrant the condemnation of land already appropriated to a public use, the power of condemnation must be conferred by the Legislature in express terms or by necessary implication.—Id.

[r] (Sup. 1904)

The fact that a proposed street crosses railroad tracks is not of itself sufficient to enable the railroad company to defeat the opening of the street and appropriation of its land therefor.—*Pittsburgh, C., C. & St. L. R. Co. v. Town of Wolcott*, 69 N. E. 451, 162 Ind. 399.

[s] (Sup. 1907)

Where the law under which two railroads are incorporated does not grant them a specific right of way, and one company seeks to condemn property purchased by the other, their respective rights must be solved by priority of location, accomplished by some public act tending to commit the company to a definite location.—*Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

A railroad company cannot, simply by running its preliminary line and purchasing, as an ordinary purchaser, the land over which its survey has been extended, so impress such lands with a public character as to pre-empt them as against another company, which has done what is necessary under the statute to subject the property to the servitude of a railway.—*Id.*

[t] (Sup. 1903)

In one sense, the property of a railroad company is private, and as such is within the protection of the federal and state Constitutions; but it is also subject to due regulation as devoted to a public use in a limited sense for the purposes of a public highway.—*Pittsburgh, C., C. & St. L. R. Co. v. Railroad Commission*, 171 Ind. 189, 86 N. E. 328.

[u] (Sup. 1908)

The adoption by the promoted railroad company of the promoters' acts in locating and purchasing the right of way, upon their conveyance of the land to it after the other railroad had appropriated the land by eminent domain proceedings, could not relate back to the preliminary location and purchase by the promoters and become effective as of that date, so as to divest the servitude placed thereon by the eminent domain proceedings, but was of no more legal effect than would have been a new contract of the same date.—*Toledo & I. Traction Co. v. Toledo & C. I. R. Co.*, 171 Ind. 213, 86 N. E. 54.

The conveyances of the land by the individuals to the contemplated railroad upon its incorporation subsequent to the appropriation of the land by condemnation proceedings of the other railroad, and consequently with a servitude fastened thereon, did not confer on the company any better right to the land than the individuals had at the time of conveyance.—*Id.*

Where individuals not invested by statute with any right to condemn land for a railroad right of way, purchased land for the right of way of an unorganized railroad which they were promoting and intended to incorporate in the

future, and caused the right of way to be surveyed and staked off, their contracts with the landowners were their individual contracts, not the contracts of the proposed railroad, and did not withdraw the land from the power of the state to appropriate it for a public use, and hence another duly organized railroad could condemn the land under the eminent domain act for a right of way.—*Id.*

[v] (App. 1908)

An interurban railway has the right to cross the tracks of a railway company in a street of a town through which it has a franchise, since the construction of such interurban railway is not an additional servitude.—*Cleveland, C., C. & St. L. R. Co. v. Feight*, 41 Ind. App. 416, 84 N. E. 15.

[w] (Sup. 1909)

Where the right to maintain a milldam with a gristmill has been secured by condemnation, and it is subsequently run almost wholly for private use or benefit, and does little grinding for toll, the dam may be taken for public use by drainage commissioners to remove obstacles to the flow, and thus prevent overflows of the river which injured adjacent roads and created pools of stagnant water which became a menace to health.—*Zehner v. Milner*, 172 Ind. 493, 87 N. E. 209, 24 L. R. A. (N. S.) 383.

[x] (App. 1909)

A railroad company cannot condemn property already devoted to a public use.—*Miller v. Cincinnati, L. & A. Electric St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 107-120.

See, also, 15 Cyc. pp. 612-629; note, 2 L. R. A. (N. S.) 227; notes, 24 Am. Rep. 351, 40 Am. Rep. 748.

#### § 49. — Limited estates or interests.

[a] (Sup. 1894)

A purchaser takes title with the implied paramount right of the public to acquire the property under the right of eminent domain, and a lienor takes his mortgage and makes his loans with notice of that paramount right, and must submit to its subsequent exercise.—*Murphy v. Beard*, 38 N. E. 33, 138 Ind. 560.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 98, 101.

See, also, 15 Cyc. p. 611.

#### § 52. — Exemptions.

[a] (Sup. 1906)

Burns' Ann. St. 1901, §§ 4708d, 4708e, 4708f, providing for enjoining the construction of a railroad on any ground held, used, or occupied as a cemetery, or held for cemetery purposes, protects not only that part of the cemetery where there are graves, but includes all reasonable additions, even though they are not

occupied by graves.—*McCann v. Trustees of Mt. Gilead Cemetery*, 77 N. E. 1090, 166 Ind. 573.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. §§ 121-130.

See, also, 15 Cyc. p. 611.

**§ 54. Exercise of delegated power.**

Conclusiveness and effect, see post, § 68.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. §§ 135-160.

**§ 55. — In general.**

[a] (Sup. 1909)

The delegated power of eminent domain can be exercised only within the strict terms of the grant, and a company claiming a delegation of the power has the burden of showing affirmatively a grant of power for the specific purpose for which it proposes to use it.—*Kinney v. Citizens' Water & Light Co. of Greenwood*, 90 N. E. 129, 26 L. R. A. 195.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. § 135.

**§ 56. — Necessity for appropriation.**

Conclusiveness of legislative determination as to necessity, see post, § 67.

Delegation of power to determine necessity to judiciary, see CONSTITUTIONAL LAW, § 61.

Necessity for appropriation of property previously devoted to public use, see ante, § 47.

[a] (Sup. 1893)

*Elliott's Supp.* § 864, authorizing the trustees of any public cemetery corporation to file a petition for the appointment of appraisers to assess the value of land necessary for cemetery uses, is not unconstitutional, as delegating to the trustees power to determine the necessity for the appropriation of lands.—*Farneman v. Mt. Pleasant Cemetery Ass'n*, 135 Ind. 344, 35 N. E. 271.

[b] (Sup. 1909)

Acts 1905, p. 398, c. 129, § 256 (*Burns' Ann.* St. 1908, § 8941), provides that any corporation engaged in the business of providing a city or town and its inhabitants with water as provided for in the two former sections may acquire such real estate and rights of way as may be necessary for its business by eminent domain. Section 254, p. 396 (*Burns' Ann.* St. 1908, § 8939), referred to, authorizes a city or town to contract with any person or corporation to furnish it and its inhabitants with water, etc. *Held*, that assuming that a water company could condemn land for a stub switch, connecting its plant with a railroad, to entitle it to do so, the use of the switch must be made to appear, at least, reasonably necessary to the performance of the charter powers and public obligations of the corporation, and a mere showing that the desired switch would afford it an economical and convenient facility in carrying on its business, which would enable it either to make greater profits or to serve its patrons

at lower rates, in that it would be relieved from transporting fuel and other supplies from the railroad to its plant by means of teams and wagons, is insufficient.—*Kinney v. Citizens' Water & Light Co. of Greenwood*, 90 N. E. 129, 26 L. R. A. 195.

A water company could not condemn such a right of way for the use of a railroad company to be under the control of such company, and to become a constituent part of its railway system.—*Id.*

Acts 1895, p. 243, c. 123, § 1 (*Burns' Ann.* St. 1908, § 5123), provides that waterworks companies may condemn lands for the source of supplies, pumping stations, settling basins, filtering basins or tanks, storage reservoirs, supply mains, delivery reservoirs, tank or stand pipes, and delivery mains, and the necessary lines of pipe connecting them. Acts 1905, p. 398, c. 129, § 256 (*Burns' Ann.* St. 1908, § 8941), provides that any corporation engaged in the business of providing any city or town and its inhabitants with water, as provided for in the previous two sections, may condemn such real estate and rights of way as may be necessary for its business. Section 254, p. 396 (*Burns' Ann.* St. 1908, § 8939), authorizes a city or town to contract with any person or corporation to furnish it and its inhabitants with water, etc. *Held*, that the phrase "real estate and rights of way" means such only as may be reasonably necessary to such companies for construction and maintenance of its works, laying and maintenance of pipe lines, mains, and conduits, and for the erection and maintenance of poles, wires, and other proper structures and appliances, and not such ways of railway communication as might become expedient and desirable because of an unfavorable location of the power plant, voluntarily chosen, and hence a right of way for a stub switch connecting its plant with a railroad could not be condemned by such a company.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. §§ 147-160.

See, also, 15 Cyc. p. 632.

**§ 58. — Extent of appropriation.**

[a] (Sup. 1887)

An extension of 200 rods for the Indianapolis & Cincinnati Railroad track beyond the depot was *held* not unreasonable.—*Protsman v. Indianapolis & C. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650.

[b] (Sup. 1866)

The power to appropriate property in any manner, without the consent of the owner, is in derogation of private right, and such appropriation should not interfere further than public necessity requires, with the right of the owner to enjoy his property.—*Edgerton v. Huff*, 26 Ind. 35.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. §§ 147-160.

See, also, 15 Cyc. pp. 632-638.

### § 59. — Exhaustion or further exercise of power.

[a] (Sup. 1885)

Under a power "to enter upon and take possession of, and use all and singular any lands, streams, and materials \* \* \* necessary for the prosecution and completion" of a railroad, held, that the company was entitled to make successive appropriations as the necessities of the work required.—*Peck v. Louisville, N. A. & C. R. Co.*, 101 Ind. 366.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 143-145.

See, also, 15 Cyc. pp. 576, 577.

### § 63. Acts constituting appropriation of property.

Acts constituting exercise of power of eminent domain, see ante, § 2.

[a] (Sup. 1892)

Taking possession and grading a right of way by a railroad company, so as to make it part of a continuous roadbed nearly 100 miles in length, was such an appropriation of the land as to give the owner thereof a right of action for damages at that time.—*Harshbarger v. Midland R. Co.*, 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 161-164.

See, also, note, 26 Am. Rep. 457.

### § 65. Determination of questions as to validity of exercise of power.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 165-170.

See, also, 15 Cyc. pp. 630-632; note, 42 Am. St. Rep. 406.

### § 66. — Jurisdiction of courts in general.

[a] (Sup. 1910)

Whether a particular use is public or private is a question of law.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 165-167.

See, also, 15 Cyc. pp. 630-632; note, 88 Am. St. Rep. 926.

### § 67. — Conclusiveness and effect of legislative action.

[a] (Sup. 1872)

The necessity for a condemnation of land for public use must be determined by the legislature, and cannot be questioned by the courts.—*Water Works Co. of Indianapolis v. Burkhardt*, 41 Ind. 364.

[b] (Sup. 1886)

While the ultimate determination of the public character of a use for which property is proposed to be condemned is for the courts,

there is a presumption in favor of the public character of a use for which a taking is authorized by the legislature.—*Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761.

[c] (Sup. 1892)

The right of eminent domain is to be exercised only when public necessity or convenience requires it, but, when the Legislature has declared such necessity, the courts cannot question the wisdom of the declaration.—*Consumers' Gas Trust Co. v. Harless*, 29 N. E. 1062, 131 Ind. 446, 15 L. R. A. 505.

[d] (Sup. 1905)

Whether private property should be taken for public use in a particular instance is a legislative question where the use is public in its nature.—*Speck v. Kenoyer*, 164 Ind. 431, 73 N. E. 896.

[e] (Sup. 1907)

Where the Legislature has authorized the taking of lands for the use declared in a complaint in condemnation proceedings, the court will not decline to acknowledge it a public use, merely because of an incidental private advantage, unless it is manifest that the proposed use does not imply a right in the general public to its enjoyment.—*Mull v. Indianapolis & C. Traction Co.*, 169 Ind. 214, 81 N. E. 637.

[f] (Sup. 1910)

A presumption exists in favor of the public character of a use declared by the Legislature to be public, but it is not conclusive upon the courts.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 165-167.

### § 68. — Conclusiveness and effect of exercise of delegated power.

[a] (Sup. 1886)

Unless it is apparent at first blush that the proposed use for which property is desired to be condemned is not public, courts cannot interfere with the discretion confided to a municipal body in doing that which the statute expressly authorizes.—*Town of Rensselaer v. Leopold*, 5 N. E. 761, 106 Ind. 29.

[b] (Sup. 1900)

Under *Burns' Rev. St. 1894*, §§ 5655, 5656, 5658-5661, vesting a county board with jurisdiction to establish public drains, the board has power to locate such ditches as are necessary on the right of way of a railroad company; and, having such jurisdiction, the question as to whether such secondary use of the right of way is so inconsistent with the former use as to supersede the latter becomes a question of fact for the determination of the board, and an order of a board allowing a drain in part on the right of way of a railroad company is not void because of absence of jurisdiction.—*Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jack-*

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son County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 850.

[c] (Sup. 1905)

Burns' Ann. St. 1901, § 6006, provides for the condemnation of land by a township for school purposes whenever necessary in the opinion of the township trustee. *Held*, that the power conferred on the trustee is absolute, and the courts have no jurisdiction to review the exercise of the trustee's discretion.—*Richland School Tp. v. Overmyer*, 73 N. E. 811, 164 Ind. 382.

Where it is proper to delegate to individuals or corporations the power to appropriate property, it is competent to delegate the authority to decide on the necessity or expediency for the taking.—*Id.*

A judicial hearing on the question of the propriety or necessity for exercising the right of eminent domain is not necessary, since the exercise of the power is one of political sovereignty.—*Id.*

[d] (Sup. 1906)

Under the eminent domain act (Acts 1905, p. 59; Burns' Ann. St. 1905, §§ 893-904), railroad companies have a right to determine on the necessity for taking land for a right of way without submitting that question to a court or jury.—*Vandalia Coal Co. v. Indianapolis & L. R. Co.*, 168 Ind. 144, 79 N. E. 1082.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 163-170.

## II. COMPENSATION.

Damages recoverable in action by property owner, see post, §§ 301-304.

Evidence as to compensation, see post, §§ 199-205.

### (A) NECESSITY AND SUFFICIENCY IN GENERAL.

#### § 69. Necessity of making compensation in general.

[a] (Sup. 1857)

The legislature cannot authorize the taking of private property for public use without providing a fair compensation to the owner.—*Evansville & C. R. Co. v. Dick*, 9 Ind. 433.

[b] (Sup. 1864)

Const. art. 1, § 21, expressly prohibits the taking of private property for public use by a corporation, unless just compensation therefor be first assessed and tendered.—*Sidener v. Norristown, H. & St. L. Turnpike Co.*, 23 Ind. 623.

[c] (Sup. 1865)

Even if the ground used for a railway owned by a private corporation might be appropriated, in whole or in part, for a common highway, under the right of eminent domain, yet it cannot be thus appropriated without being paid

for.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

[d] (Sup. 1879)

A condemnation of designated lands that will be overflowed by the construction of a dam in a water course, pursuant to 1 Rev. St. 1876, p. 832, § 12, does not confer upon the party condemning such land any easement, appurtenant to the land so appropriated, of the right to overflow other land lying higher up on the stream.—*Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

[e] (Sup. 1885)

Rev. St. 1881, § 3073, providing that the grade of a street shall not be changed "until the damages occasioned by such change shall have been assessed and tendered," implies that, where there is no injury, there need be no assessment.—*City of Kokomo v. Mahan*, 100 Ind. 242.

[f] (App. 1906)

The Legislature cannot delegate the power of eminent domain, so as to take private property without compensation.—*Lewis Tp. Imp. Co. v. Royer*, 38 Ind. App. 151, 76 N. E. 1068.

[g] (Sup. 1907)

The owner of a steam railroad is not entitled to compensation for the crossing of its track at a public highway intersection by an electric interurban road built on the highway with the consent of the board of county commissioners.—*South East & St. L. R. Co. v. Evansville & Mt. V. Electric R. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916.

[h] (Sup. 1908)

Neither a natural person nor a corporation can claim damages on account of being compelled to comply with a police regulation designed to secure the public health, safety, or welfare.—*Cincinnati, I. & W. R. Co. v. City of Cincinnati*, 170 Ind. 316, 83 N. E. 503.

[i] (App. 1908)

Property owners have a constitutional right to compensation for land taken for public purposes.—*Posey Tp. of Franklin County v. Senour*, 42 Ind. App. 580, 86 N. E. 440.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 171-179.

See, also, 15 Cyc. p. 639.

#### § 70. Constitutional provisions.

Persons entitled to raise constitutional questions, see CONSTITUTIONAL LAW, § 42.

[a] (Sup. 1906)

Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation, is not a restraint on the exercise of the police power for the public welfare by which a particular use of property once lawful may be forbidden or property wholly destroyed without compensation, and without the fault of the owner.—*State v. Richcreek*, 77 N.

E. 1085, 167 Ind. 217, 5 L. R. A. (N. S.) 875, 119 Am. St. Rep. 491.

[b] (Sup. 1907)

Burns' Ann. St. 1901, § 5905f, authorizing the county superintendent of schools to revoke teachers' licenses for specified grounds, does not violate Const. art. 1, § 21, providing that property shall not be taken without just compensation.—Stone v. Fritts, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. (N. S.) 1147.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 174, 175.

See, also, 15 Cyc. p. 639; note, 18 L. R. A. 160.

### § 71. Sufficiency of statutory provisions for compensation.

[a] (Sup. 1865)

A provision in the charter of a railroad corporation that the proprietor of lands proposed to be taken for the use of such corporation shall file with the company his claim for damages, that the company shall appoint disinterested men to award them, and that, if either party is dissatisfied with the award, he may appear to a jury, is, except as to nonresidents and persons under a disability, constitutional.—New Albany & S. R. Co. v. Connelly, 7 Ind. 32.

[b] (Sup. 1907)

Acts 1905, p. 61, c. 48, § 5, after providing that a defendant in condemnation proceedings may object to such proceedings on jurisdictional grounds or for lack of power in plaintiff to exercise the right, provides that defendant may object, for any other reason disclosed in the complaint or set up in such objections, and forbids further pleading except the answer provided for in section 8. Section 8 (page 63) provides that the owner may file exceptions to the assessment of damages and cause the proceedings to advance to issue and be tried as in a civil action. The act further provides that the appraisers and the court or jury trying the case upon such exceptions shall assess all damages, both direct and consequential. Section 11 provides that any person whose land may thereafter be taken for public use without having been first appropriated under this or any prior law may proceed to have his damages assessed under this act. *Held*, that the act did not permit a taking of private property without just compensation, in contravention of Const. art. 1, § 21.—Vandalia Coal Co. v. Indianapolis & L. R. Co., 168 Ind. 144, 79 N. E. 1082.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 180-187.

See, also, 15 Cyc. pp. 640-647.

### § 73. Necessity of payment before taking.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 188-204; 25 CENT. DIG. High. § 359.

See, also, 6 Cyc. p. 270, 15 Cyc. pp. 775-782.

### § 74. — In general.

[a] (Sup. 1838)

The statute of 1832 relating to the Wabash & Erie Canal, and authorizing the appropriation of private property for public uses, and providing for the subsequent compensation for the property so appropriated, was not unconstitutional.—Rubottom v. McClure, 4 Blackf. 505.

[b] (Sup. 1846)

It is not essential to the validity of a statute authorizing a canal company to take land necessary for constructing the canal and hydraulic works to be connected with it, and also for works necessary for its navigation, that it should require the land to be paid for before it is taken and used, under the constitution, providing that no man's property shall be taken or applied to public use without just compensation being made therefor.—Hankins v. Lawrence, 8 Blackf. 266.

[c] (Sup. 1848)

The constitutional prohibition against taking private property for public uses without compensation being made therefor does not require that compensation shall be made before the taking of the property, but leaves it open for the legislature to prescribe the mode in which the amount of compensation shall be ascertained and the time of payment.—McCormick v. Town of Lafayette, 1 Ind. 48, Smith, 83.

[d] (Sup. 1859)

The damages assessed for land taken for a railroad must be tendered before a right to enter can accrue; but, if it is important for the railroad to enter immediately, and before an appeal from the assessment can be determined, the tender and acceptance so made will not preclude them from having the damages reduced on the appeal.—Indianapolis & C. R. Co. v. Brower, 12 Ind. 374.

[e] (Sup. 1863)

Where a railroad corporation takes the private property of infant owners for public use, it is excused from demanding a relinquishment from such owners or from offering to them compensation, although such demand and offer be ordinarily required by their charter to precede such taking of individual property.—Indiana Cent. Ry. Co. v. Oakes, 20 Ind. 9.

[f] An injunction will lie to restrain a turnpike company from entering upon lands for the purpose of constructing its road before compensation has been legally assessed and tendered.—(Sup. 1864) Sidener v. Norristown, H. & St. L. Turnpike Co., 23 Ind. 623; (1866) Norristown, H. & St. L. Turnpike Co. v. Burket, 26 Ind. 53.

[g] (Sup. 1871)

Where the land of a citizen is not actually appropriated in the making of street and alley improvements, the owner is not entitled to have the damages first assessed and tendered; but where it becomes necessary, in making such im-



provements, to appropriate and use the real estate of a citizen, his damages must be first assessed and tendered.—*City of Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

[h] (*Sup.* 1872)

The damages need not be assessed or tendered before entering on the lands if the statute provides a reasonably convenient opportunity to obtain the compensation.—*Jeffersonville, M. & I. R. Co. v. Daugherty*, 40 Ind. 33.

[i] (*Sup.* 1874)

Under the constitution of 1851, the owner of land appropriated by a railroad company cannot be required to initiate proceedings, under the statute, for the assessment of damages for such appropriation. It is the duty of the railroad company to have the damages assessed, and to tender the same before taking the land. This necessarily follows from the provision of the constitution that no man's property shall be taken by law without just compensation, nor, except in case of the state, without such compensation being first assessed and tendered. All decisions of this court asserting a contrary doctrine are overruled.—*Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

[j] (*Sup.* 1874)

When a landowner enters into a written contract with a railroad company to sell, and, within a specified time, to convey to such company a strip of ground for a roadbed, and gives possession to the purchaser, who thereupon proceeds to construct the road through such land, the vendor cannot enjoin the use and possession thereof by the railroad company, when the latter is not in default in performing the terms of the contract. By the agreement to sell and convey, the seller waives his constitutional right to have his damages assessed and tendered before possession can be taken by the railroad company.—*Baltimore, P. & C. R. Co. v. Highland*, 48 Ind. 381.

[k] (*Sup.* 1877)

Lands cannot be taken for the purpose of the construction of a railroad without first tendering to the owner all damages occasioned by the taking.—*Aurora & C. R. Co. v. Miller*, 56 Ind. 88.

[l] (*Sup.* 1877)

Under Act Jan. 9, 1832, providing for the construction of the Wabash & Erie Canal, the assessment of damages to be made in favor of the owner of lands appropriated for the purpose of the construction of the canal was to be made after the appropriation.—*Nelson v. Fleming*, 56 Ind. 310.

[m] (*Sup.* 1882)

A railroad is not entitled to possession of lands sought to be condemned for right of way until after payment of full compensation therefor.—*Lake Erie & W. R. Co. v. Kinsey*, 87 Ind. 514.

[n] (*Sup.* 1836)

Where the assessment of benefits in favor of a landowner for the improvement of a drain exceeds the assessment of damages, he cannot require the payment of the damages assessed, before his property is taken for such purpose.—*Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191.

[o] (*Sup.* 1908)

Under the Constitution the right of eminent domain cannot be enjoyed by the public, except on condition that full compensation for all damage to private property for that taken or injured shall be first paid or tendered.—*Cincinnati, I. & W. R. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 188-197;

10 CENT. DIG. Const. Law, § 879.

See, also, 15 Cyc. p. 775.

§ 75. — Taking by state or municipality.

[a] (*Sup.* 1848)

The "act authorizing the president and trustees of the town of Lafayette, to open and grade streets and construct side walks in said town," approved January 19, 1846, is constitutional, and authorizes said corporation in certain cases to use private property without first making compensation therefor.—*McCormick v. Town of Lafayette*, 1 Ind. 48, Smith, 83.

[b] (*Sup.* 1859)

Taking land for highways is a taking by the state, for which compensation need not be made before the taking, under Const. art. 1, § 21.—*Dronberger v. Reed*, 11 Ind. 420.

[c] (*Sup.* 1860)

Acts 1857, p. 61, §§ 59, 60, do not require a city, in improving the streets, to tender and assess compensation for the injury caused abutting owners to them before the city proceeds in the contemplated improvement.—*City of Lafayette v. Spencer*, 14 Ind. 399.

[d] (*Sup.* 1862)

Where a city desires to appropriate the property of an abutting owner for purposes of a street, it must first comply with the provisions of the law as to the assessment and tender of damages.—*City of Lafayette v. Bush*, 19 Ind. 326.

[e] (*Sup.* 1872)

It is not necessary to the taking of property by the state that the damages of the aggrieved party be first assessed or tendered, if, by statutory provision, the injured party is afforded a reasonable and convenient opportunity to obtain compensation.—*Jeffersonville M. & I. R. Co. v. Daugherty*, 40 Ind. 33.

[f] (*Sup.* 1876)

The entering upon or taking the property of another, by a road supervisor, is a taking by the state, and does not require prepayment, be-

cause it falls within the exception contained in Const. art. 1, § 21, which ordains that no man's property shall be taken by law without just compensation, nor, "except in case of the state," without just compensation first assessed and tendered.—*McOsker v. Burrell*, 55 Ind. 425.

[g] (Sup. 1878)

An order of the board of county commissioners in highway proceedings that the highway shall be located and established whenever the petitioners shall pay to a certain remonstrator the sum of \$25 should be construed in accordance with Highway Act, § 25, prohibiting the opening of a highway until the assessed damages are paid, as meaning to direct that the road should not be opened and worked until such \$25 was paid.—*Suits v. Murdock*, 63 Ind. 73.

Under Highway Act, § 25 (1 Rev. St. 1876, p. 533), providing that no highway shall be opened, worked, or used until the damages assessed therefor are paid or deposited in the county treasury, a highway may be legally laid out and established before the damages are paid or deposited, but cannot be opened or used until that is done.—*Id.*

[h] (Sup. 1879)

A. brought suit against a city to enjoin it from opening a street through his land until the damages should be paid. The answer alleged that the land, at the time proceedings to take the same were begun, was, and for many years before had been, an open and public street and highway of said city; that all the interest A. had in the land was the ownership of the fee, subject to a perpetual easement of a street and highway over the land; and that the proceedings to take the land were had by the city by mistake and ignorance of these facts. *Held*, on demurrer, that the answer was not sufficient, since the facts alleged therein did not show that the ground appropriated was a street by user, by grant, by dedication, or appropriation, or that it was established in any manner known to the law.—*City of Elkhart v. Simonton*, 69 Ind. 196.

[i] (Sup. 1894)

The damages awarded for the taking of lands by a municipality are payable as soon as the assessment of the same is confirmed, unless the municipality exercises the privilege expressly conferred by Rev. St. 1881, § 3176, by declaring that payment of the damages assessed shall be paid as therein provided.—*City of Terre Haute v. Blake*, 36 N. E. 422, 136 Ind. 636.

[j] (Sup. 1896)

Land cannot be appropriated for street purposes unless compensation is first assessed and paid or tendered.—*City of New Albany v. Endres*, 42 N. E. 683, 143 Ind. 192.

[k] (Sup. 1903)

Where the award of damages in proceedings by a city to condemn property for streets is appealed to the circuit court, and a judgment

in excess of such award is obtained on the appeal, the city must pay or tender the property owner such excess, having paid the original award into court, before the land can be finally appropriated.—*Heinl v. City of Terre Haute*, 66 N. E. 450, 161 Ind. 44.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 198, 199;

25 CENT. DIG. High. § 359.

See, also, 15 Cyc. p. 775.

#### § 76. — Entry on making deposit or payment into court.

[a] (Sup. 1886)

The condemning party may pay to the clerk of the court the damages awarded, such payment conferring license to take possession of the land.—*Indiana Oolitic Limestone Co. v. Louisville, N. A. & C. R. Co.*, 107 Ind. 301, 7 N. E. 244.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 200-203.

#### §§ 79, 80. Waiver of, or estoppel to claim, compensation.

Estoppel by taking compensation, see ESTOPPEL, § 92.

[a] (Sup. 1870)

Where a legally organized turnpike company located and constructed its road upon land by the verbal license of the owner of the land, *held*, that the company was entitled to the possession of the roadway, although the damages were not assessed or paid, or any other consideration given for the right of way.—*Harrison, N. T. R. & B. Turnpike Co. v. Roberts*, 33 Ind. 246.

[b] (Sup. 1883)

It is not necessary that one claiming an estate in land by virtue of an appropriation made by the state under the right of eminent domain should affirmatively show that compensation has been paid, where it appears that the landowner filed no claim within the time limited by law.—*Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580.

[c] (Sup. 1887)

A landowner who executes no conveyances, makes no representations, and grants no licenses, is not estopped from claiming damages for land wrongfully seized by a railroad company, although he is silent while the work of building the road is going on.—*Bloomfield R. Co. v. Grace*, 112 Ind. 128, 13 N. E. 680.

[d] (Sup. 1890)

Under Rev. St. 1881, § 3953, which provides that, where the title to any railroad right of way shall fail, or has not been acquired, the company or the landowner may apply for a writ for the assessment of damages, the landowner is not barred from his right to such writ by the fact that he voluntarily permitted the railroad company to enter upon and appropriate

his land.—*Midland R. Co. v. Smith*, 125 Ind. 509, 25 N. E. 153.

[e] (*Sup.* 1892)

Since railroad companies are required by law to fence their right of way, a conveyance of a right of way on the promise of the company to fence the same is without consideration, and the grantor may afterwards have his damages assessed.—*Shortle v. Terre Haute & I. R. Co.*, 131 Ind. 338, 30 N. E. 1084.

[f] (*App.* 1893)

When a person who owns the fee in a street consents to the appropriation thereof by a railroad company for a right of way, he is not thereby estopped from afterwards claiming damages for injury to the property thus appropriated, and for a depreciation in value of his abutting property, caused by the construction and operation of such road.—*Evansville & R. R. Co. v. Charlton*, 6 Ind. App. 56, 33 N. E. 120.

[g] (*App.* 1893)

A grant of a strip of land for a railroad right of way does not carry by implication a release of damages for injury to property abutting on a street not in existence when the road was built, which injury was caused by a change in the grade of the railroad and the necessary extension of a fill upon the street beyond the limits of the right of way.—*Egbert v. Lake Shore & M. S. R. Co.*, 6 Ind. App. 350, 33 N. E. 659.

[h] (*Sup.* 1903)

Where a property owner waives damages on the laying out of a rural road, such waiver is effectual, even though the highway is not actually opened until after the territory embracing it has passed within the limits of an incorporated town.—*Lake Shore & M. S. R. Co. v. Town of Whiting*, 67 N. E. 933, 161 Ind. 76.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 205-214;

25 CENT. DIG. High. § 360.

See, also, 15 Cyc. pp. 782, 804.

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

§ 81. Property and rights subject of compensation.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 215-232.

See, also, 15 Cyc. pp. 646-652.

§ 82. — Real property in general.

[a] (*Sup.* 1907)

Where the owner of land stands by and without objection permits a public schoolhouse to be constructed thereon in good faith and to be used for public school purposes until public interests and convenience become involved, the rule that a structure erected by a tort-feasor becomes a part of the land does not apply, and in

an action to condemn the land the owner cannot recover the value of the improvements as part of the damages.—*McClarren v. Jefferson School Tp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417.

[b] (*Sup.* 1908)

Land taken from a railroad company by a city in extending a street over the company's right of way is taken in the exercise of the right of eminent domain, and subject to full compensation.—*Cincinnati, I. & W. R. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 215-219.

See, also, note, 5 L. R. A. (N. S.) 922.

§ 84. — Water rights.

Compensation for alteration of flow or discharge of water, see post, § 98.

Elements of compensation for injuries to property not taken, see post, § 97.

[a] (*Sup.* 1874)

2 Gav. & II. 314, §§ 684, 699, 701, providing that water shall not be diverted from the bed of any water course by the authority of this act, to the injury of any mill or machinery already erected, or in process of erection, etc., construed together, deny the privilege of the writ of assessment of damages, when asked for the purpose of flowing water back on, or diverting it from, any mill or millworks already erected or in process of erection.—*Larsh v. Test*, 48 Ind. 130.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 227-230.

See, also, 15 Cyc. p. 648; note, 48 L. R. A. 698.

§ 85. — Easements and other rights in real property.

[a] (*Sup.* 1886)

Although abutters have such a right of property in the easement of the street that the street cannot be narrowed except in the exercise of the right of eminent domain, yet a statute authorizing the laying out, narrowing, etc., of streets, constitutes such narrowing a taking for public use, for which compensation must be made.—*Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761.

[b] A railroad company authorized by the council of a city to construct and operate a track on a way within the limits of the city has no authority to interfere with the property rights of an adjacent owner to use the way as a passageway to and from the adjacent property without making compensation therefor.—(*App.* 1904) *Cincinnati, R. & M. R. R. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; (1906) *Same v. Troutman*, 75 N. E. 277, 38 Ind. App. 700; *Same v. Patterson*, 39 Ind. App. 702, 77 N. E. 1190.

[c] (Sup. 1908)

A railroad company, having dedicated its property to public use for purposes of transportation, was not entitled to compensation for the taking of its property necessary for the construction of a connection with another railroad at a junction point, pursuant to the railroad commission's reasonable order for an interchange of traffic.—Pittsburgh, C., C. & St. L. R. Co. v. Railroad Commission, 171 Ind. 189, 86 N. E. 328.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 221-226.

See, also, 15 Cyc. p. 646.

#### § 86. — Franchises.

Interference with franchise as element of compensation to property not taken, see post, § 108.

[a] (Sup. 1887)

Rev. St. 1881, § 3003, giving railroad companies the right to cross highways without paying compensation therefor, does not apply to gravel roads operated by private corporations having private property rights therein.—Indianapolis & C. Gravel-Road Co. v. Belt R. Co., 110 Ind. 5, 10 N. E. 923.

A gravel-road company having been incorporated under the general laws (Rev. St. 1881, § 3624 et seq.), by which it is provided that where a gravel-road company occupies an existing highway in pursuance thereof, and in accordance with an order of the county board, the highway shall become the property of the company, a railroad company is not entitled to lay and maintain its track across such gravel road without compensation therefor, notwithstanding the fact that the railroad company would have had the right to cross such highway as against a former corporation which had forfeited its rights therein before it had been declared a public highway.—Id.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 231.

See, also, 15 Cyc. p. 647.

#### § 89. Nature of injury to property not taken.

FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. EM. DOM. §§ 233-238.

#### § 91. — General or special injuries.

[a] (Sup. 1884)

An abutting lot owner has no cause of action against a railroad company for operating its railroad in a street in the usual way with leave of the city, where the injury is only such as the general public sustains.—Dwenger v. Chicago & G. T. R. Co., 98 Ind. 153.

[b] (App. 1894)

Where a change of grade at a railroad crossing cuts off one entrance to an alley which affords one of the means of egress from and access to lots abutting on such alley, and causes

a material diminution in the value of the lots, recovery by the owner cannot be defeated on the ground that his injury is not different from that suffered by the general public.—Pennsylvania Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421.

[c] (Sup. 1910)

Damages are only allowable to such persons as sustain special injury from the laying out and opening of a public highway.—Glendenning v. Stahley, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 234, 235.

#### § 92. — Proper or improper construction or operation of works.

[a] (Sup. 1864)

Under 1 Gav. & H. St. p. 231, giving a city full power to repair streets and construct drains and sewers, if it does this with proper skill and without malice, a citizen has no remedy for consequential injury suffered thereby.—City of Vincennes v. Richards, 23 Ind. 381.

[b] (Sup. 1883)

Where a city injured property of an abutting owner by the negligent and unskillful improvement of a street, such owner is entitled to recover damages against the city therefor.—Town of Princeton v. Gieske, 93 Ind. 102.

[c] (App. 1903)

In a proceeding to condemn an easement for natural gas pipe lines, it was proper to instruct that, in estimating the damages, the jury should not consider any injury which might result to plaintiff from any negligence or unskillfulness of defendant in the operation and maintenance of its pipe line over the strip of land sought to be appropriated therein, since plaintiff would have the same right to sue for and recover damages for such negligence or unskillfulness as would any other person injured thereby.—Muncie Nat. Gas Co. v. Allison, 67 N. E. 111, 31 Ind. App. 50.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 236.

#### § 93. — Direct or remote, contingent, or prospective consequences or losses.

[a] (Sup. 1881)

A municipal corporation has a right to use a public way, lying outside its boundaries, for the purposes of drainage, without paying or tendering damages to adjacent property holders for consequential injuries.—Cummins v. City of Seymour, 79 Ind. 491, 41 Am. Rep. 618.

[b] (Sup. 1908)

Under Burns' Ann. St. 1908, § 934, prescribing a rule for assessing damages in condemnation proceedings, it was error to permit an allowance for any increased danger from the operation of petitioner's railroad over the land sought to be taken, and for any other facts

shown by the evidence that might be either annoying or hurtful to the defendant, necessarily caused by the permanent operation of the railroad over the land appropriated; such injuries being too remote and speculative.—*Indianapolis & W. R. Co. v. Hill*, 172 Ind. 402, 86 N. E. 414.

[c] (Sup. 1909)

Owners of property in the vicinity of a public square, whose means of ingress and egress would not be destroyed or affected by discontinuing its use for public purposes, have no vested rights in its continued use as a public square, their losses being merely consequential and not direct, and its discontinuance would not be a taking without compensation.—*East Chicago Co. v. City of East Chicago*, 171 Ind. 654, 87 N. E. 17, transferred from the Appellate Court (1908) 42 Ind. App. 383, 85 N. E. 783.

[d] (Sup. 1910)

In proceedings for the establishment of a highway, all damages, both present and prospective, to the lands affected, which are the natural and direct result of the appropriation, must be determined, and no contingent or speculative damages can be considered, but only such matters as actually affect the present worth of the land.—*Glendenning v. Stahley*, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 237-238.

See, also, 15 Cyc. pp. 653-655; note, 3 L. R. A. (N. S.) 333.

**§ 94. Elements of compensation for injuries to property not taken.**

Measure and amount of compensation, see post, §§ 130-141.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 236, 239-300; 25 CENT. DIG. High. §§ 358, 361.

See, also, note, 47 L. R. A. 782.

**§ 95. — In general.**

[a] (Sup. 1882)

Since a county acquires only an easement in land condemned for a highway, evidence of the rental value of the land taken is inadmissible to show damages for such taking.—*Hagaman v. Moore*, 84 Ind. 406.

[b] (App. 1904)

The cost of removal of buildings from land condemned for a railroad right of way forms no part of the damages to be assessed to the landowner.—*White v. Cincinnati, R. & M. R. R.*, 71 N. E. 276, 34 Ind. App. 287.

[c] (Sup. 1908)

Under Burns' Ann. St. 1901, § 5153, empowering railroad companies to construct their roads across any highway so as not to interfere with the free use thereof, etc., and requiring the company to restore the highway thus intersected to its former state, or in a sufficient

manner not to unnecessarily impair its usefulness, where, in the exercise of the right of eminent domain, a city extended a street across a railroad right of way, the railroad company was not entitled to compensation for the expense of constructing and maintaining a crossing over the street, since the statutory requirement, as a regulation emanating from the police power, must be complied with without compensation.—*Cincinnati, I. & W. R. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 239-242, 244, 266-268, 273.

See, also, note, 4 L. R. A. (N. S.) 890.

**§ 96. — Taking part of tract.**

[a] (Sup. 1868)

In the assessment of damages due to the owner of lands taken by a railroad, it is proper to consider, in determining the amount, the taking of earth from the remaining lands wherewith to construct the roadbed.—*White Water Val. R. Co. v. McClure*, 29 Ind. 536.

[b] (Sup. 1875)

On the trial of a proceeding to condemn land for the track of a railroad, it was not error to instruct the jury that the landowner was entitled, as damages, to the value of the land actually taken, to which might be added any injury to the residue of the land naturally resulting from the appropriation, and the construction and operation of the road thereon, such as cutting the fields into inconvenient and ill shape, and destroying means of communication between different portions of the farm, the company not being required to furnish any crossing other than highway crossings, but being entitled to exclusive possession of the strip taken, and that the jury might consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already inclosed, as the company was not legally obliged to fence the railway track, except so far as it might choose to do so for the protection of its own interests, the law simply imposing on the company the obligation to pay for animals killed by it on its track where it was not, but might be, securely fenced.—*Baltimore, P. & C. R. Co. v. Lansing*, 52 Ind. 229.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 245-249.

See, also, 15 Cyc. p. 687.

**§ 97. — Taking water rights.**

[a] (Sup. 1899)

The act of a city in draining its sewage in a stream, thereby so polluting its waters that they destroy the pastures of a lower riparian proprietor in flood time and emit noxious odors to his personal injury, is not such a taking of private property for public use as must be preceded by just compensation.—*City of Valparaiso*

v. Hagen, 54 N. E. 1062, 153 Ind. 337, 48 L. R. A. 707, 74 Am. St. Rep. 305.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. §§ 250, 251.

See, also, 15 Cyc. pp. 706-708; note, 3 L. R. A. (N. S.) 912.

**§ 98. — Alteration of flow or discharge of water.**

**[a] (Sup. 1881)**

Injuries for backing water by dams, etc., upon the land of another, seem to be embraced within the constitutional inhibition against injuring property by legislative authority without making compensation.—Trustees of Wabash & E. Canal v. Spears, 16 Ind. 441, 79 Am. Dec. 444; (1861) New Albany & S. R. Co. v. Higman, 17 Ind. 594.

**[b] (Sup. 1876)**

A railroad company is liable in damages for injury occasioned by reason of the construction of a raised railroad track along a street of a city, thereby causing the water from rains and freshets to flow upon adjacent real estate.—Indianapolis, B. & W. R. Co. v. Smith, 52 Ind. 428.

**[c] (Sup. 1883)**

Where surface water was collected in a ditch, and turned on the lands of another by reason of the negligent grading of the city street, the fact that such grading was done in pursuance of an ordinance of the city was no defense to the city's liability for the injury occasioned thereby.—City of North Vernon v. Voegler, 89 Ind. 77.

Where a municipal corporation constructed a ditch in such a manner as to collect surface water and pour it on another's land, where it was not accustomed to run, such owner is entitled to recover damages for the injury occasioned thereby.—Id.

**[d] (Sup. 1907)**

In condemnation proceedings to acquire a railroad right of way, it is proper to show the damage to a landowner caused by the obstruction of his ditch and consequent backing of the water on his land by the company by the construction of the road; such obstruction having been made prior to the trial.—New Jersey, I. & I. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. EM. DOM. §§ 252-255.

See, also, 15 Cyc. pp. 660, 661, 707.

**§ 100. — Occupation or use of street or other highway.**

Appropriation to new or additional use, see post, § 119.

Effect of smoke, foul odors, noise, or vibration, see post, § 104.

Obstruction of access, see post, § 106.

**[a] (Sup. 1857)**

The lot and street adjoining, as to the owner of the former, constitute but one piece of property, and an injury to the latter is an injury to the former, and to the whole property.—Protzman v. Indianapolis & C. R. Co., 9 Ind. 467, 68 Am. Dec. 650.

**[b] (Sup. 1859)**

The use of a city street for a railroad is not a taking of private property without compensation, within the meaning of the constitution.—New Albany & S. R. Co. v. O'Daily, 12 Ind. 551.

**[c] (Sup. 1859)**

A proceeding for the assessment of damages, under the act of 1852, cannot be maintained against a railroad company for laying their track in a public street in front of the complainant's property.—New Albany & S. R. Co. v. O'Daily, 13 Ind. 353.

**[d] (Sup. 1880)**

Owners of land abutting land deeded to a railroad for right of way cannot object to the company's building a side track thereon, which interfered with such owners of the right of way as a city street.—Indianapolis, P. & C. R. Co. v. Rayl, 69 Ind. 424.

**[e] (Sup. 1881)**

The building and operation of a horse railroad in the streets of a city, by authority of the legislature, is not a taking of private property for public use, within the provision of the constitution.—Eichels v. Evansville St. R. Co. 78 Ind. 261, 41 Am. Rep. 561.

**[f] (Sup. 1891)**

An abutter has a private property right in a street distinct from that of the public of which he cannot be deprived without compensation.—Lostutter v. Aurora, 26 N. E. 184, 126 Ind. 430, 12 L. R. A. 259.

**[g] (Sup. 1891)**

A property owner sustains special damages entitling her to an injunction to restrain the construction of a second track on the street adjacent to her property, where the only means of ingress and egress to and from her lot is through the street in front of her lot at the point where the track is being constructed, and the track is in such close proximity to her house as to endanger it by sparks emitted from locomotives, and will turn the surface water on and overflow her lot.—Chicago, St. L. & P. Ry. Co. v. Eisert, 26 N. E. 759, 127 Ind. 156.

**[h] (App. 1893)**

Where a person owns several lots, a part of which abut on a street, and a part of which have no connection therewith, except in so far as they join the lots which abut on the street, he is not entitled to recover damages for the depreciation in value of the lots which do not abut on the streets, on account of the location of a railroad along such street.—Evansville & R. R. Co. v. Charlton, 6 Ind. App. 56, 33 N. E. 129.

## [i] (App. 1893)

An owner of the fee in the north half of a street has no right of action against an elevated road built on the south half, under Rev. St. 1881, §§ 905-908, providing for an assessment of damages in case of the actual taking of property.—*Haslett v. New Albany Belt & Terminal R. Co.*, 7 Ind. App. 603, 34 N. E. 845.

## [j] (App. 1894)

The owner of land abutting on a street is not debarred from recovering damages from a railroad company constructing a track thereon, by the fact that the municipal authorities have granted the company a right of way over the street.—*Pittsburgh, C. & St. L. Ry. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

## [k] (App. 1906)

A street railroad in a city street does not constitute an additional burden upon the real estate.—*Indianapolis Northern Traction Co. v. Ramer*, 37 Ind. App. 264, 76 N. E. 808.

## [l] (App. 1909)

Location and maintenance of a telephone pole in a street close to, and directly in front of, the main entrance of a saloon, and only a short distance from such entrance, did not constitute a permanent injury to the premises.—*Merchants' Mut. Tel. Co. v. Hirschman*, 43 Ind. App. 283, 87 N. E. 238.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 256-265, 267.

See, also, 15 Cyc. pp. 662, 700-703; notes, 14 L. R. A. 381, 43 L. R. A. 554.

## § 101. — Alteration of grade of street or other highway.

[a] The consequential injury occasioned by the grading of a street is not a taking of private property for public use, within the meaning of the prohibition of the constitution.—(Sup. 1861) *Macy v. City of Indianapolis*, 17 Ind. 267; (Sup. 1881) *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135.

## [b] (App. 1893)

Rev. St. 1881, § 3903, which gives a railroad company the right to construct its road upon or across any highway, but provides that it must restore the highway to its former state, or to a condition which will not impair its usefulness, does not relieve a company from liability for damages to property abutting on a street caused by a change in the grade of the railroad and the necessary extension of a fill upon the street.—*Egbert v. Lake Shore & M. S. R. Co.*, 6 Ind. App. 350, 33 N. E. 659.

## [c] (App. 1894)

The fact that a railroad company is authorized by law (Rev. St. 1894, § 5153; Rev. St. 1881, § 3903) to change the grade of a highway at a crossing of its road does not relieve the company from liability to an abutting owner whose property is damaged by such change.—

*Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421.

## [d] (App. 1910)

Where a street is graded pursuant to legal authority and in a careful manner, the abutting owners have no right to compensation unless given by statute.—*Chicago, I. & L. R. Co. v. Johnson*, 90 N. E. 507.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 269, 270;

25 CENT. DIG. HIGH. §§ 358, 361.

See, also, 15 Cyc. pp. 662-664, 703.

## § 102. — Inconvenience in use of property.

[a] The value of the land appropriated, and any injury to the residue of the land from which it is taken, naturally resulting from the appropriation and construction of the road thereon, such as cutting the fields into an ill shape, destroying the convenience of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary, are all proper matters to be considered in estimating the damages.—(Sup. 1868) *White Water Val. R. Co. v. McClure*, 29 Ind. 536; (1873) *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328.

## [b] (Sup. 1902)

In proceedings to open a highway, the property owner is entitled to compensation for inconveniences.—*Fifer v. Ritter*, 64 N. E. 463, 159 Ind. 8.

## [c] (Sup. 1907)

In railroad right of way condemnation proceedings, the cutting of fields into inconvenient shapes, the interruption of convenient ways for animals to pass from the farm buildings to and from pasture, and the necessity for additional fencing are elements of damage properly inquired into.—*New Jersey, I. & L. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

## [d] (Sup. 1907)

The cutting of fields into inconvenient shapes, and danger from fire caused by a proper use of the road, are elements of damages in condemning a railroad right of way.—*Indianapolis & Cincinnati Traction Co. v. Larrabee*, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 271, 272.

See, also, 15 Cyc. p. 737.

## § 103. — Necessity for fences or crossings.

## [a] (Sup. 1858)

Additional fencing, required by reason of the construction of a railroad through a party's land, is a proper matter to be considered, in condemnation proceedings, in estimating the compensation to which such party is entitled.—*Evansville I. & C. Straight Line R. Co. v.*

Fitzpatrick, 10 Ind. 120; Same v. Stringer, Id. 551; Same v. Cochran, Id. 560.

[b] (*Sup.* 1872)

In proceedings to appropriate land for a gravel road, the cost of material for and fence on each side of the road where it runs through the land of which a portion is condemned is a proper element of damages.—Montmorency Gravel Road Co. v. Rock, 41 Ind. 263.

[c] (*Sup.* 1875)

On the trial of a proceeding to condemn land for the track of a railroad, it was not error to instruct the jury that the landowner was entitled, as damages, to the value of the land actually taken, to which might be added any injury to the residue of the land naturally resulting from the appropriation and the construction and operation of the road thereon, such as cutting the fields into inconvenient and ill shape, and destroying means of communication between different portions of the farm, the company not being required to furnish any crossing other than highway crossings, but being entitled to exclusive possession of the strip taken; and that the jury might consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already inclosed, as the company was not legally obliged to fence the railway track, except so far as it might choose to do so for the protection of its own interests, the law simply imposing on the company the obligation to pay for animals killed by it on its track where it was not, but might be, securely fenced.—Baltimore & C. R. Co. v. Lansing, 52 Ind. 229.

[d] (*Sup.* 1884)

Where land is taken for a highway, the cost of erecting new fences is an element of damage.—Watson v. Crowsore, 93 Ind. 220.

[e] (*Sup.* 1902)

In proceedings to open a highway, the property owner is entitled to compensation for additional fences.—Fifer v. Ritter, 64 N. E. 463, 159 Ind. 8.

[f] (*Sup.* 1909)

In a proceeding to establish a highway across railroad tracks, the railroad company cannot recover the cost of wing fences and cattle guards and of planking the proposed highway, as such expenses would be incurred by it in complying either with the requirements of Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1908, § 5195, cl. 5), or of laws passed in the exercise of the police power of the state.—New York, C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225.

[g] (*Sup.* 1909)

Under Acts 1903, p. 426, c. 227 (Burns' Ann. St. 1908, § 5707 et seq.), in a proceeding to condemn an electric railway right of way no award can be made for the cost of fencing along the right of way; it being presumed that the

company will obey the law.—Indianapolis & W. R. Co. v. Branson, 172 Ind. 383, 86 N. E. 834, 88 N. E. 594.

[h] (*Sup.* 1910)

On proceedings for the establishment of a highway, the question of additional fencing possibly required by the appropriation of a portion of a tract of land should not be submitted or determined as an independent or ultimate fact, but only in connection with other facts and circumstances.—Glendenning v. Stahley, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 274-277.

See, also, 15 Cyc. p. 697.

#### § 104. — Effect of smoke, foul odors, noise, or vibration.

[a] (*Sup.* 1908)

A street railway company operating on a city street, for the carriage of freight and passengers, interurban trains of three cars, each 60 feet in length, at a rate of 20 to 30 miles an hour, thereby rendering the use of the street dangerous, and thereby causing the house of an abutting owner 60 feet from the track to shake so as to cause the plastering and ceilings and the pictures on the walls to fall, and to disturb the comfort of the owner and his family occupying the house, is liable to the abutting owner for the special damages sustained; the operation of its cars in such a manner by a street railway being unlawful and unjustifiable.—Kinsey v. Union Traction Co., 169 Ind. 563, 81 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 278-281.

See, also, 15 Cyc. p. 753.

#### § 106. — Obstruction of access.

[a] (*Sup.* 1876)

A railroad company is liable for injury occasioned by the construction of an embankment in a street in front of a lot occupied by a dwelling house, thereby rendering the approach to the lot impossible for carriages, wagons, and vehicles, and inconvenient for foot passengers.—Indianapolis, B. & W. R. Co. v. Smith, 52 Ind. 428.

[b] (*Sup.* 1881)

In an action against a railroad company for damages for appropriating plaintiff's land for a right of way, it appeared that defendant's road ran along the eastern line of plaintiff's land, crossing at right angles two other railroads, which cut plaintiff's land in two. *Held*, that it was error to instruct the jury to consider the condition of the two existing railroads only in reference to the ingress and egress upon the east side of the land.—Union Railroad Transfer & Stockyard Co. v. Moore, 80 Ind. 458.

Where two railroad tracks cross a landowner's private way between his house and



barn, and defendant company's tracks, which join such road at a point near where they cross such private way, cause a constant obstruction by cars, locomotives, and smoke of such tracks where they cross such way, the landowner is entitled to compensation for such obstruction.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 282-289.

See, also, 15 Cyc. p. 746.

**§ 108. — Interference with franchise.**

[a] (Sup. 1909)

Where a highway crosses the right of way of a railroad company at a point at which it has only a main track and two switch tracks, no question can justly arise as to the impairment of the company's franchise by such taking so as to entitle it to damages.—New York, C. & St. L. R. Co. v. Rhodes, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 292, 293.

See, also, 15 Cyc. p. 667.

**§ 109. — Danger of personal injury.**

[a] (Sup. 1907)

Damages resulting from danger to the person or stock of the owner of land from the construction and operation of a trolley line are too remote, uncertain, and speculative to be considered by the jury in fixing the amount of the owner's compensation for lands taken and for the depreciation in the value of the lands which will be damaged, but not actually taken, by the construction and operation of the proposed road.—Indianapolis & Cincinnati Traction Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003.

[b] (Sup. 1909)

Under Act 1905 (Acts 1905, p. 62, c. 48), § 6, authorizing recovery of the value of land condemned for railroad purposes, and for the damages to the remainder of the tract, damages which may arise in the future from the happening of some possible, but uncertain, event cannot be considered, e. g., the danger to which the owner and his family may be exposed in crossing tracks, since it cannot be assumed that the company will negligently injure him or his family, and since, if the road is improperly constructed, or is negligently operated, he has ample remedy notwithstanding the award.—Indianapolis & W. R. Co. v. Byanson, 172 Ind. 383, 86 N. E. 834, 88 N. E. 594.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 294, 295.

See, also, 15 Cyc. p. 751.

**§ 110. — Danger of injury to animals.**

[a] (App. 1901)

On a condemnation of land by a railroad company for a right of way, that horses being

worked on the land may become frightened by trains being properly operated cannot be considered by the jury to enhance the owner's damages by reason of the appropriation of the land, as such damages are speculative, and not the proper subject of inquiry.—Chicago, I. & E. R. Co. v. Mason, 59 N. E. 185, 26 Ind. App. 395.

[b] (Sup. 1907)

Under Acts 1903, p. 426, c. 227, interurban railroads are required to fence their right of way, and the danger to animals on the land adjoining, but not taken by them, will be only speculative, and should not be considered in determining the diminution of the market value of such land.—Indianapolis & Cincinnati Traction Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 294, 296, 297.

See, also, 15 Cyc. p. 751.

**§ 111. — Danger from fire.**

[a] (Sup. 1877)

Danger of fire from locomotives is an "injury" which the appraisers may consider, under 2 Rev. St. p. 32, § 15, regulating the taking of land for a railroad.—Swinney v. Ft. Wayne, M. & C. R. Co., 59 Ind. 205.

[b] (Sup. 1879)

In proceedings to appropriate land to the use of a railroad company, the jury may properly consider the increased danger of fire from locomotives to the adjoining property of the landowner, and the consequent increased cost of insurance and decreased rental value of the buildings, and also the injury to a warehouse situated on the land and the facilities for using it.—Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137.

[c] (App. 1895)

The jury cannot consider, as an independent element of damage, not connected with the value of the land, probable future losses caused by fires and explosions resulting from the ordinary, prudent, and careful operation and maintenance of the pipe line.—Indiana Natural Gas & Oil Co. v. Jones, 14 Ind. App. 55, 42 N. E. 487; Same v. Bailey, Id. 697, 42 N. E. 488; Same v. Downing, Id. 700, 42 N. E. 489; Same v. Collins, Id., 42 N. E. 644; Same v. Wooters, Id. 702, 42 N. E. 644.

[d] (Sup. 1907)

The increased hazard from fire being set from passing locomotives is a proper consideration for the jury in estimating the damages.—New Jersey, I. & I. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 294, 298.

### § 112. — Injuries from construction or operation of works.

[a] (App. 1904)

On condemnation of part of a paper mill lot, the measure of damages is not only the value of the portion of the lot appropriated with the value of that part of the building thereon and fixtures thereon, but also the injury done to such paper mill as a whole, its value being largely as a unit, and the damages being ascertained by the difference in the value of the mill before and after the appropriation.—*White v. Cincinnati, R. & M. R. R.*, 34 Ind. App. 287, 71 N. E. 276.

[b] (Sup. 1907)

In estimating the damages to the landowner in condemning a right of way for an interurban railroad, only damages naturally arising from the proper construction and use of such road can be considered, as a negligent construction or improper use thereof gives an independent right of action.—*Indianapolis & Cincinnati Traction Co. v. Larrabee*, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003.

[c] (Sup. 1907)

Damages recoverable for condemning land for a street railroad company's transmission line includes the value of land appropriated and such damages as result from the proper construction and operation of the line.—*Mull v. Indianapolis & C. Traction Co.*, 169 Ind. 214, 81 N. E. 657.

Damages occurring by reason of the negligent operation of a street railroad company's transmission line are not a part of the damages assessable in eminent domain proceedings, but are recoverable in an independent action.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 299, 300.

### § 114. Temporary use.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 301, 302.  
See, also, 15 Cyc. p. 657.

### § 116. — Use during construction of works.

[a] (App. 1893)

Contractors in constructing a sewer for a city have no right to go beyond the lines of the street on which the sewer is being constructed, and deposit earth on a lot abutting on such street, without first having the damages assessed and paid or tendered to the owner.—*Kinser v. Dewitt*, 34 N. E. 1014, 7 Ind. App. 597.

[b] (App. 1901)

In condemnation proceedings for a right of way by a railroad company it was not error to admit evidence of damage to land adjoining the right of way while constructing a cut on the road, and as a necessary result of proper construction of such road.—*Indiana Stone R. Co. v. Strain*, 62 N. E. 63, 27 Ind. App. 604.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 301, 302.

### § 117. Appropriation to new or additional use.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 303-319.  
See, also, 15 Cyc. pp. 668-684, 696-703.

### § 118. — In general.

[a] (Sup. 1879)

Where a railroad company occupies with its tracks the banks of a canal, the owner of the fee of such canal bank is entitled to damages, since the appropriation by the railroad company is an additional easement to that of the bank of the canal.—*Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 303.  
See, also, 15 Cyc. p. 668; note, 2 L. R. A. (N. S.) 588.

### § 119. — Streets or other highways.

[a] (Sup. 1874)

An ordinary steam railway is an additional servitude, not comprehended within the easement for a street, and which the abutting owner cannot be presumed to have anticipated or consented to.—*Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

[b] (Sup. 1881)

Municipal street improvements such as drains and sewers are not within the provisions of the Constitution prohibiting the taking of private property for public use without compensation first paid or tendered.—*Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

[c] (Sup. 1883)

No additional burden is imposed by changing a highway into a toll road. The change is not in the character of the servitude, but in the mode of sustaining the highway in the one case by taxes, in the other by tolls.—*Carter v. Clark*, 89 Ind. 238.

[d] (Sup. 1887)

Where an abutting lot owner has executed to a railroad company a release of all damages on account of the location, construction, or operation of its road on certain portions of the street, reciting that "it is the intention of the parties to release a right of way to be occupied by one track as now located," he cannot enjoin the company from laying a switch on the same ties, the outer rail of which is 14 inches from the rail on that side of the main track, leaving 8½ inches of the original ties projecting beyond; and no additional burden or injury being shown.—*Indianapolis & St. L. R. Co. v. Calvert*, 110 Ind. 555, 11 N. E. 476.

[e] (Sup. 1890)

It is not necessary as the future business and necessity of a railway company acquiring a right of way demands an additional switch.

or an additional track, for it to file an additional instrument of appropriation and have additional damages assessed resulting to the property abutting on the right of way or street along which the additional track or switch was to be located by reason of its construction, and there must be no difference between the rights of landowners abutting on the right of way and abutting on the street in cases where damages have been assessed.—*White v. Chicago, St. L. & P. R. Co.*, 23 N. E. 782, 122 Ind. 317, 7 L. R. A. 257.

[f] (*Sup.* 1890)

The abutting owner of the fee of a county road constructed at the expense of the landowners is entitled to compensation for its use by a natural gas company for its pipes, and a license by the county board of commissioners to the company to lay its pipes in the road only conveys the right of the county in the highway, but does not affect private property rights.—*Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L. R. A. 602.

The appropriation of land for a rural highway does not entitle the local officers to use it for any other than highway purposes without compensating the abutting owner, though they acquired a right to use it for all purposes legitimately connected with the local system of highways.—*Id.*

The laying of gas pipes in a highway is a taking of the property of an owner of land abutting on the highway within the Constitution, for which he is entitled to compensation.—*Id.*

The owner of a fee in a suburban highway has a special proprietary right distinct from that of the public, which cannot be taken without compensation.—*Id.*

[g] (*Sup.* 1891)

A city may take possession of an abandoned well originally dug in a street by a lot owner without making compensation for additional servitude.—*Lostutter v. Aurora*, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259.

A street cannot be diverted from the use to which it was dedicated, and no additional burden can be laid thereon without lawful authority and until compensation has been paid or tendered, but an urban servitude is very comprehensive, and authorizes much larger use of the street than that authorized by a suburban servitude.—*Id.*

[h] (*App.* 1893)

A municipal corporation has the power to grant a permission to a railroad company to build its tracks on its streets, but such grant does not transfer any proprietary rights of the persons owning lands abutting on the streets, and does not impair or destroy the right of an abutting landowner owning the fee in the street to recover damages for the additional burden imposed on his land.—*Ilaslett v. New Albany*

*Belt & Terminal R. Co.*, 34 N. E. 845, 7 Ind. App. 603.

[i] (*Sup.* 1895)

As abutting owners on a highway own the fee subject to the easement for road purposes, which do not include the building of a pipe line along it for conducting natural gas, and thus supplying it to the public, the legislature cannot authorize such a gas company, though engaged in a public enterprise, to so construct its line without making compensation to the abutting owner.—*Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156, 39 N. E. 423, 42 N. E. 640.

The building of a pipe line along a highway does not come within the uses for which highways were intended, and the laying of gas pipes is the imposition of an additional burden upon the fee from that embraced in the assessment for road purposes for which compensation must be made.—*Id.*

[j] (*Sup.* 1898)

The erection of telephone systems upon city streets is not an additional servitude, for which the adjacent fee owners are entitled to compensation, but is within the contemplated uses of the street at the time of the dedication.—*Magee v. Overshiner*, 49 N. E. 951, 40 L. R. A. 370, 150 Ind. 127, 65 Am. St. Rep. 358.

[k] (*App.* 1899)

Constructing a pipe line along a public highway is an imposition of an additional burden on the fee from that embraced in the easement for highway purposes, for which compensation must be made to the fee owner.—*Huffman v. State*, 52 N. E. 713, 21 Ind. App. 449, 69 Am. St. Rep. 368.

[l] (*Sup.* 1901)

The construction of a subsurface trench in a sidewalk three feet wide and five feet deep, and three feet from an abutter's lot line, for a conduit for telephone wires to be used by the city public in intercommunication by electricity, is not a new servitude, within the contemplated uses of the street, entitling the abutter to compensation.—*Coburn v. New Telephone Co.*, 59 N. E. 324, 156 Ind. 90, 52 L. R. A. 671.

[m] (*Sup.* 1904)

The use of the highways by street railway companies is a legitimate use of the highways, and does not create an additional servitude.—*Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 71 N. E. 642, 163 Ind. 268, 66 L. R. A. 105, 106 Am. St. Rep. 222.

The carriage of light express matter, passenger's baggage, and mail matter upon street cars does not constitute a ground of complaint on the part of abutting lot owners.—*Id.*

The construction and operation of an inter-urban electric railroad to carry passengers, their baggage, light express matter, and mail, in trains consisting of one, or, by special permission of the board of public works, of two, cars, of the best and most approved pattern, is not

an additional servitude upon the street for which the abutting property owners are entitled to compensation.—Id.

A railroad cannot construct a common passenger and freight railroad upon the streets of a city, in the absence of a license from the abutting lot owners, without compensation first assessed and paid or tendered.—Id.

[n] (Sup. 1908)

The operation by a corporation, organized under the statute providing for the incorporation of street railway companies, of interurban cars on streets of a city with its permission, for the carriage of passengers, express, and light freight, is not an additional servitude on the streets, and abutting owners are not entitled to compensation therefor.—Kinsey v. Union Traction Co., 169 Ind. 503, 81 N. E. 922.

[o] (App. 1909)

Where the relocation of a highway contemplated the moving of the tracks of an interurban street railway company, the increased inconvenience and danger caused by the relocation was within the damages to be awarded to the landowner.—Miller v. Cincinnati, L. & A. Electric St. R. Co., 43 Ind. App. 540, 88 N. E. 102.

[p] (App. 1910)

A city may grant to a railroad permission to build its tracks on a street, but such permission is simply a grant of the right to share with the general public the use of the easement of a public highway, and does not impair the right of an abutting owner to recover damages for the additional burden imposed on his land.—Chicago, I. & L. R. Co. v. Johnson, 90 N. E. 507.

Where a railroad maintained its track on the side of a street for such a length of time as to bar a claim for damages therefor, and then removed the track to the center of the street and occupied land owned in fee by the abutting owner on the opposite side of the street, the latter could recover the damages for the additional burden imposed on his land, though the removal of the track was pursuant to a lawful requirement of the city.—Id.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 304-314.  
See, also, 15 Cyc. pp. 669, 670, 700-703; notes, 17 L. R. A. 474, 24 L. R. A. 721, 3 L. R. A. (N. S.) 323, 4 L. R. A. (N. S.) 202; notes, 28 Am. Rep. 267, 37 Am. Rep. 224, 56 Am. Rep. 250; note, 106 Am. St. Rep. 233-269.

§ 120. — Railroad rights of way.

[a] (Sup. 1875)

The original charter of the Jeffersonville, Madison & Indianapolis Railroad Company, granted in 1846, giving the company the right to construct, operate, and repair a railroad not exceeding 60 feet wide, construed in connection with the amended charter of 1849 and the whole current of legislation in Indiana regulating the

right of eminent domain by uniformly fixing a limit to the width of the right of way, the amended charter did not enlarge the width of the right of way, as fixed and defined by the original charter; but the company, having appropriated and used less than that width, and having erected telegraph poles on only one side of its road, and made no use of the other side, except for the purpose of keeping its track in repair, for a period of 18 years from the time of the original appropriation, had no right to erect telegraph poles on the other side of its track, at the distance of 29 feet from the center thereof, without compensation and payment of damages in the mode provided by the law or charter by which such railroad was governed at the time of such new appropriation.—Prather v. Jeffersonville, M. & I. R. Co., 52 Ind. 16.

[b] (Sup. 1894)

As the right of way acquired by a steam-railroad company across a street is subject to the easement of the public in the street, and as the operation of a street railway imposes no additional burden on a street, a street-railway company, which has acquired from the local authorities permission to build so as to cross the tracks of a steam railroad where they intersect a street, may construct its road across such tracks without compensation to the steam-railroad company.—Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. St. Ry. Co. 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 315-319.  
See, also, 15 Cyc. pp. 669, 696-698.

§ 121. Corporations and persons liable for compensation.

Liability to action by property owner, see post, § 285.

[a] (Sup. 1883)

Where a company has appropriated land, and a judgment has been rendered against it for its value, and the company is reorganized, the new company, entering on and occupying the land, is liable for the payment of the judgment, for it thereby ratifies the original appropriation.—Lake Erie & W. R. Co. v. Griffin, 92 Ind. 487.

[b] (Sup. 1886)

Where a new railroad corporation, succeeding to the property, rights, and franchises of an older company, enters upon land appropriated by its predecessor, and continuously uses the same for railroad purposes, to the exclusion of the landowner, it will be deemed to have adopted the original appropriation; and, the value of the land having been determined in such original proceedings by the judgment of a court of competent jurisdiction, the new company is, in equity, liable therefor, and it cannot escape such liability by afterwards abandoning the land.—Lake Erie & W. R. Co. v. Griffin, 107 Ind. 464, 8 N. E. 451.

[c] Where a landowner obtains judgment in condemnation proceedings against a railroad company for land appropriated by it for railroad purposes, its successor, which enters on, uses, and occupies the land for the purposes for which it was condemned, is liable to such owner for the amount of such judgment.—(Sup. 1892) *New York, C. & St. L. R. Co. v. Hammond*, 132 Ind. 475, 32 N. E. 83; (1895) *Chicago & S. E. R. Co. v. Galey*, 141 Ind. 360, 39 N. E. 925.

[d] (App. 1910)

Though a city cannot delegate its authority to change the grade of a street to a railroad occupying it, yet where a city fixes the grade to enable it to pave the street and the only right of the railroad is to adjust its tracks in the street to meet the requirements of the city, the railroad doing the work of grading the street is not liable for injuries to abutting owners.—(Chicago, I. & L. R. Co. v. Johnson, 90 N. E. 507.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 320-324;  
25 CENT. DIG. High. § 362.  
See, also, 15 Cyc. pp. 786-788.

(C) MEASURE AND AMOUNT.

Measure and amount of damages recoverable in action by property owner, see post, §§ 301-304.

§ 122. Necessity of just or full compensation or indemnity.

[a] (Sup. 1840)

The clause in the Constitution which provides that a just compensation shall be made for private property taken for public use means, not that the property thus taken shall be valued and its price paid in money, but that the owner shall be recompensed for the actual injury he may have sustained—all circumstances considered—by the measure of which he complains.—*McIntire v. State*, 5 Blackf. 384.

[b] (Sup. 1909)

In condemnation proceedings, all damages resulting from the taking should be included in the award, since the award bars recovery by the owner for any damage which should have been legally included therein.—*Indianapolis & W. R. Co. v. Branson*, 172 Ind. 383, 86 N. E. 834, 88 N. E. 594.

[c] (Sup. 1910)

The owner of land need not accept a promissory stipulation made by a condemning party on its own motion to allow the owner of the land privileges in the land condemned, and the owner may insist on full pecuniary compensation for property appropriated together with resultant damages.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 161.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 325, 325½.

§ 123. Sufficiency of statutory provisions as to amount.

[a] (Sup. 1855)

Act March 4, 1859, § 6 (Acts 1859, p. 5), which provides that the appraisers, in estimating the value of the road, shall take into consideration the location of the road for business, the competition of other roads, its earnings, etc., is constitutional.—*Louisville & N. A. R. Co. v. State ex rel. McCarty*, 25 Ind. 177, 87 Am. Dec. 358.

[b] (Sup. 1897)

Act March 6, 1891, providing for condemnation of a railroad right of way for streets on payment of damages assessed under the provisions of Rev. St. 1894, §§ 3629-3657 (Rev. St. 1881, §§ 3166-3194, does not limit the damages to the value of the real estate actually taken, but makes full provision for the assessment of all damages.—*City of Terre Haute v. Evansville & T. H. R. Co.*, 46 N. E. 77, 149 Ind. 174, 37 L. R. A. 189.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 326.  
See, also, 15 Cyc. p. 655.

§ 124. Time with reference to which compensation to be made.

[a] In a proceeding to condemn and appropriate land for the way of a railroad company, the inquiry as to the value of the land should relate to the time of the appropriation, and not to the time of the trial of such proceeding.—(Sup. 1844) *Vanblaricum v. State*, 7 Blackf. 209; (1875) *Logansport, C. & S. W. R. Co. v. Buchanan*, 52 Ind. 163.

[b] (Sup. 1856)

In the trial of a suit against a railroad company to recover damages arising from laying out the road, it is not proper to receive evidence of its value at the time of trial. It is proper to prove what was its value at the time of the construction of the road.—*Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74; (1856) *Graham v. Evansville, I. & C. Straight Line R. Co.*, Id. 276.

[c] (Sup. 1871)

A railroad company which entered upon land without consent of the owner, and without color of title, and erected improvements thereon, and afterwards sought to appropriate the land with authority of law, held liable to the owner for the value of the land at the time of the legal appropriation, including the improvements.—*Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463, 10 Am. Rep. 56.

[d] (Sup. 1879)

Where proceedings to appropriate land to the use of a railroad company, and to assess damages therefor, were begun several years aft-

er the company had entered upon the land and built its track, the inquiry as to the amount of damages should relate to the time of filing the act of appropriation.—*Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137.

[c] (App. 1903)

An instruction that the assessment of damages for property condemned for a pipe line must relate "to the time of the condemnation" is equivalent to an instruction that the assessment of the damages must relate "to the time of the filing of the instrument of appropriation."—*Muncie Natural Gas Co. v. Allison*, 87 N. E. 111, 31 Ind. App. 50.

[t] (Sup. 1907)

Where lands are condemned by a railroad for a right of way, all damages for rights taken and resulting to the remaining lands, both present and prospective, which are the natural and reasonable incidents of the proposed improvement, must relate to the time of filing the condemnation complaint.—*New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 332-344.

See, also, 15 Cyc. pp. 719-724.

§ 125. Nature and extent of right taken.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 345-351.

See, also, 15 Cyc. p. 685; note, 60 L. R. A. 204.

§ 126. — In general.

[a] (Sup. 1883)

When the fee is taken in land by eminent domain, the owner must be awarded value of that estate.—*Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580.

[b] (App. 1898)

Where an easement in land is appropriated for the laying of natural gas mains, damages cannot be allowed for possible injury to crops from leakage or for injuries to persons and property likely to result from explosions.—*Manufacturers' Natural Gas Co. of Indianapolis v. Leslie*, 51 N. E. 510, 22 Ind. App. 677.

On an appeal from an award of damages for the appropriation of an easement in land for the laying of natural gas mains, the jury should consider the relation of the remainder of the farm affected to the part condemned, the fact that the owners were deprived of the privilege of improving certain portions of their land, and the liability of the soil and crops to injury by leakage.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 345-347.

See, also, 15 Cyc. p. 685.

§ 128. — Railroad rights of way.

[a] (Sup. 1908)

*Burns' Ann. St.* 1901, § 5153, empowers railroad companies to construct their roads

across any highway so as not to interfere with the free use thereof, and requires the company to restore the highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness. *Held* that, in condemnation proceedings by a city to extend a street across land over which a railroad had an easement for a right of way, instructions directing the jury to allow defendant for the value of the land actually taken in extending the street, for the value of the section of the road embankment required to be removed, and for the cost of removing the same, were as favorable as defendant was entitled to.—*Cincinnati, I. & W. R. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

[b] (Sup. 1909)

As the establishment of a highway across the right of way of a railroad company does not deprive it of its use of the right of way, a different rule for ascertaining compensation must be applied than that which obtains in the condemnation of land of others, and the company is not entitled to the value of the real estate taken and the injury to that not taken.—*New York, C. & St. L. R. Co. v. Rhodes*, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 349-351.

See, also, 15 Cyc. pp. 696-699; note, 26 Am. St. Rep. 498.

§ 129. Taking entire tract or piece of property.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 352-361½.

See, also, 15 Cyc. p. 685.

§ 130. — Measure of compensation in general.

[a] (App. 1909)

Damages against an interurban street railway company for the relocation of its tracks on the moving of a highway must be restricted to compensation for land actually taken, and cannot include damages for improvements and trees destroyed in relocating the highway and already paid for.—*Miller v. Cincinnati, L. & A. Electric St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102.

Damages against an interurban street railway company for the use of property previously condemned and abandoned by a railroad company must be restricted to compensation for land actually taken, and cannot include changes previously made by the railroad company.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 352, 354, 355.

See, also, 15 Cyc. p. 685.

**§ 131. — Value of land.**

[a] (Sup. 1873).

In proceedings to condemn land for the use of a gravel road, the damages are assessed once for all, and the jury should look to every circumstance resulting from the appropriation, present and future, which affects the present value of the land.—*Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328.

[b] (Sup. 1877)

In a proceeding to appropriate land for railroad purposes, an instruction from which the jury might understand that in ascertaining the amount of the damages they were to consider the value of the land as such, and also the value of the gravel existing on the premises, was erroneous.—*Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 59 Ind. 100.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 353.

**§ 133. — Improvements and fixtures.**

[a] (Sup. 1885)

When a railroad takes a strip of land, and with the knowledge of the owner and without his objection builds thereon a railroad, and afterwards damages are claimed under the statute for the appropriation of the land, damages cannot be allowed for the value of the company's rails and cross-ties laid down upon the strip of land taken.—*Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409.

[b] (App. 1904)

Under Burns' Ann. St. 1901, § 5160, providing that a railroad desiring to appropriate land for a right of way shall deposit with the clerk of the court of the county where the land lies a description of the rights and interests intended to be appropriated, and that such lands, rights, and interests shall belong to the company, to use for the purposes specified, by making or tendering payment therefor, when there are buildings on the land they must be paid for as part of the realty.—*White v. Cincinnati, R. & M. R. R.*, 71 N. E. 276, 34 Ind. App. 287.

In a proceeding to condemn, for a railroad right of way, land on which there are buildings constituting a manufacturing plant, the machinery therein necessary to carry on the business of the plant, regardless of the manner of its attachment to the freehold, should be considered a part of the freehold, in estimating the damages.—*Id.*

[c] (Sup. 1907)

One who, having the right of eminent domain, enters on another's land with or without consent, and places improvements thereon, is not liable for such improvements to the landowner on subsequent condemnation of the land.—*McClarren v. Jefferson School Tp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 358–361½.

See, also, note, 16 L. R. A. 805.

**§ 134. — Value for special use.**

[a] (Sup. 1892)

In condemnation proceedings for a railway right of way, where the situation is such that the natural growth of a city and the proximity of the land to it fixes its use for suburban residences in the immediate future with such certainty as to make the land of additional value on that account at the time of the appropriation, the jury may consider it in estimating the amount of damages.—*Ohio Valley Railway & Terminal Co. v. Kerth*, 30 N. E. 298, 130 Ind. 314.

[b] (Sup. 1902)

A company owning land is entitled, on its condemnation, to the value of the land only, as its franchise and right to construct its works are not taken away, and the value of the land for mill dam purposes cannot be considered in determining such damages.—*Indiana Power Co. v. St. Joseph & E. Power Co.*, 159 Ind. 42, 63 N. E. 304, 64 N. E. 468.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 356.

**§ 135. Taking part of tract or property.**

Elements of compensation for injuries to part not taken, see ante, § 96.

**FOR CASES FROM OTHER STATES,**SEE 18 CENT. DIG. Em. Dom. §§ 363–370.  
See, also, 15 Cyc. p. 687.**§ 136. — In general.**

[a] (Sup. 1879)

In 1872 a railroad company entered upon certain land and built its track, and in 1877 proceedings to establish the appropriation were commenced. *Held*, in an action for the assessment of damages for said appropriation, that a judgment in favor of the landowner against the company, for its unlawful entry in 1872, was not admissible for the company to reduce the damages.—*Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137.

[b] (Sup. 1891)

In the assessment of damages to the owner of land occupied by a railroad, the true rule is a fair and just comparison of the value of the whole tract through which the road passes before and after the improvement is made.—*Evansville & R. R. Co. v. Swift*, 128 Ind. 34, 27 N. E. 420.

[c] (Sup. 1893)

In estimating the damage caused to a farm by establishing a highway across it, evidence of a contemplated change by the owner in his use of the farm is not admissible, since the issue is as to the present damage to the

land.—Goodwine v. Evans, 134 Ind. 262, 33 N. E. 1031.

[d] (App. 1901)

Where real estate through which a railroad right of way is sought to be obtained is used for agricultural purposes, evidence of the value of the land for agricultural purposes with the railroad constructed thereon is admissible on behalf of the landowner in condemnation proceedings.—Chicago, I. & E. R. Co. v. Curless, 60 N. E. 467, 27 Ind. App. 306.

[e] (Sup. 1910)

When a part only of a tract of land is appropriated for a public highway, the damage is the depreciation in the value of the land, measured by the difference between its market value as affected and unaffected by the improvement, or before and after the appropriation. When the injuries exceed the special benefits, the damages consist of two general elements, the value of the land appropriated, and the diminished value per acre of the residue; and, in determining the market value of the remaining parcels, it is proper to consider, among other facts, the burden of building and maintaining additional fences.—Glendenning v. Stahley, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 363-366.  
See, also, 15 Cyc. p. 687.

### § 137. — Land constituting single tract.

[a] (Sup. 1892)

The mere establishment of a line of railroad across a tract of land does not so effectually and completely divorce the severed tracts that the law will declare that they can no longer constitute parts of one entire farm in assessing damages for the appropriation of other rights of way by other roads through the land.—Chicago & W. M. R. Co. v. Hunccheon, 30 N. E. 636, 130 Ind. 529.

[b] (App. 1906)

Where a railroad right of way was sought to be condemned diagonally through a farm consisting of 65 acres of land in one body, damages should be considered and assessed for the entire farm.—Union Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052.

[c] (Sup. 1910)

Where remonstrator, in a proceeding for the establishment of a highway, owned a tract of land lying north of the proposed road, and he and his wife owned a tract lying south of it as tenants by entirety, the rule that in determining the amount of special benefits or damages sustained by one proprietor all land belonging to him lying in a contiguous body and used for a common purpose is to be considered as one tract was not applicable; and hence it was proper not to admit evidence to show the market value of one tract considered in connection with the other.—Glendenning v. Stahley, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 367-369.  
See, also, note, 57 L. R. A. 932.

### § 138. — Injuries to part not taken.

[a] (App. 1904)

Where part of a tract of land is taken for a railroad right of way, the owner is entitled to the value of the land appropriated, and any injury to the residue naturally resulting from the appropriation and the construction and operation of the road thereon.—White v. Cincinnati, R. & M. R. R., 71 N. E. 276, 34 Ind. App. 287.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 370.  
See, also, 15 Cyc. p. 690.

### § 139. Injuries to property not taken.

Elements of compensation, see ante, §§ 94-112. Right to compensation dependent on nature of injury, see ante, §§ 89-93.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 371-377.  
See, also, 15 Cyc. p. 691.

### § 141. — Depreciation of value.

[a] (Sup. 1892)

In an action against a city for the wrongful taking of land for a street, where the shrubs, shade trees, and soil were removed, and a street and sidewalk constructed, so that the property could not be restored to its previous condition, besides which a continuance of the street as a thoroughfare is demanded by the public interest, the injuries are permanent, and the measure of damages is the fair and reasonable value of the land taken.—City of Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263.

[b] Where an owner of land had the right to use a way on adjacent property as a means of ingress to and egress from the land, and as appurtenant to it, and a railroad company built its track on the way, thereby obstructing the same, the owner was entitled to damages on the theory of a permanent depreciation in the value of the land occasioned by the obstruction of the way.—(App. 1904) Cincinnati, R. & M. R. R. v. Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; Same v. Troutman (1906) 38 Ind. App. 700, 75 N. E. 277; Same v. Patterson, 39 Ind. App. 702, 77 N. E. 1199.

[c] (App. 1905)

The measure of damages for an injury to land in opening a highway through it is the difference between the market value at the time with the highway and its market value without it.—Pichon v. Martin, 73 N. E. 1009, 35 Ind. App. 167.

[d] (App. 1905)

The instruction, in proceedings to condemn land for a railroad right of way, that the damages are to be determined by finding the value



of the land remaining after the company has appropriated its right of way and built its road, and determining the value of the entire lot as it now is, and, deducting one from the other, the difference being the measure of damages, sufficiently states the measure of damages, the difference in value of the real estate at the time of the appropriation, and the value of the residue after the strip is taken.—*Consolidated Traction Co. v. Jordan*, 75 N. E. 301, 36 Ind. App. 156.

[e] (Sup. 1910)

In proceedings to condemn land for an electric railroad right of way, the damages must be determined by the fair cash market value of the land before and after the taking, and a witness testifying on the subject may not testify as to what he would pay for the land.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 161.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 372-376.

See, also, 15 Cyc. p. 692.

§ 144. Deduction or set-off of benefits.

Evidence as to benefits in action by property owner, see post, § 209.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 378-393.

See, also, 15 Cyc. pp. 764-774; note, 45 Am. Dec. 532.

§ 145. — In general.

[a] In estimating the damages occasioned by taking private land for a public work, the benefits which the appraisers are to take into consideration, under the statute, are those resulting from the enhanced value of the same body of land of which a part has been appropriated to the public use; and benefits resulting to other and separate lands of the owner are not to be considered.—(Sup. 1840) *McIntire v. State*, 5 Blackf. 384; (1841) *State v. Digby*, Id. 543; (1844) *Vanblaricum v. State*, 7 Blackf. 209.

[b] (Sup. 1840)

A statute (Jan. 27, 1836) which allows that, in assessing damages occasioned by taking private property for public use, the benefits resulting to the owner from the construction of the work shall be taken into consideration, is not in violation of that clause of the constitution which provides that a just compensation shall be made for private property taken for public use.—*McIntire v. State*, 5 Blackf. 384.

The constitutionality of a statute is not affected by its confining the assessment for benefits arising from a public work to him who claims compensation for property used in its accomplishment.—Id.

[c] Under the statutes, in assessing land damages in a railroad case, the jury are to disregard benefits which may be supposed to accrue to the landowner, as drainage by the railroad ditches.—(Sup. 1854) *McMahon v. Cincinnati*

& C. Short-Line R. Co., 5 Ind. 413; (1854) *Newcastle & R. R. Co. v. Brumback*, Id. 543; (1858) *Evansville, I. & C. Straight Line R. Co. v. Fitzpatrick*, 10 Ind. 120; (1858) *Same v. Cochran*, Id. 500.

[d] (Sup. 1854)

In the assessment of damages against a railroad company for the appropriation of lands, no deduction can be made for any benefits which may be supposed to result to the owner of the land to be appropriated.—*McMahon v. Cincinnati & C. Short-Line R. Co.*, 5 Ind. 413.

[e] (Sup. 1856)

The charter of a railroad company contained the provision that in all cases where any person through whose land the road may run shall refuse to relinquish the same, or where a contract between the parties cannot be made, it shall be lawful for the corporation to give notice to a justice of the peace, etc., who shall thereupon summon the owner to appear, and shall appoint 12 disinterested men, who, on oath, shall view the premises, and, taking into consideration the advantage and disadvantage caused to the same by building the road, assess the damage, etc. *Held*, that this act was against common right, and must be strictly construed. *Held*, further, that to entitle the company to the benefit of its provisions they must have taken the initiative in assessing the damages, that the act only applied to a case where the land appropriated was part of a tract with which the road came in contact, and, if the road was not in such contact at the time the assessment was made, the fact that, under the original laying out, it had been, was of no importance.—*Eward v. Lawrenceburgh & U. M. R. Co.*, 7 Ind. 711.

[f] (Sup. 1856)

In a suit against a railroad company to recover damages for land taken, the defendant asked that the following instruction should be given to the jury: "In ascertaining the extent of the injury to the plaintiffs, an estimate of the value of the property taken, at the time of the taking, is a necessary step; but if the benefits resulting to the plaintiffs, by the construction of the railroad, be equal in pecuniary value to the value of the property taken by the defendant, it is a just and legal compensation for the property so taken." *Held*, that the instruction should have been given.—*Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74; *Graham v. Evansville, I. & C. Straight Line R. Co.*, Id. 276.

[g] (Sup. 1868)

Any consideration of the benefits resulting to the residue of the land from the building of the road is expressly prohibited by the statute.—*White Water Val. R. Co. v. McClure*, 29 Ind. 536.

In a proceeding under the general railroad law for an assessment of damages for taking of land, evidence that the farm is worth as much, or more, with the road than without it,

is inadmissible. No deduction is to be made for any benefit.—Id.

[h] (Sup. 1882)

Under Const. art. 1, § 21, providing that "no man's land shall be taken by law without just compensation," in estimating damages for taking land for a highway, the benefits to the owner may be considered.—Hagaman v. Moore, 54 Ind. 496.

[i] (Sup. 1892)

Under Const. art. 1, § 21, providing that no man's property shall be taken by law without just compensation, land cannot be subjected to the easement of a highway without compensation to the owner, yet such compensation need not be a monetary one, as the benefits inuring to the land by reason of the location of the highway may equal the damage caused by the easement imposed.—Rassier v. Grimmer, 28 N. E. 866, 29 N. E. 918, 130 Ind. 219.

[j] (Sup. 1892)

In estimating the damages which one may sustain by reason of establishing a highway over his land, the benefit he will receive is also to be considered.—Hire v. Kniseley, 29 N. E. 1132, 130 Ind. 295.

[k] (Sup. 1892)

In an action for wrongfully opening a street through plaintiff's property, the determination of the verdict by deducting the value of the property with the street through it from the value without such street is within Rev. St. 1881, § 3172, providing that "in cases where both benefits and damages shall be assessed upon the same real estate, or to the same person or persons, the benefits, if less than the damages, shall be deducted from the assessment of damages."—City of Ft. Wayne v. Hamilton, 32 N. E. 324, 132 Ind. 487, 32 Am. St. Rep. 263.

[l] (Sup. 1893)

In estimating the damage caused to a farm by establishing a highway across it, the benefits which the owner will receive from the existence of a highway should be considered.—Goodwine v. Evans, 134 Ind. 262, 33 N. E. 1031.

[m] (Sup. 1895)

Under the rule that in case of the establishment of a highway, as against damages found, the jury may consider benefits found by it, a verdict and judgment establishing a highway, and awarding the landowner no damages, are not open to the constitutional objection that it is a taking of his property without compensation.—Forsyth v. Wilcox, 143 Ind. 144, 41 N. E. 371.

[n] On condemnation of land for the opening of a street, only a portion of a certain landowner's property having been taken, the jury had a right to consider the amount of benefit to that which remained.—(1902) Fifer v. Ritter, 64 N. E. 463, 159 Ind. 8; (1904) Pittsburgh,

C., C. & St. L. R. Co. v. Town of Wolcott, 69 N. E. 451, 162 Ind. 399.

[o] (App. 1902)

In determining the question of damages growing out of the location of a public highway, the benefits accruing to real estate, affected by establishing and opening such highway may be considered, and set off against any damages resulting.—Renard v. Grande, 64 N. E. 644, 29 Ind. App. 579.

[p] (Sup. 1905)

Where land of a remonstrator in highway proceedings lay in one body, except for one intervening road, and was used for a common purpose, benefits to any of remonstrator's lands could be considered by the jury in ascertaining his damages, although the remonstrance was by its terms arbitrarily confined by the remonstrator to part of the lands.—Speck v. Kenoyer, 73 N. E. 896, 164 Ind. 431.

[q] (Sup. 1905)

Under Const. art. 1, § 66, declaring that no man's property shall be taken without just compensation, the compensation to be awarded an owner for lands taken and appropriated for a public highway need not always be made in money, but the benefits derived from the improvement may be set off against the damages caused thereby, and may suffice to constitute a just compensation.—Heath v. Sheetz, 74 N. E. 505, 164 Ind. 665.

[r] (App. 1905)

No damages can be recovered by a remonstrant in a highway condemnation proceeding where the benefits to his land are as much as his damages.—Pichon v. Martin, 73 N. E. 1009, 35 Ind. App. 167.

[s] (App. 1905)

Burns' Ann. St. 1901, § 922, providing that in estimating damages no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work, applies to condemnation proceedings for a railroad right of way.—Indianapolis Northern Traction Co. v. Dunn, 76 N. E. 269, 37 Ind. App. 248.

[t] (App. 1906)

Civ. Code 1852, art. 41, § 683 et seq., provides for a "writ of assessment of damages." Section 706 authorizes a railroad to have the writ, and section 711 provides that in estimating the damages no deduction shall be made for any benefit that might be supposed to result to the owner from the contemplated work. 1 Rev. St. 1852, p. 409 (Burns' Ann. St. 1901, §§ 5134 et seq., 5159, 5160), relative to the incorporation of railroads, authorizes railroads to condemn land and prescribe the proceedings. Burns' Ann. St. 1901, § 5468a, as amended by Acts 1903, p. 92, c. 36, provides for the construction of electric interurban railways through lands not within the limits of a street or highway, authorizes the condemnation of land for that purpose, and substantially adopts the meth-

od prescribed by the railroad act of 1852 for the appropriation of land by railroads. *Held* that, in condemning land for an electric interurban railway, damages should be assessed as in case of assessments for railroads, and consequently no deduction should be made for benefits which may be supposed to result to the landowner from the construction of the road.—*Indianapolis Northern Traction Co. v. Ramer*, 76 N. E. 808, 37 Ind. App. 264.

[u] (App. 1906)

In a proceeding under Burns' Ann. St. 1901, § 5468a et seq., to condemn land for an interurban street railroad, the jury, in estimating the damages, should not make deductions for benefits accruing to the landowner from the construction and operation of the road.—*Carrell v. Muncie, H. & Ft. W. R. Co.*, 78 N. E. 254, 38 Ind. App. 700.

[v] (App. 1906)

In a proceeding to condemn land for an interurban electric railway, no deduction should be made for benefits accruing to the landowner from the construction and operation of the road.—*Union Traction Co. v. Pfeil*, 39 Ind. App. 51, 78 N. E. 1052.

[w] (Sup. 1910)

In the establishment of public highways, benefits derived by reason of a road having been laid out may suffice to constitute just compensation for the land taken and appropriated within the meaning of the constitutional provision that private property shall not be taken without just compensation.—*Glendenning v. Stahley*, 91 N. E. 234.

In proceedings for the establishment of a highway, all benefits, both present and prospective, to the lands affected, which are the natural and direct result of the appropriation, must be determined, and no contingent or speculative benefit can be considered, but only such matters as actually affect the present worth of the land.—*Id.*

In proceedings for the establishment of a highway, an instruction that, if in process of time the proposed road would reasonably bring added benefits to any particular tract of land, they might consider how much the benefit would be to such tract by establishing the road was not error.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 378-389.

#### § 146. — General or special benefits.

[a] (App. 1905)

In proceedings for the laying out of a highway the jury are only authorized to consider benefits and damages as specially applied to the specific real estate over which the road is laid out.—*Pichon v. Martin*, 73 N. E. 1009, 35 Ind. App. 167.

[b] (Sup. 1910)

Where the situation of one's land was such as to entitle him to claim special damages from

the laying out of a highway over the same, it followed infallibly that special means and facilities of ingress and egress to and from his premises were afforded, making his benefits in the same sense special and different from those resulting to the general public.—*Glendenning v. Stahley*, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 390-393.

See, also, 15 Cyc. p. 770.

#### § 149. Amount awarded.

[a] (Sup. 1890)

An abutting landowner cannot recover nominal damages for the occupation of a street by a railroad, but only for damages actually sustained.—*Burkham v. Ohio & M. R. Co.*, 122 Ind. 344, 23 N. E. 799.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 327-331, 401.

#### § 150. Inadequate or excessive compensation.

[a] (Sup. 1892)

In estimating the damages sustained by the owner of land by reason of opening a highway over his premises, where there was evidence from which the jury might infer that the benefit equaled the damage, an assessment of one dollar will not be set aside on appeal as inadequate.—*Hire v. Kniseley*, 130 Ind. 295, 29 N. E. 1132.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 402.

See, also, 15 Cyc. p. 908.

#### (D) PERSONS ENTITLED AND PAYMENT.

Necessity of payment before taking, see ante, §§ 73-76.

Payment to attorney, see ATTORNEY AND CLIENT, § 98.

#### § 151. Persons entitled.

Nature of right to compensation awarded, see post, § 245.

Persons entitled to sue where property has been taken or injured, see post, § 284.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 403-426;

25 CENT. DIG. High. § 360.

See, also, 15 Cyc. pp. 788-800.

#### § 152. — In general.

[a] (Sup. 1857)

Under the provisions of Act 1836, p. 13, a lessee for life or years may recover for injuries to his interest by the construction of railroads, etc.—*Burbridge v. New Albany & S. R. Co.*, 9 Ind. 546.

[b] (Sup. 1877)

In an action against a city and another, the complaint alleged that the latter became the

owner of certain land subsequently condemned for street purposes by such city by obtaining a sheriff's deed therefor, based on a sheriff's sale of the same to him on a decree foreclosing a prior mortgage thereon in his favor; that at the time of such foreclosure such land was incumbered by the lien of a judgment in favor of the plaintiff, who had not been made a party to the foreclosure suit; and that the city had paid to its codefendant as damages for such condemnation a sum exceeding the aggregate of such decree, interest, costs, and the plaintiff's judgment. Demand that the plaintiff be allowed to redeem from the city, or that such other defendant be compelled to contribute. *Held*, that as a matter of equity such codefendant is liable to the plaintiff, without demand, for the amount of the plaintiff's judgment, and for the costs of the action.—*Gimbel v. Stolte*, 59 Ind. 446.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 403-406.

See, also, 15 Cyc. pp. 788, 799.

### § 153. — Vendor or purchaser.

[a] (Sup. 1819)

The grantee of land abutting on a stream cannot maintain an action to recover damages for raising the waters of a stream by a dam, where his grantor, being the owner of the land at the time of the erection of the dam, was awarded damages therefor, if the damages complained of were such as were contemplated by the jury in assessing the damages.—*Kepley v. Taylor*, 1 Blackf. 492.

[b] (Sup. 1863)

Quere, whether, where property is condemned for public use, the equitable owner is not entitled to the damages in lieu of the land, and whether such condemnation in any way affects the relations of the vendor and vendee.—*Caldwell v. Bank of Salem*, 20 Ind. 294.

[c] (Sup. 1883)

After a deed to a railroad company of its right of way, "in consideration of the location and construction" of the road, "so long as it shall be required for the uses of said company," the company mortgaged the right of way, but never constructed the road, and the premises were sold under foreclosure to A., who sold to B. Subsequently another company condemned the right of way, and paid the money into court. *Held*, that the grantor, and not B., was entitled to the money.—*Ingalls v. Byers*, 94 Ind. 134.

[d] (Sup. 1884)

Damages for the taking, and injury to the land, belong to the owner at the time of the injury, and do not pass to a grantee with the title to the land.—*Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409.

[e] (Sup. 1888)

When a company having the power of eminent domain has entered into possession of land

necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of such owner takes the land subject to the burden placed upon it, and the right to payment or damages from the company belongs to the owner at the time it took possession.—*Evansville & T. H. R. Co. v. Nye*, 15 N. E. 261, 113 Ind. 223.

[f] (Sup. 1888)

Where a railroad takes land without making compensation, the claim of the owner for damages is a chose in action, which does not pass to his grantee by warranty deed, unless expressly stipulated.—*Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650.

[g] (Sup. 1908)

An owner of property abutting on a street on which interurban cars are operated may prosecute an action for special damages resulting from the improper operation of the cars, notwithstanding a sale of the property pending the action, and notwithstanding an injunction to restrain the wrong complained of is sought.—*Kinsey v. Union Traction Co.*, 169 Ind. 563, 81 N. E. 922.

[h] (Sup. 1908)

Exceptions to an award in condemnation proceedings, showing that the exceptor purchased the land sought to be condemned after the filing of the instrument of appropriation, are bad where they fail to show that the right of action for such appropriation was also assigned.—*Ft. Wayne & S. W. Traction Co. v. Ft. Wayne & W. R. Co.*, 170 Ind. 49, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

The right of action for damages which accrue to a landowner from the appropriation of land by an interurban railroad company for a right of way does not pass to a subsequent grantee of the land except by express stipulation to that effect in the conveyance.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 407-416.

See, also, 15 Cyc. pp. 795-798.

### § 154. — Mortgagor or mortgagee.

[a] (Sup. 1887)

Where mortgaged land is condemned and taken for a public street, although the damages assessed have been paid to the mortgagor, the mortgagee is entitled to recover the amount of the award from the city as an equivalent for the land so taken.—*Sherwood v. City of La Fayette*, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 417-420.

See, also, 15 Cyc. p. 794; note, 18 L. R. A. 113; note, 88 Am. St. Rep. 359, 363.

**§ 155. — Landlord or tenant.**

[a] (Sup. 1857)

A lease for years contained a provision that nothing in the instrument could prejudice or affect the right of the lessor to demand and recover damages resulting to the property from the construction of railroads, to the same extent as if he were in possession. *Held*, that a waiver by the lessor of his right to recover such damages operated to the benefit of the railroad company, and not to that of the lessee.—*Burbridge v. New Albany & S. R. Co.*, 9 Ind. 546.

[b] (App. 1901)

Where, in an action for wrongful appropriation of land by a railway company, the complaint alleged plaintiff's ownership and possession of the land, but the evidence showed that at the time of the acts complained of the land was rented and in possession of a tenant, plaintiff's right to recover was not affected thereby, since, for the purposes of the action, the possession of plaintiff's tenant was her possession.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 421-424.  
See, also, 15 Cyc. p. 790; note, 21 L. R. A. 212.

**§ 157. Apportionment.**

[a] (App. 1906)

On the condemnation of land, the tenant thereof is entitled to have his damages assessed and apportioned between the landlord and himself accordingly to their respective rights.—*Douglas v. Indianapolis & N. W. Traction Co.*, 76 N. E. 892, 37 Ind. App. 332.

Where, in condemnation proceedings, a tenant of the land failed to plead any interest in the land, he assented to a recovery of all damages by the landlord.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 427.  
See, also, 15 Cyc. p. 790.

**§ 159. Duties as to payment.****FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 433-435;  
25 CENT. DIG. High. § 372.

**§ 160. — In general.**

[a] (Sup. 1877)

Where damages are awarded as a condition precedent to the opening of a public highway, it is discretionary with the board of commissioners, under the statute, whether they will order the same to be paid out of the county treasury.—*Hayes v. Board of Com'rs of Kosciusko County*, 59 Ind. 552.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 433, 434.

**§ 163. Requisites and sufficiency of payment.**

[a] (Sup. 1846)

Laws 1842, p. 24, which, in providing the means for prosecuting the extension of the Wabash & Erie Canal, enacted that all the expenses of constructing the work should be paid in canal scrip, did not intend to change the provision of the act of 1836 that the assessment and payment of damages for injuries done to real estate in constructing the canal should be paid in gold and silver. Had the act of 1842 provided for the assessment and payment of such damages in anything other than gold and silver, the provision would have been unconstitutional.—*State v. Beackmo*, 8 Blackf. 246.

[b] (Sup. 1847)

The act authorizing the taking of land of individuals for the purpose of constructing the Wabash & Erie Canal west of Lafayette was objected to on the ground that the owners of the land were compelled to take certain scrip, mentioned in the act of 1842, in payment of their damages which might be assessed. The answer to that objection was *held* to be that the scrip was not the only fund provided by law for the payment of said damages; the means for payment being provided by the act of 1843.—*Lucas v. Hawkins*, 8 Blackf. 337.

[c] (Sup. 1887)

Land was taken possession of by the Wabash & Erie Canal Company in 1846. Timber was cut off of it, a basin or reservoir was formed by the construction of banks, water was thrown into it by means of a dam, and the pond thus formed was used as a part of the canal. *Held* that, after the lapse of such a period, the presumption is that the damages arising from the appropriation of the land were paid or waived, and that the canal company acquired the fee in the land seized.—*Blair v. Kiger*, 111 Ind. 193, 12 N. E. 293.

[d] (App. 1901)

In an action against a railway company for the wrongful appropriation of land without plaintiff's permission and without payment of compensation, an instruction that no particular words are necessary to a tender, that the party making it must have the money and offer it to the party entitled, and that the mere offering to pay the money at some other time, or coupled with a condition, or the offer of a check or certificate of deposit, would not be a good tender, was not objectionable, since it was proper for the court to tell the jury what acts would or would not constitute a tender.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 436-441;  
8 CENT. DIG. Canals, § 9.  
See, also, 15 Cyc. p. 783.

**§ 164. Operation and effect of payment.**

[a] (Sup. 1877)

1 Rev. St. 1876, pp. 532, 533, §§ 21, 25, provide that no highway shall be opened until the damages assessed are paid to the persons entitled thereto, or deposited in the county treasury for their use, or they shall give their consent in writing, filed with the auditor. *Held* that, where the board refuses to order the payment of such damages out of the county treasury, the petitioners for the highway may or may not, at their option, pay the same; but, in case of payment by them, they have no recourse on the county for the money paid.—*Hayes v. Board of Com'rs of Kosciusko County*, 59 Ind. 552.

[b] (Sup. 1882)

Where, in proceedings by a railroad company to condemn land for a right of way, the company paid the amount awarded to the clerk, such payment did not vest title in the company, but merely operated to authorize it to take possession, subject to the result of future litigation, determinable upon its failure to pay an additional amount awarded on a subsequent trial.—*Lake Erie & W. R. Co. v. Kinsey*, 87 Ind. 514.

[c] (App. 1893)

Where contractors in building a free gravel road, for which gravel from the land occupied by plaintiff was required and being unable to agree with the owner as to the price, by proper proceedings secured the appointment of appraisers, who appraised the value for gravel to be taken, and assessed all damages to the land and to the crops, and the same was paid to the owner of the freehold, including all the items of damage for which plaintiff claimed, and plaintiff with full knowledge and consent made no claim therefor but actively participated in the adjustment to that extent, he could not afterwards claim from the contractors the money which with his consent had already been paid to the owner of the freehold.—*Shauver v. Phillips*, 32 N. E. 1131, 34 N. E. 450, 7 Ind. App. 12.

[d] (Sup. 1899)

Where, in a proceeding to establish a highway, a property owner accepted payment of the amount of damages awarded to him in the commissioner's court, he thereby waived his right to further contest the amount of damages he had sustained or the public utility of the road, and was estopped to complain of the dismissal of his appeal by the circuit court.—*Glassburn v. Deer*, 41 N. E. 376, 143 Ind. 174.

[e] (App. 1904)

Where a property owner accepts and retains the damages assessed in condemnation proceedings, he cannot claim greater damages, either in a direct appeal or in a collateral action.—*Stauffer v. Cincinnati, R. & M. R. R.*, 70 N. E. 543, 33 Ind. App. 356.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 442-444;  
25 CENT. DIG. High. § 372.

See, also, 15 Cyc. pp. 784, 785.

**III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.**

Accrual of right of action by landowner, effect of infancy, see *LIMITATION OF ACTIONS*, § 72.

Application of general statutes of limitation to action by landowner to have damages assessed, see *LIMITATION OF ACTIONS*, § 39.

Assessment of damages in condemnation proceedings as affecting liability of railroad company for injuries to stock, resulting from failure to fence tracks, see *RAILROADS*, § 411.

Demand for trial by jury, see *JURY*, § 25.

Institution of condemnation proceedings as estoppel to assert dedication, see *DEDICATION*, § 39.

Right of property owner to compel proceedings to assess compensation, see post, § 269.

Right to exercise power of eminent domain, as precluding city from acquiring property by transfer, see *MUNICIPAL CORPORATIONS*, § 224.

Right to trial by jury, see *JURY*, § 19.

Right to trial by jury, denial or infringement of right, see *JURY*, § 35.

Statutory provisions as deprivation of property without due process of law, see *CONSTITUTIONAL LAW*, § 231.

**§ 166. Nature and form of proceeding.**

[a] (Sup. 1875)

Under a turnpike franchise authorizing the construction of a main road and branches, and prescribing a method for condemning a right of way for the main road only, the method prescribed for the main road must be pursued in acquiring a right of way for branches.—*Heady v. Vevay, Mt. S. & V. Turnpike Co.*, 52 Ind. 117.

[b] (Sup. 1888)

Condemnation proceedings are not ordinary civil actions, but are statutory proceedings of a special nature.—*Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 19 N. E. 440, 116 Ind. 578.

[c] (App. 1902)

A condemnation proceeding is in its nature a special statutory one; and, while it is not in a strict sense an ordinary civil action, yet the provisions of the Civil Code as to matters of practice may be called to the aid of such statute.—*Great Western Natural Gas & Oil Co. v. Hawkins*, 66 N. E. 765, 30 Ind. App. 557.

[d] (Sup. 1908)

Eminent domain proceedings are not in a strict sense ordinary civil actions, but are actions of a special character based wholly on

statute; nevertheless, in respect to the practice therein, the provisions of the Civil Code, so far as applicable and consistent, may be invoked.—*Toledo & I. Traction Co. v. Toledo & C. I. R. Co.*, 171 Ind. 213, 86 N. E. 54.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Eminent Domain. §§ 448-450, 456.

See, also, 15 Cyc. p. 805.

#### § 167. Statutory provisions and remedies.

##### [a] (Sup. 1854)

Section 15 of the act entitled "An act to provide for the incorporation of railroad companies," approved May 11, 1852, and the part of an act approved June 18, 1852, relating to the assessment of damages where land is taken by a railroad company, are to be taken in pari materia, and considered as one enactment.—*McMahon v. Cincinnati & C. Short-Line R. Co.*, 5 Ind. 413.

##### [b] (Sup. 1863)

Where a special remedy is given by a statute for the taking of private property in the construction of public works, that remedy only can be adopted, and it is not a cumulative remedy, and this rule is applicable as well to corporations created by statute under the new as under the old Constitution, in all cases where the incorporating act is not a private statute.—*Indiana Cent. Ry. Co. v. Oakes*, 20 Ind. 9.

##### [c] (Sup. 1893)

The statute providing that it shall be lawful for a railroad company or for the party owning lands upon which any part of the road is constructed to apply to the proper court for a writ of assessment of damages provides a cumulative remedy, and does not defeat or take away the common-law remedy.—*Chicago & I. Coal Ry. Co. v. Hall*, 34 N. E. 704, 135 Ind. 91, 23 L. R. A. 231.

##### [d] (Sup. 1894)

If, in condemnation proceedings by a town for the opening of streets and alleys, there is a substantial compliance with the statutory requirements, in good faith, the proceedings will not be held void.—*Graves v. Town of Middletown*, 137 Ind. 400, 37 N. E. 157.

##### [e] (Sup. 1903)

The general railroad law, Burns' Rev. St. § 5158a, requiring the question as to whether it is practicable to avoid a grade crossing at the intersection of two railroads, and, if not, the mode of such crossing, to be submitted to the circuit court, does not apply to a street or interurban electric railway crossing a railroad, they being governed by Burns' Rev. St. 1901, § 5468e, requiring the manner of such crossing to be determined by commissioners in the proceedings to acquire the right of crossing.—*Wabash R. Co. v. Ft. Wayne & S. W. Traction Co.*, 67 N. E. 674, 161 Ind. 295.

##### [f] (Sup. 1904)

Burns' Rev. St. 1901, §§ 4404-4410, relative to the opening of streets requiring notice to the owner of property to be appropriated, providing a hearing at which evidence may be received, requiring a report to be made to a tribunal designated, as well as the assessment and tender of damages to the owner, and providing an appeal to the circuit court, is not unconstitutional.—*Pittsburgh, C., C. & St. L. R. Co. v. Town of Wolcott*, 69 N. E. 451, 162 Ind. 399.

##### [g] (Sup. 1907)

While statutes regulating eminent domain should be strictly construed, a literal and exact compliance therewith is not required.—*Darrow v. Chicago, L. S. & S. B. R. Co.*, 169 Ind. 99, 81 N. E. 1081.

##### [h] (Sup. 1907)

Under the express provisions of Acts 1905, pp. 59-64, c. 48 (Burns' Ann. St. Supp. 1905, §§ 893-904), providing for condemnation, actions pending at the time the act took effect were not affected thereby. *Held*, that a condemnation proceeding pending when the act was passed was governed by Acts 1881, p. 592, c. 87 (Burns' Ann. St. 1901, §§ 6006-6008), regulating condemnation proceedings, even though that act were repealed by the later one.—*McClarren v. Jefferson School Tp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417.

##### [i] (Sup. 1908)

Act March 6, 1905 (Acts 1905, p. 219, c. 129), known as the "Cities and Towns Act," which repealed Acts 1899, p. 270, c. 152, providing for proceedings by cities to condemn property for public use, expressly excepts proceedings pending when the act went into effect, and such cases are to be determined as if the latter statute had not been enacted.—*City of Terre Haute v. Sachs*, 171 Ind. 679, 86 N. E. 45.

##### [j] (Sup. 1909)

Under Drainage Act 1907 (Acts 1907, p. 508, c. 252), providing for the filing of petitions to drain lands in the circuit or superior court of the county in which the lands are situated, and for the filing of any demurrer or remonstrance to such petition in the same court, the circuit court is invested with jurisdiction in proceedings to condemn property for drainage purposes.—*Zehner v. Milner*, 172 Ind. 493, 87 N. E. 209, 24 L. R. A. (N. S.) 383.

##### [k] (App. 1909)

That a telephone pole was so set in a street as to constitute an additional burden did not change the act of setting it from a nuisance to an appropriation of property so as to require an abutting owner to resort to the remedy for assessing damages provided by Burns' Ann. St. 1901, § 893, etc.; the property owner being entitled either to sue for damages, or to institute a proceeding under the statute.—*Merchants'*

Mut. Tel. Co. v. Hirschman, 43 Ind. App. 283, 87 N. E. 238.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 451-456.  
See, also, 15 Cyc. pp. 830, 831.

**§ 168. Right to institute proceedings.**

[a] (Sup. 1857)

A proceeding against railroad companies to assess damages for land to be taken by them seems to be authorized by 2 Rev. St. p. 193, art. 41, §§ 706-710. Proceedings subsequent to the return of the writ are governed by section 697; and, under this statute, it is immaterial which party takes the initiative in instituting proceedings.—Marion & M. V. R. Co. v. Ward, 9 Ind. 123.

[b] (Sup. 1877)

One railroad company cannot appropriate land for the use of another.—Swinney v. Ft. Wayne, M. & C. R. Co., 59 Ind. 205.

[c] (Sup. 1906)

A de facto corporation may maintain proceedings under the power of eminent domain.—Morrison v. Indianapolis & W. Ry. Co., 76 N. E. 961, 77 N. E. 744, 166 Ind. 511.

Where the corporate existence of a corporation seeking to condemn land is properly challenged, it is incumbent on the plaintiff to show that it is either a de jure or a de facto corporation.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 457-460.  
See, also, 15 Cyc. pp. 808-810.

**§ 169. Conditions precedent in general.**

[a] (Sup. 1876)

A proceeding to assess against a railroad company damages sustained by a landowner from the appropriation of his land for the construction of the railroad of such company cannot be maintained by such owner, under 1 Gav. & H. St. p. 509, § 15, where there has not been an instrument of appropriation filed by the company, as provided in said section.—Indianapolis, B. & W. R. Co. v. Reed, 52 Ind. 357.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 461.  
See, also, 15 Cyc. pp. 812-829.

**§ 170. Inability to agree with owner.**

[a] (Sup. 1877)

A railroad company need not offer to purchase land before commencing condemnation proceedings to appropriate it under Act May 11, 1852.—Swinney v. Ft. Wayne, M. & C. R. Co., 59 Ind. 205.

[b] (Sup. 1888)

An appeal does not waive any objection seasonably and appropriately made that plaintiff has not complied with the statute requiring an effort to agree with the owner before bring-

ing proceedings to condemn.—Lake Shore & M. S. Co. v. Cincinnati, W. & M. R. Co., 19 N. E. 440, 116 Ind. 578.

[c] (App. 1898)

To authorize an application for a writ of assessment, under Rev. St. 1881, §§ 905, 906, 909 (Rev. St. 1894, §§ 917, 918, 921), providing that the owner of land taken by a railroad for its right of way may have a writ of assessment directing the sheriff to assess his damages by jury, it is unnecessary that any negotiation or attempt at an agreement should have been had between the parties before making the application, where the property had already been taken, and the time for negotiations, as provided in section 3907, Rev. St. 1881 (section 5160, Rev. St. 1894), had passed.—Kennedy v. Cleveland, C. & St. L. R. Co., 50 N. E. 592, 20 Ind. App. 315.

[d] (App. 1908)

Act Feb. 27, 1905 (Acts 1905, p. 59, c. 48: Burns' Ann. St. 1908, § 929), relating to eminent domain, provides that any person, etc., having the right of eminent domain, before proceeding to condemn, shall make an effort to purchase the lands, etc. Section 933 provides that defendant may file objections to the proceedings, and if they are overruled the court or judge may appoint appraisers. *Held*, that a corporation proceeding under the act must establish, as preliminary to its right to demand that the court appoint appraisers, that it is a corporation which is invested with the right to exercise the power of eminent domain, and that it has made an effort to purchase the property sought to be taken, and it is error to appoint appraisers without that proof being made.—Slider v. Indianapolis & L. Traction Co., 42 Ind. App. 304, 85 N. E. 372, 721.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 462-467.  
See, also, 15 Cyc. pp. 813, 821.

**§ 171. Defenses and objections.**

Estoppel by accepting compensation, see ESTOPPEL, § 92.

[a] (Sup. 1851)

An irregularity in the proceeding of the defendants in executing the writ of ad quod damnum authorized by their charter could only be taken advantage of by the owners of the soil appropriated by the defendants.—Bush v. Peru Bridge Co., 3 Ind. 21.

[b] (Sup. 1875)

If a condemnation proceeding may be dismissed, on the motion of the landowner, because the instrument of appropriation deposited with the clerk of the circuit court, as provided in section 15, 1 G. & H. 509, is not signed by any person in behalf of the railroad company, such objection will be waived if not made until a late stage of the proceeding.—Logansport, C. & S. W. R. Co. v. Buchanan, 52 Ind. 163.



[c] (Sup. 1877)

To the petition of a railroad company to appropriate lands, the owner answered asking an injunction upon the alleged grounds that the plaintiff had no valid organization, did not intend to build the proposed road, and had organized simply in the interest of another company, which grounds were being tested in a quo warranto proceeding then pending against such company. *Held*, that the answer is sufficient.—*Aurora & C. R. Co. v. Miller*, 56 Ind. 88.

[d] (Sup. 1879)

The fact that a petitioner, under 1 Rev. St. p. 532, § 19, first directed his remonstrance solely to the public utility of the proposed location or change of highway, and that reviewers appointed thereon have reported it to be of public utility, does not preclude him from afterwards, before their final action, remonstrating on the ground of damages.—*Bowers v. Snyder*, 68 Ind. 340.

[e] (Sup. 1884)

A decision by road commissioners on the report of reviewers against a remonstrance on the ground of inutility is a bar to any subsequent remonstrance on the same ground, though not to one for damages.—*Denny v. Bush*, 95 Ind. 315.

[f] (Sup. 1905)

*Burns' Ann. St.* 1901, § 6006, provides for the condemnation of land by a township for school purposes whenever necessary in the opinion of the township trustee; and by section 6008, subd. 3, on filing of the report of appraisers, the owner may except to the same for any cause. *Held*, that the landowner cannot show, in defense to the proceedings, that a less quantity of land than that sought to be condemned will suffice, or that another location would be more convenient, and could be had for a less price.—*Richland School Tp. v. Overmyer*, 73 N. E. 811, 164 Ind. 382.

It was not competent in such a proceeding to introduce evidence that the property was to be applied to a different use than that for which it was appropriated.—*Id.*

[g] (Sup. 1907)

*Acts* 1905, p. 61, c. 48, § 5, provides that the defendant in condemnation proceedings may object to such proceedings on the ground that the court has no jurisdiction, that the plaintiff has no right to exercise the power of eminent domain for the use sought, and may object for any other reason disclosed in the complaint or set up in such objections, and forbids further pleadings except the answer provided for in section 8 (page 63). In a proceeding to condemn a railroad right of way, the owner of the land objected for the reasons that it owned all the coal underlying a large tract of land and had laid out a system of mining all of the lands in a body; that the tract sought to be condemned was substantially in the center of the coal lands; that at no time had the railway company offered to contract with regard to a right

of way across the land as a whole; that the construction of the road would interfere in numerous specified ways in the operation of the mines; that the appraisalment of the land to be appropriated should include an estimate of the owner's damages to the land as a whole; and that the railway company having failed to offer to purchase the owner's interest in adjoining tracts the court was without jurisdiction as to the tract in the center sought to be condemned. *Held*, that none of the objections presented matter in bar or in abatement of the railway company's right to appropriate the small tract in the center of the coal land within the meaning of *Acts* 1905, p. 61, c. 48, § 5.—*Vandalia Coal Co. v. Indianapolis & L. R. Co.*, 168 Ind. 144, 79 N. E. 1082.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 468, 469.  
See, also, 15 Cyc. pp. 866, 867.

#### § 172. Jurisdiction.

Exclusive or concurrent jurisdiction, effect of priority of jurisdiction, see *COURTS*, § 475.

[a] (Sup. 1863)

As 1 Gav. & H. St. p. 509, and 2 Gav. & H. St. p. 315, give concurrent jurisdiction to the circuit and common pleas courts of actions for the assessment of damages for land taken for railroad purposes, where proceedings have been commenced in the common pleas, and appraisers have been appointed, and the award has been returned to that court, the circuit court cannot deprive it of jurisdiction by attempting to assume the same.—*Hughes v. Lake Erie & P. R. Co.*, 21 Ind. 175.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 470-472;  
25 CENT. DIG. High. § 366.  
See, also, 15 Cyc. pp. 810-812.

#### § 174. Time for application.

Accrual of right of action, see *LIMITATION OF ACTIONS*, § 58.

Demand affecting limitation of actions, see *LIMITATION OF ACTIONS*, § 66.

Infancy affecting limitation of actions, see *LIMITATION OF ACTIONS*, § 72.

Limitations applicable, see *LIMITATION OF ACTIONS*, § 39.

[a] Before St. 1842, p. 158, a party, after he had erected a milldam, could not, under St. 1831, have a writ of *ad quod damnum*.—(Sup. 1838) *Smith v. Olmstead*, 5 Blackf. 37; (1839) *Summy v. Mulford*, Id. 113.

[b] (Sup. 1850)

The Indiana general internal improvement act of 1836 is in force so far as it is unchanged by subsequent legislation; and, by that act, claims for damages to lands by the construction of public improvements must be made in two years after the appropriation of the land, or damage done, and not afterwards.

—White Water Valley Canal Co. v. Ferris, 2 Ind. 331.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 475, 476.  
See, also, 15 Cyc. p. 837.

**§ 175. Parties.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 477-487.  
See, also, 15 Cyc. pp. 837-840.

**§ 177. — Defendants.**

**[a] (Sup. 1877)**

A proceeding by a city to condemn real estate for street purpose, under sections 61 to 67, inclusive, of the act of March 14, 1867 (1 Rev. St. 1876, p. 267), for the incorporation of cities, etc., is a proceeding against the owner thereof alone, and the holder of a simple judgment lien thereon is not entitled to notice thereof, and cannot redeem therefrom.—Gimbel v. Stolte, 59 Ind. 446.

**[b] (Sup. 1907)**

Under Acts 1905, p. 60, c. 48, § 2, providing that, where it is desired to condemn a right of way, a complaint may be filed which shall state the names of all claimants and owners of the property, it is not necessary to the jurisdiction of the court that all persons interested in the property be made parties, but damages may be assessed to persons made parties, and they cannot object to the failure to join other parties.—Darrow v. Chicago, L. S. & S. B. R. Co., 169 Ind. 99, 81 N. E. 1081.

A husband need not be joined in a proceeding to condemn the wife's lands, as his rights would not be foreclosed by the assessment of damages in favor of the wife.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 478, 480, 481, 483, 485.  
See, also, 15 Cyc. p. 837; note, 16 L. R. A. 186.

**§ 179. Process or notice.**

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 488-498;  
25 CENT. DIG. High. § 366.  
See, also, 15 Cyc. pp. 841-849; note, 16 L. R. A. 186.

**§ 180. — Necessity.**

**[a] (Sup. 1856)**

In proceedings brought by a landowner for the assessment of damages for land taken by a railroad company, an award of execution for damages and costs assessed in favor of the applicant is erroneous where no notice was given to the railroad company of the proceedings prior to the assessment of the damages by the appraisers.—Columbus & S. R. Co. v. Richardson, 7 Ind. 543.

**[b] (Sup. 1861)**

The person applying for leave to build a dam acquires the right to do so only as against those whose lands the jury find will probably be affected and who are notified as provided by the statute.—Lane v. Miller, 17 Ind. 58.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 489.  
See, also, 15 Cyc. pp. 841-844; note, 4 L. R. A. (N. S.) 169.

**§ 181. — Form, requisites, and sufficiency.**

**[a] (Sup. 1875)**

The charter of a turnpike company, in providing the mode of assessing damages for the condemnation of the right of way, directed the giving of notice to a justice of the peace of the county, without prescribing the form or contents of such notice. *Held*, that the fact that a written instrument filed before a justice by said company, in a proceeding to condemn the right of way over land, after giving notice to the justice, assumed the form of a complaint against the owner of the land, did not vitiate the notice or render it bad on demurrer.—Heady v. Vevay, Mt. S. & V. Turnpike Co., 52 Ind. 117.

**[b] (Sup. 1887)**

By the express provisions of Rev. St. 1881, § 906, an application for a writ for the assessment of damages for land taken for a right of way of a railroad on behalf of the landowner and the writ itself must contain such a "precise description" of the land as will thereafter preclude any difficulty in identifying it in another action concerning it, or in any other respect when an identification shall become material; and where it is described as passing "over and across the plaintiff's said land about 10 rods north of the center of said tract, occupying for its right of way a strip through said land, running east and west at the point aforesaid, about 100 feet wide," the description is too indefinite, and the writ should be quashed on proper motion.—Midland R. Co. v. Smith, 109 Ind. 488, 9 N. E. 474.

**[c] (Sup. 1907)**

A description of land in a publication of notice in a condemnation proceeding was not insufficient because of failure to state in terms that the land was in the county where action was brought, where it showed the congressional township and range, and the statute requires that the action shall be brought in the county where the land lies.—Southern Indiana R. Co. v. Indianapolis & L. R. Co., 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

**[d] (App. 1908)**

A notice to a property owner that the outlet of a sewer was to be in a creek at the lot line is notice to her that the sewer would not

enter her property.—*Liebole v. Traster*, 41 Ind. App. 278, 83 N. E. 781.

#### FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Em. Dom. §§ 488, 490–492.

See, also, 15 Cyc. pp. 845, 846.

#### § 182. — Service.

[a] (Sup. 1866)

In a proceeding for the assessment of damages, under section 7 of the act authorizing the construction of plank roads, etc. (1 Gav. & H. St. p. 474), if the owner of the land is an adult, and a resident of the county where the land is situated, he must be summoned to appear for trial before the justice within 10 days; but if the owner is a minor, having a guardian who is a resident of the county, the summons must be served on the guardian at least 10 days before the day of trial.—*Norristown, H. & St. L. Turnpike Co. v. Burket*, 26 Ind. 53.

[b] (Sup. 1877)

Under the statute relative to the condemnation of land by railroads, the delivery of the act of appropriation to the owner of the land or guardian is the first notice required, and this must be done before the appointment of appraisers.—*Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205.

#### FOR CASES FROM OTHER STATES.

SEE 18 CENT. DIG. Em. Dom. §§ 493–496.

See, also, 15 Cyc. pp. 846–848.

#### § 184. — Defects, objections, and amendment.

[a] (Sup. 1857)

In proceedings against a railroad company for damages for land taken, the company filed a pleading assigning as a reason, among others, why the assessment should be set aside, "that the writ of assessment did not contain a sufficient description of the real estate to be taken." *Held* that, though this was deficient in form, it must be accepted as a demurrer to the writ.—*Marion & M. V. R. Co. v. Ward*, 9 Ind. 123.

[b] (Sup. 1890)

In proceedings for the assessment of damages for the taking of land by a railway company for its right of way, it is not error to grant leave to amend the description of the land appropriated where the amendment simply furnishes a correct description of the land upon which the right of way was actually located and graded, for such proceedings are amendable in matters of description so long as they remain in fieri.—*Midland R. Co. v. Smith*, 25 N. E. 153, 125 Ind. 509.

[c] (Sup. 1894)

An owner, who, after condemnation proceedings by a town for the opening of an alley, appears before the treasurer, and demands the damages assessed, waives any defect in the service of the notice on him.—*Graves v. Town of Middletown*, 137 Ind. 400, 37 N. E. 157.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 498.

#### § 185. Appearance and representation by attorney.

[a] (App. 1906)

Where, in condemnation proceedings, the landowners, who were nonresidents, entered a full appearance and filed pleas in bar, all questions as to the jurisdiction of their persons were waived.—*Douglas v. Indianapolis & N. W. Traction Co.*, 76 N. E. 892, 37 Ind. App. 332.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 499.

#### § 186. Maps, plans, or surveys.

[a] (Sup. 1907)

An insufficient map filed to show the location of a right of way is not remedied by the sufficient description in the recorded deeds of the land.—*Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

A map filed by a railroad company, which gives no idea as to the width of the right of way which it has elected to appropriate to public purposes, or as to whether a single line shown thereon is the median line of the right of way, or otherwise, is insufficient.—*Id.*

Burn's Ann. St. 1901, § 5152, provides that a railroad, "before proceeding to construct a part of its road into or through any county, \* \* \* shall make a map and profile of the route intended to be adopted which shall be \* \* \* filed in the office of the clerk of such county. \* \* \*" *Held*, that the filing of the map and profile need not precede condemnation.—*Id.*

[b] (Sup. 1907)

In proceedings by a railroad to condemn land incident to a change in its line, the filing in the office of the clerk of the circuit court of a blueprint of the map and profile of the proposed change, and of the certificate thereto subscribed by a majority of the board of directors, instead of the original, was not a substantial defect, where the map, profile, and certificate were shown to be authentic and correct.—*Smith v. Cleveland, C., C. & St. L. R. Co.*, 170 Ind. 382, 81 N. E. 501.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 500–504.

See, also, 15 Cyc. p. 817.

#### § 187. Possession and use pending proceedings.

Effect of award or judgment as to right to possession, see post, § 244.

Time of passing of title or right, see post, § 320.

[a] (Sup. 1907)

It is no ground for attack upon Acts 1905, p. 59, c. 48, providing for the exercise of eminent domain, that the act authorizes the taking

of possession before the matters in controversy are settled on appeal, since the right to an appeal is not an inherent right, but may be granted or withheld at the pleasure of the Legislature.—*Smith v. Cleveland, C. & St. L. R. Co.*, 170 Ind. 382, 81 N. E. 501.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 505, 507.

See, also, 15 Cyc. p. 978.

### § 189. Pleading.

Pleading matters of fact or conclusions, see PLEADING, § 8.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 508-524.

See, also, 15 Cyc. pp. 850-863.

### § 190. — Mode and form in general.

[a] (Sup. 1855)

In statements provided for in Rev. St. 1838, pp. 343, 344, of damages to land by the laying out of railroads, the same strictness is not required as in pleadings in court.—*Martinsville & F. R. Co. v. Bridges*, 6 Ind. 400.

[b] (Sup. 1907)

Upon the preliminary hearing in a proceeding by a consolidated railroad company to condemn land, interrogatories to be answered by the railroad, relating to various facts occurring subsequent to the act of consolidation, were properly stricken out, since the statute provides that no pleadings other than the complaint and written objections thereto, filed by the defendant, shall be allowed.—*Smith v. Cleveland, C. & St. L. R. Co.*, 170 Ind. 382, 81 N. E. 501.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 508.

See, also, 15 Cyc. p. 850.

### § 191. — Petition or complaint.

[a] (Sup. 1855)

Though, in a claim for damages, under Rev. St. 1838, for injuries to land occasioned by the construction of a public work, the same strictness is not required in the averments as in pleadings in a court of record, yet the written statement of the claim should show whether the injury was occasioned by the passing through and appropriation of claimant's land, or the taking of timber and other materials, for which the statute provides.—*Martinsville & F. R. Co. v. Bridges*, 6 Ind. 400.

[b] (Sup. 1857)

The inquest, in case of assessment of land damages, taken in connection with the application and writ, is sufficient to advise a railroad company what is to be answered, and no complaint need be filed.—*Marion & M. V. R. Co. v. Ward*, 9 Ind. 123.

It is not necessary to aver that the land has been taken. The right of the owners of land to proceed is perfected by the survey and

location without any other act of appropriation.—Id.

A description setting out the congressional subdivisions of the applicant's land, then "commencing at a stake in the west line of said tract of land, 9 chains and 21 links from the northwest corner of said lot," and further described by courses and distances making a parallelogram 80 feet wide, extending across 80 acres, was held, on demurrer, to be a precise description of the land to be taken, within the meaning of 2 Rev. St. p. 193, §§ 706-710.—Id.

[c] (Sup. 1875)

In proceedings to condemn lands for the use of a turnpike, the complaint must show over what particular part or parts of the sections the road is located, so that the land to be condemned can be ascertained and described in the judgment without extrinsic evidence.—*Rising Sun & H. Turnpike Co. v. Hamilton*, 50 Ind. 580.

[d] (Sup. 1876)

An application, under Prac. Act, § 41, for the assessment of damages for land taken and used by a railroad company in the construction of its road, must allege the fact of such taking, and refer to the law authorizing it.—*Indianapolis & V. R. Co. v. Newsom*, 54 Ind. 121.

An application for an assessment of damages for lands taken must describe the lands with precision sufficient to enable the sheriff and jury to locate them.—Id.

An application, by a landowner, for the assessment of damages against a railroad company which had constructed its road across his farm, described particularly the whole tract of land, but described the location of the road only as "extending diagonally through said tract of land from a point near the northeast corner to a point near the southwest corner." Held, that the description was fatally defective.—Id.

[e] (Sup. 1880)

Code, art. 41, §§ 706, 707, 710, provides for a writ in the nature of an ad quod damnum to be issued on the application of a railroad desiring to appropriate lands, or of an individual interested in land taken by the railroad. Held, that an application by an individual for the writ, which alleged that the railroad appropriated the land, and that plaintiff thereafter inherited the same from his father, but which failed to allege anything to show that plaintiff had become entitled to the damages by assignment, inheritance, or otherwise, was bad.—*Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161.

In a proceeding to recover damages from a railroad company for constructing its road over certain lands, the complaint alleged that the plaintiff, when he inherited the lands from his father, found the defendant in the possession of them, and it made no reference to the law which authorized the defendant to appropriate the lands. Held, that the complaint was insufficient.—Id.

## [f] (Sup. 1888)

A recital that, "having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to, the compensation therefor," the plaintiff took, etc., does not allege any attempt to agree as to the point and manner of crossing.—*Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. Ry. Co.*, 116 Ind. 578, 19 N. E. 440.

Under Rev. St. 1881, § 3903, subd. 6, granting to a railroad company power "to cross, intersect, join, and unite its railroad with any other railroad before constructed," and providing that, "if the two corporations cannot agree upon the amount of compensation, \* \* \* or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners," etc., the petition must allege that an effort has been made to agree upon the amount of compensation, the points and the manner of crossing.—Id.

## [g] (Sup. 1893)

A petition alleging that petitioner is a corporation owning and controlling a public cemetery, and that its trustees believe it necessary to purchase lands therein described for its use as an addition to such cemetery, sufficiently shows that petitioner is seeking to condemn land to be used as a public cemetery, in addition to the cemetery already owned and controlled by it.—*Furneman v. Mt. Pleasant Cemetery Ass'n*, 135 Ind. 344, 35 N. E. 271.

## [h] (App. 1903)

As the power of eminent domain can be exercised only for a public use, the instrument of appropriation of a natural gas company, in a proceeding to condemn for a pipe line under the power given it by Burns' Rev. St. 1901, § 5103, must show that it is engaged in furnishing gas to the public; it is not enough to allege that the real estate is necessary for its pipe line from its wells to a city.—*Great Western Natural Gas & Oil Co. v. Hawkins*, 66 N. E. 765, 30 Ind. App. 557.

A natural gas company being authorized by Burns' Rev. St. 1901, § 5104, to condemn an easement only, the instrument of appropriation is defective in asking the right to take the fee.—Id.

## [i] (Sup. 1907)

A complaint in condemnation proceedings averring the name of the corporation desiring to condemn, the name of the owner of the property to be appropriated, the intended use of the property, the location, width, and termini of the right of way, a specific description of the land from which dirt was to be taken for making the embankment, and that the corporation condemning had not been able to agree with the owner for the purchase of such property, is sufficient.—*Vandalia Coal Co. v. Indianapolis & L. R. Co.*, 168 Ind. 144, 79 N. E. 1082.

## [j] (Sup. 1907)

Where a complaint in a condemnation proceeding substantially follows the statute, other

matters which would afford sufficient grounds of objection to the taking should be brought forward by the defendants.—*Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

The complaint in condemnation proceedings under Acts 1905, p. 15, § 2 (Burns' Ann. St. 1905, § 894, cl. 4), must set out by a specific description the location, general route, width, and termini of the proposed right of way.—Id.

Where the complaint in condemnation proceedings for a railroad right of way substantially follows the statute, objection thereto must be raised by answer.—Id.

## [k] (Sup. 1907)

The filing of the complaint in condemnation proceedings, under Acts 1905, p. 59, c. 48, (Burns' Ann. St. Supp. 1905, § 893, etc.), in open court, was in substantial compliance with section 2, p. 60, providing that one desiring to condemn land may file a complaint in the office of the clerk of the circuit or superior court of the county where the property sought to be appropriated is situated; a literal and exact compliance not being required, and clerks of the circuit and superior courts being the custodians of all records of those courts and papers filed therein.—*Darrow v. Chicago, L. S. & S. B. R. Co.*, 169 Ind. 99, 81 N. E. 1081.

Under Acts 1905, p. 60, c. 48, § 2, providing that the complaint filed in condemnation proceedings shall contain a specific description of the land sought to be taken, it is not necessary to describe in the complaint any part of defendant's land, except that to be taken.—Id.

The description of real estate in a complaint in condemnation proceedings is sufficient if it will enable one skilled in such matters to locate it.—Id.

## [l] (Sup. 1907)

Acts 1905, p. 60, c. 48, provides that, where a right of way is sought, the complaint in condemnation proceedings must state the location, general route, width, and termini thereof, and a specific description of each piece of land to be taken. A complainant averred that the defendant owned a quarter section particularly described, and that plaintiff desired to construct its transmission line on and over said tract by placing 24 poles 115 feet apart across the land from the west side to the east side thereof, which poles were to be placed within 6½ feet of the fence on the north side of the right of way of a certain railroad through the land on a strip of land 6½ feet wide running in a diagonal manner through the quarter section on the north side of and parallel with and immediately adjoining the railroad right of way, as then located through the land; the amount of land actually occupied by the poles being not to exceed 40 square feet. *Held*, that the description was sufficient.—*Mull v. Indianapolis & C. Traction Co.*, 169 Ind. 214, 81 N. E. 657.

[m] (*App.* 1908)

An allegation, in a complaint in proceedings under Act Feb. 27, 1905 (Acts 1905, p. 59, c. 48; Burns' Ann. St. 1908, § 929 et seq.), relating to eminent domain, that "plaintiff has been unable to agree with the owner for the purchase of said land for the purpose of such change in the highway," is not insufficient as a mere inference, since it employs the language prescribed by section 930, providing that if such person, etc., shall not agree with the owner of the land touching the damages sustained, he may file a complaint.—*Slider v. Indianapolis & L. Traction Co.*, 42 Ind. App. 304, 85 N. E. 372, 721.

[n] (*Sup.* 1910)

A complaint for the condemnation of lands to be flowed by a dam for a milling company held to contain all the matters required to be alleged by Acts 1905, p. 60, c. 48, § 2 (Burns' Ann. St. 1908, § 930), providing that a complaint, in condemnation proceedings, shall state the name of the person or corporation desiring to condemn such lands, the names of all owners, claimants, and holders of liens on the property, the use the plaintiff intended to make of the property, a specific description of each piece of land sought to be taken, and that such plaintiff has been unable to agree for the purchase of such lands with such owner.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

Under Burns' Ann. St. 1908, § 927, providing that a writ of assessment of damages may be had by any person owning the land on one side of a water course upon which he desires to erect a mill or other machinery to be propelled by water, to assess the damages to the lands of another, by the overflow of water by any milldam already erected or proposed to be erected, a complaint, in condemnation proceedings, alleged that plaintiff is the owner of a specified tract of land, with the privilege of a dam, and the right to overflow water on certain lands; that his property is on the banks of a permanent water course named; that plaintiff was organized, as a corporation, to grind flour and feed upon the toll system, is the owner of a flour and feed mill situated on the premises described; that plaintiff is one of the corporations, which, under the laws of this state, has the right to exercise the power of eminent domain; that plaintiff intends to use the lands sought to be taken for the purpose of overflowage. *Held*, that the allegations of the complaint bring plaintiff within the provisions of the statute conferring the power of eminent domain to acquire such easements as it seeks to take.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 509-518.

See, also, 15 Cyc. pp. 850-859.

## § 192. — Answer and cross-petition.

[a] (*Sup.* 1846)

A writ was issued in a case where the petitioner's milldam, previously built, caused land

of the defendant to be overflowed. The inquest was favorable to a continuance of the dam, and gave the defendant damages for the injury to his land. The plea was a decree in chancery in the defendant's favor, enjoining the petitioner forever from causing, by his dam, the overflowing of defendant's premises. *Held*, that the plea was insufficient.—*Peck v. Rensselaer*, 8 Blackf. 312.

[b] (*Sup.* 1880)

One through whose land a highway is proposed to be established may remonstrate upon the ground of its inutility, and claim damages in the same remonstrance.—*Peed v. Brenneman*, 72 Ind. 288.

[c] (*Sup.* 1906)

Act Feb. 27, 1905, § 3 (Acts 1905, p. 61, c. 48; 4 Burns' Supp. 1905, § 893 et seq.), provides that the notice to defendants in condemnation proceedings shall require defendants to appear on a day fixed by plaintiff by indorsement on the complaint. Section 5 provides that defendant's objections "shall be filed not later than the first appearance of such defendant." *Held* that, even though section 5 contemplates a filing by defendants on the day they are notified to appear, rather than on the day they do appear, the provision is directory only, and does not deprive the court of power, on proper showing by defendant or on consent of plaintiff, to permit a filing by defendants appearing after the time notified.—*Morrison v. Indianapolis & W. R. Co.*, 76 N. E. 961, 77 N. E. 744, 166 Ind. 511.

Act Feb. 27, 1905, § 1 (Acts 1905, p. 59, c. 48; 4 Burns' Supp. 1905, § 893 et seq.), provides that any corporation having the right to exercise the power of eminent domain shall first make an effort to purchase the property. Section 3 (page 61) provides that the notice to defendants in condemnation proceedings shall require them to "show cause why the property described should not be condemned as prayed for in the complaint." Section 4 provides for the appointment of appraisers when the court is satisfied as to the right of plaintiffs to exercise the power. Section 5 provides for written objections by defendant on the ground of lack of jurisdiction, lack of power in plaintiff to exercise right, "or for any other reasons disclosed in the complaint or set up in such objections," and forbids further pleadings except the answer provided for in section 8 (page 63). Section 8 provides for a filing of exceptions to the assessment by any one aggrieved and that the cause shall proceed to issue, trial and judgment. *Held*, that not only may the objections authorized by section 5 fill the office of a demurrer, but issues of fact defeating the condemnation are thereby properly presented, rather than by the exceptions referred to in section 8.—*Id.*

A failure of plaintiff to object to the filing of objections by defendant appearing after the

time fixed by the complaint is a waiver of the requirements as to the time of filing.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 510-521.  
See, also, 15 Cyc. pp. 860, 861.

**§ 193. — Demurrer.**

[a] (Sup. 1857)

Where a railroad company intend to abandon their location, such fact should be stated by answer, and not urged on demurrer, or, if they have made no such location as is averred, such averment should be traversed.—*Marion & M. V. R. Co. v. Ward*, 9 Ind. 123.

[b] (Sup. 1908)

In proceedings to condemn land for a railroad right of way, objections to the proceeding denying plaintiff's right to exercise the power of eminent domain for the use sought, and challenging the sufficiency of the allegations of the complaint to show such right, perform the office of a demurrer, and tender issues of law for the decision of the court on the face of the pleadings.—*Westport Stone Co. v. Thomas*, 170 Ind. 91, 83 N. E. 617.

[c] (Sup. 1908)

In eminent domain proceedings, if plaintiff desired to test the sufficiency of defendants' objection in respect to the facts therein alleged, it should have demurred as provided by the Code, to an answer in a civil action; a motion to strike not being the proper practice.—*Toledo & I. Traction Co. v. Toledo & C. I. R. Co.*, 171 Ind. 213, 86 N. E. 54.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 522.

**§ 194. — Amendments.**

[a] (Sup. 1885)

The power to permit the description of the land to be condemned to be amended is vested in the court by Rev. St. § 3909, authorizing the amendment of defects and informalities in any special proceedings.—*Hunt v. New York, C. & St. L. R. Co.*, 99 Ind. 593.

[b] (Sup. 1885)

The instrument of appropriation of land for right of way in condemnation proceedings may, on cause shown, be amended by adding stipulations thereto as to fences and crossings, calculated to reduce consequential damages, after the report of the appraisers has been filed, and issues joined on exceptions thereto.—*Chicago & G. S. R. Co. v. Jones*, 103 Ind. 386, 6 N. E. 8.

[c] (App. 1896)

A railroad company may amend its petition to condemn land for a right of way by altering the width of the strip required, and by inserting a provision that the company will put in such bridges and tile drains as may be needed to give proper drainage across the right of way.

—*Indiana, I. & I. R. Co. v. Rinehart*, 14 Ind. App. 588, 43 N. E. 238.

[d] (Sup. 1907)

Under Acts 1905, p. 61, c. 48, § 5, providing that the pleadings in condemnation proceedings may be amended on leave of the court, the court may allow a complaint to be amended as to the description of the real estate, even after verdict.—*Darrow v. Chicago, L. S. & S. B. R. Co.*, 169 Ind. 99, 81 N. E. 1081.

[e] (Sup. 1907)

In condemnation proceedings, it was not error to allow an amendment of the description of the property contained in the complaint to agree with the description in the appraisal after the appraisal had been filed, since the court has power even after verdict to allow amendments to remedy defects in the description.—*McClarren v. Jefferson School Tp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 523.

See, also, 15 Cyc. p. 859.

**§ 195. — Issues, proof, and variance.**

[a] (Sup. 1864)

2 Gav. & H. St. p. 314, § 697, makes the complaint and return, as to the defendant, in an application for the assessment of damages against a railroad company, a cause of action, and authorizes him to raise issues of law upon them by the ordinary modes used in courts of this state, which, being disposed of, may be followed by issues of fact, to be formed and tried according to the usual practice in civil cases.—*Cincinnati & C. R. Co. v. McFarland*, 22 Ind. 459.

[b] (Sup. 1897)

Under Rev. St. 1894, § 3643 (Rev. St. 1881, § 3180), providing for appeals from proceedings for the condemnation of land by a city for street purposes, a statement filed by the appellant, which stands for an answer, objecting to the amount of damages assessed, and demanding a greater amount, is sufficiently specific to form an issue on the question of damages, where no question is raised as to the regularity of the proceedings.—*City of Decatur v. Grand Rapids & I. R. Co.*, 45 N. E. 793, 146 Ind. 577.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 524.

See, also, 15 Cyc. pp. 862, 863.

**§ 197. Dismissal before hearing.**

[a] (Sup. 1872)

Where a complaint by a turnpike company to condemn lands for its road states that the road has been located, the question of location cannot be tried on a motion to dismiss because the road has not been located.—*Beynon v. Brandywine, B. & S. C. Turnpike Co.*, 39 Ind. 129.

Where a complaint by a company to condemn lands states that its road has been locat-

ed, the question of location cannot be tried on a motion to dismiss.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 527.

See, also, 15 Cyc. p. 937.

**§ 198. Hearing and determination as to right to take.**

[a] (Sup. 1836)

The inquest, in the case of a writ of ad quod damnum, must distinctly state whether, in the opinion of the jury, the health of the neighborhood will be affected by the stagnation of the water which the contemplated dam may occasion.—Gherkey v. Haines, 4 Blackf. 159.

[b] (Sup. 1872)

Without proof that the line of a road for which land is sought to be condemned is a departure from the line contemplated by the articles of association of the company instituting the proceedings, it is not error to overrule a motion to dismiss the proceedings because of such departure.—Beynon v. Brandywine, B. & S. C. Turnpike Co., 39 Ind. 129.

[c] (App. 1903)

Under Burns' Rev. St. 1901, § 5105, relative to condemnation by a natural gas company of a right of way for a pipe line, providing that, on filing of the act of appropriation with the clerk of court and delivery of a copy to the landowner, the court shall appoint appraisers, the court may inquire into the sufficiency of the instrument of appropriation, and may refuse to appoint appraisers, it not appearing on the face of the proceedings that the petitioner has the right to maintain the proceedings.—Great Western Natural Gas & Oil Co. v. Hawkins, 66 N. E. 765, 30 Ind. App. 557.

[d] (Sup. 1905)

Burns' Ann. St. 1901, § 6006, provides for the condemnation of land by a township for school purposes whenever necessary, in the opinion of the township trustee; and by section 6008, subd. 3, on filing of the report of appraisers the owner may except to the same for any cause. Held, that the fact that the township trustee would be benefited in his private business beyond the general benefits resulting to the public, or that he was prejudiced against the landowner, was not a proper matter to go to the jury.—Richland School Tp. of Fulton County v. Overmyer, 73 N. E. 811, 164 Ind. 352.

[e] (Sup. 1906)

It being proper to tender issues of fact in the written objections which under Act Feb. 27, 1905, § 5 (Acts 1905, p. 61, c. 48; 4 Burns' Supp. 1905, § 893 et seq.), owners of land are authorized to file in condemnation proceedings prior to the appointment of appraisers, a right to a trial of such issues will be implied.—Morrison v. Indianapolis & W. R. Co., 76 N. E. 961, 77 N. E. 744, 166 Ind. 511.

[f] (Sup. 1907)

Upon a preliminary hearing in condemnation proceedings, the only issues allowable are such as go to defeat or abate the asserted right to exercise the power of eminent domain.—Smith v. Cleveland, C., C. & St. L. R. Co., 170 Ind. 382, 81 N. E. 501.

[g] (App. 1903)

Act Feb. 27, 1905 (Acts 1905, p. 59, c. 48; Burns' Ann. St. 1908, § 933), relating to eminent domain, provides that a defendant may object to proceedings for condemnation on certain grounds, which objections shall be in writing, filed not later than defendant's first appearance, and, if the objections are overruled, the court or judge shall appoint appraisers, as provided in the act. Held that, by the objections provided for, a preliminary hearing may be had, at which the landowner may controvert plaintiff's right to condemn his land, and have all such questions determined and disposed of by the judge in vacation or the court in term time before making the interlocutory order appointing appraisers to assess damages.—Slider v. Indianapolis & L. Traction Co., 42 Ind. App. 304, 85 N. E. 372, 721.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 525, 526, 528, 535-539.

See, also, 15 Cyc. pp. 863-871.

**§ 199. Evidence as to compensation.**

Irrelevant evidence on redirect examination of witness, see WITNESSES, § 280.

Scope of cross-examination of witness, see WITNESSES, § 268.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. §§ 540-544.

See, also, 15 Cyc. pp. 898, 899; note, 22 Am. St. Rep. 49.

**§ 200. — Presumptions and burden of proof.**

[a] (Sup. 1907)

Where a railroad was authorized to destroy a drain by constructing its embankment across the same, it was proper for the appraisers in condemnation proceedings to assume that the road would exercise its legal rights in that respect, and to consider the obstruction of the drain and the consequences to the land whereon the same was situated, as a proper element of damage.—New Jersey, I. & I. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 540.

See, also, 15 Cyc. p. 898.

**§ 201. — Admissibility in general.**

Admissions, as evidence, see EVIDENCE, § 213. Evidence admissible by reason of admission of similar evidence, see EVIDENCE, § 155.



## [a] (Sup. 1844)

In ascertaining the amount of damages for land taken in constructing the Central Canal, either party may show how the canal was progressing when the land was taken, and what appropriations of money had then been made for the completion of the canal.—*Vanblaricum v. State*, 7 Blackf. 209.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 540½.

See, also, 15 Cyc. p. 899.

## § 202. — Value of property.

Evidence as to sales of and price paid for property similarly situated, see EVIDENCE, § 142. Expert testimony, see EVIDENCE, § 355. Hearsay evidence, see EVIDENCE, § 317. Opinion evidence, see EVIDENCE, §§ 474, 488, 501.

## [a] (Sup. 1892)

In proceedings to condemn a railroad right of way through land distant three-eighths of a mile from a large and growing city, and one-eighth of a mile from a platted and improved addition thereto, with which it is connected by two roads, a map made from actual survey and measurement, representing the land as subdivided by extending the streets of the city and addition, is competent evidence to show the value of the land from its susceptibility to be platted advantageously, and consequent adaptability for residences.—*Ohio Val. Railway & Terminal Co. v. Kerth*, 130 Ind. 314, 30 N. E. 298.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 541.

See, also, note, 124 Am. St. Rep. 536.

## § 203. — Damages.

Opinion evidence, see EVIDENCE, § 497.

## [a] (Sup. 1843)

A person claimed damages of the state, under the statute concerning internal improvements, because the Wabash & Erie Canal was cut through his land, separating that part of it on which his dwelling house stood from the rest of the tract, and causing a part of his land to be overflowed. *Held*, that the state might prove, to lessen the damages, how much it would cost to build a bridge on the land over the canal, and what would be the expense of draining off the water.—*State v. Beackmo*, 6 Blackf. 488.

## [b] (Sup. 1891)

In proceedings to appropriate land for railroad purposes, evidence of the value of the property before and after the construction of the railroad is competent to prove damages.—*Evansville & R. R. Co. v. Fettig*, 29 N. E. 407, 130 Ind. 61.

## [c] (Sup. 1892)

In assessing the damages sustained by the construction of a railroad through a large tract

of land already intersected by two railroads, evidence of the effect of such railroad upon the value of portions of the land beyond the other railroads is admissible, since it is a question for the jury whether they consist of parts of the same tract or of separate and distinct parcels.—*Chicago & W. M. R. Co. v. Huncheon*, 130 Ind. 529, 30 N. E. 636.

## [d] (App. 1898)

In the absence of evidence that a natural gas main will prevent the future improvement of land, damages cannot be allowed therefor in proceedings to appropriate an easement for its construction.—*Manufacturers' Natural Gas Co. of Indianapolis v. Leslie*, 51 N. E. 510, 22 Ind. App. 677.

## [e] (Sup. 1902)

Evidence that the value of a strip of land cut off from the main farm by the proposed highway consisted solely in the timber which grew on it was admissible on the issue of damages.—*Fifer v. Ritter*, 64 N. E. 403, 159 Ind. 8.

## [f] (Sup. 1904)

In a proceeding to condemn land for the purpose of a railway right of way, the value of the land before and after appropriation is not the only fact which the jury were authorized to consider in determining the amount of damages, but they may also consider all the evidence of the case which may throw any light on the subject.—*Chicago, I. & E. R. Co. v. Wyssor Land Co.*, 163 Ind. 288, 69 N. E. 546.

## [g] (App. 1905)

In proceedings to determine damages for condemnation of land for a railroad right of way, it is not error to admit evidence of a cut in the grade of the road along by the land in question.—*Consolidated Traction Co. v. Jordan*, 75 N. E. 301, 36 Ind. App. 156.

## [h] (Sup. 1907)

Where, under right of way condemnation proceedings, a railroad had constructed its embankment across defendant's drainage ditch, placing a tile drain under the embankment, a witness was properly permitted to state, for the purpose of showing damages, that at the time of the trial the water was backed up from time to time.—*New Jersey, I. & L. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

Where, at the time of the trial of railroad right of way condemnation proceedings, the road had already constructed an embankment across a drainage ditch on defendant's land, evidence as to the manner of placing a drainage tile through the embankment, and the extent to which the water was thereby set back over the contiguous lands, was admissible for the purpose of showing the actual damages to the land; it being assumed that the road was constructed as contemplated at the time the right of way was appropriated, and that the present apparent damage would have been reasonably anticipated if assessed before construction.—*Id.*

## [l] (Sup. 1910)

Where the only issue on exceptions to the appraisers' award in condemnation proceedings was the amount of damages sustained by the landowners, and it appeared that an attempt to purchase the land had failed and had been abandoned, a writing signed by the landowners, in which they agreed to convey the land for a specified sum, was not admissible as a contract fixing the amount of recovery, nor as primary or substantive evidence on the amount of damages, which must be shown by the testimony of competent witnesses.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 161.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 542.

## § 205. — Weight and sufficiency.

Opinion evidence, see EVIDENCE, § 568.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 544.

## § 206. Mode of assessment of compensation.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 545-551.

See, also, 15 Cyc. p. 872.

## § 207. — In general.

## [a] (Sup. 1825)

When the legislature authorizes the taking of private property, the compensation therefor must be settled, either by stipulation between the legislature and the proprietor, by commissioners mutually elected by the parties, or by the intervention of a jury.—*Armstrong v. Jackson ex dem. Elliott*, 1 Blackf. 374.

## [b] (Sup. 1854)

The assessment of damages against a railroad company for the appropriation of lands may be legally made by arbitrators appointed by the court under Act May 11, 1852, or by jurors selected in the mode prescribed by Act June 18, 1852.—*McMahon v. Cincinnati & C. Short Line R. Co.*, 5 Ind. 413.

## [c] (Sup. 1859)

Where any part of the roadbed or track of an existing company is taken, so that a proceeding under the statute may be had for the assessment of damages, all the damages occasioned by the taking, both to the ground and franchise, must be assessed and recovered in the statutory proceeding.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

## [d] (Sup. 1864)

It is not error to refuse a motion or prayer of a party to have a part of the issues in a cause tried at one time by a jury, and the others at another time by the court.—*Cincinnati & C. R. Co. v. McFarland*, 22 Ind. 459.

## [e] (Sup. 1864)

2 Gav. & H. St. p. 315, providing the manner for the assessment of damages where land is taken by a turnpike company, did not repeal section 7 of the turnpike act (1 Gav. & H. St. p. 474), which provides another method for assessing such damages.—*Sidener v. Norristown, H. & St. L. Turnpike Co.*, 23 Ind. 623.

## [f] (Sup. 1872)

Assessors appointed in a certain county, under Act March 11, 1867, to assess the benefits of a proposed turnpike, have no authority to view, list, and assess the lands in another county.—*Pendleton & E. Turnpike Co. v. Barnard*, 40 Ind. 146.

## [g] (Sup. 1890)

As Rev. St. 1881, § 3266, relating to the condemnation of private property by a municipal corporation for public purposes, provides for an appeal from the appraisalment of the commissioners appointed for such purposes, it is not unconstitutional in that it authorizes the common council to appoint the commissioners.—*Bass v. City of Fort Wayne*, 121 Ind. 389, 23 N. E. 259.

## [h] (App. 1906)

In a proceeding under Burns' Ann. St. 1901, § 5468a et seq., to condemn land for an interurban street railroad, the damages to the landowner should be assessed as in case of the appropriation of land for the use of a commercial railroad.—*Carrell v. Muncie, II. & Ft. W. R. Co.*, 78 N. E. 254, 38 Ind. App. 700.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 545, 546.

See, also, 15 Cyc. p. 872.

## § 208. — Arbitration.

See, also, ante, § 207.

Proceedings on arbitration, see post, § 212.

## [a] (Sup. 1853)

Where a statute creating a corporation provides that, for determining damages for land taken by the company, each party may select one freeholder and give notice to the other to select another to act as arbitrators, a claim, when filed, need not show that the arbitrator selected by claimant was a freeholder.—*Centreville & A. Turnpike Co. v. Jarrett*, 4 Ind. 213.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 547.

See, also, 15 Cyc. p. 883.

## § 209. — Trial by jury.

See, also, ante, § 207.

Constitutional right to trial by jury, see JURY, § 19.

Proceedings on assessment by jury, see post, §§ 213-223.

## [a] (Sup. 1959)

Where the parties to proceedings to procure an assessment of damages sustained by a landowner in consequence of the running of a

road through his land agreed that three viewers should examine the premises and assess the damage, the right to a jury was waived.—*Piper v. Connersville & L. Turnpike Road Co.*, 12 Ind. 400.

[b] (Sup. 1872)

Where, in a condemnation proceeding, the owner makes no objection to the appointment of viewers, and does not claim a jury, he waives the right of a trial by jury; and, after the coming in of a report by the viewers, it is too late to demand a jury.—*Beynom v. Brandywine, B. & S. C. Turnpike Co.*, 39 Ind. 129.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 548.

See, also, 15 Cyc. pp. 872-874.

### § 210. — Assessment by commissioners, appraisers, or viewers.

See, also, ante, § 207.

As denial of right to trial by jury, see JURY, § 35.

Proceedings on assessment by commissioners, appraisers, or viewers, see post, §§ 225-239.

[a] (Sup. 1875)

In a proceeding for the vacation of a public highway, if the viewers find in favor of the proposed vacation, they may assess such damages as the party objecting may sustain.—*Butterworth v. Bartlett*, 50 Ind. 537.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 549.

See, also, 15 Cyc. pp. 883-894.

### § 212. Arbitration and award.

[a] (Sup. 1890)

In an action against a railway for damages caused by taking plaintiff's land for a right of way without compensation, defendant set up as a defense that the amount of damages had been submitted to arbitration by agreement between plaintiff and a contractor who had agreed with defendant to procure the right of way; that the award had been made; and that the contractor was willing to fulfill the same, and before this suit had tendered to plaintiff the amount thereof. *Held*, that the performance of the award could be enforced by defendant, and that the defense was sufficient.—*Terre Haute & L. R. Co. v. Harris*, 126 Ind. 7, 25 N. E. 831.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 547; 4

CENT. DIG. Arb. & Aw. § 457.

See, also, 15 Cyc. pp. 883-894.

### § 213. Assessment by jury.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 552-573.

See, also, 15 Cyc. pp. 872-882.

### § 215. — Qualifications of jurors.

[a] (Sup. 1854)

No person owning land within one mile of a contemplated railroad is competent to act in

assessing damages, either as an arbitrator under Act May 11, 1852, or as a juror selected under Act June 18, 1852.—*McMahon v. Cincinnati & C. Short-Line R. Co.*, 5 Ind. 413.

[b] (Sup. 1872)

Although Railroad Act, § 15 (1 Gav. & H. St. p. 509), requires that the appraisers appointed to assess damages in the proceedings for the appropriation of land shall be freeholders, yet, if either of the parties excepting to the appraisement insist on a trial by jury, the jurors need only be reputable householders, under 2 Gav. & H. St. p. 30, requiring that jurors in a circuit court shall be "reputable male householders."—*Louisville, N. A. & St. L. Air Line R. Co. v. Dryden*, 39 Ind. 393; *Same v. Duvall*, Id. 398.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 553.

See, also, 15 Cyc. p. 876.

### § 217. — Oath of jurors.

[a] (Sup. 1885)

Where jurors to assess damages severally swore that they would to the best of their ability assess the damages sustained by plaintiff from the taking by defendant of the land described in the application and writ, and would assess at their true cash value the land so taken, and the damages sustained by reason of said taking, there was no ground of exception that the jury did not take and subscribe the oath required by law.—*Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 555.

See, also, 15 Cyc. p. 878.

### § 219. — Conduct of proceedings in general.

[a] (Sup. 1873)

In determining whether a proposed highway will be a benefit or an injury to a particular farm, the jury may properly consider the existence or nonexistence of the roads passing over or near the farm.—*Fisher v. Hobbs*, 42 Ind. 276.

[b] (App. 1896)

Where an instrument filed by a railroad company with the clerk of court for the appropriation of land for a right of way provided that the company "will put in such bridges and tile drains as may be needed to give proper drainage across the right of way," the jury, in assessing damages, may consider the condition of the land and the sufficiency of drains built by the company.—*Indiana, I. & I. R. Co. v. Rinehart*, 14 Ind. App. 588, 43 N. E. 238.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 556, 557;

25 CENT. DIG. Iligh. § 367.

See, also, 15 Cyc. p. 878.

**§ 220. — View.****[a] (App. 1901)**

In proceedings to assess the damages by a railroad company in taking land, an abuse of discretion in refusing a view by the jury did not appear from the fact that the court might properly have granted a view.—*Chicago, I. & E. R. Co. v. Loer*, 60 N. E. 319, 27 Ind. App. 245.

In proceedings to assess the damages for the taking of land by a railway company, no abuse of discretion in refusing a view by the jury was apparent where the facts could be accurately described by witnesses and a correct idea obtained from the oral testimony and examination of maps admitted in evidence.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 558, 559.

See, also, 15 Cyc. pp. 879, 880.

**§ 221. — Questions for jury.**

Instructions invading province of jury, see TRIAL, §§ 191, 194.

**[a] (App. 1901)**

On a trial to determine the compensation to be paid by a railroad company for right of way after the road is built, the court may properly exclude testimony as to the intent of the company in constructing its road, since the jury are called solely to assess the damages caused by the taking of the land.—*Chicago, I. & E. R. Co. v. Loer*, 60 N. E. 319, 27 Ind. App. 245.

**[b] (Sup. 1910)**

The question of benefits and damages growing out of the location and establishment of a public highway is peculiarly appropriate for the determination of a jury.—*Glendenning v. Stahl*, 91 N. E. 234.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 560, 561.

**§ 222. — Instructions.**

Applicability of instructions to pleadings and evidence, see TRIAL, § 252.

Assumption by judge as to facts, see TRIAL, § 191.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 206.

Instructions as to application of personal knowledge of jurors, see TRIAL, § 254.

Instructions as to evidence and matters of fact in general, see TRIAL, § 234.

Instructions invading province of jury, see TRIAL, § 194.

Requests for instructions, see TRIAL, § 260.

**[a] (Sup. 1873)**

In a proceeding by a railroad company to appropriate land for the line of its road, the court was requested to charge that the plaintiff was "entitled to recover in damages only the actual damage suffered in consequence of the appropriation of the land by the defendant for the right of way, and such injuries as directly

result from such appropriation." *Held*, that as the charge did not include any allowance by the jury for the fencing made necessary, and for the overflowing of other parts of the land caused by embankments, and for damages caused by excavations for earth made outside of the strip appropriated, there being evidence of these matters, the charge was properly refused.—*Grand Rapids & I. R. Co. v. Horn*, 41 Ind. 479.

In a proceeding by a railroad company to appropriate land for the line of its road, a charge that, if the jury should find from the evidence "that, by the construction of culverts and drains through and along the embankments over plaintiff's land, the defendant railroad company has, in this way, to some extent, drained the plaintiff's land, or rendered its drainage more easy and less expensive, such benefit, if any, may be considered in estimating plaintiff's damage," was properly refused, since the benefit was not limited to meet the damage resulting from the overflow of water caused by the fills and embankments made by the railroad company.—*Id.*

**[b] (Sup. 1877)**

On the trial of an appeal from assessment of damages in a proceeding to appropriate land for railroad purposes, it is error to give an instruction from which the jury may understand that, in ascertaining the amount of damages, they are to consider the value of the land as such, and also the value of the gravel existing on it.—*Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 59 Ind. 100.

**[c] (Sup. 1885)**

Rev. St. 1881, §§ 887, 908, requiring the sheriff to charge his jury in proceedings to assess damages, must be regarded as merely directory.—*Indiana, B. & W. R. Co. v. Allen*, 100 Ind. 409.

**[d] (Sup. 1891)**

It is proper to refuse to instruct the jury that, if the road has not been completed, they should, in estimating damages, only consider such as would naturally result from the proper construction of the road, and such as are confined to the time immediately after the appropriation of the land.—*Chicago & I. C. Ry. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477.

**[e] (Sup. 1892)**

In proceedings to open a highway, where it appeared that a fence was already standing in the center of the proposed road, it was proper to instruct the jury, in assessing the damages, to consider the cost only of removing the fence to the line of the road, and not the value of the material in the fence.—*Hire v. Kniseley*, 130 Ind. 295, 29 N. E. 1132.

**[f] (Sup. 1893)**

In proceedings to establish a highway across a farm, it is not error for the court to instruct the jury that they "might consider" certain essential elements of damages, instead

of instructing them that it was their duty to do so.—*Goodwine v. Evans*, 134 Ind. 262, 33 N. E. 1031.

[g] (App. 1901)

In assessing damages for the appropriation of land for a railroad right of way, an instruction that, in estimating damage to the drainage of the land, the jury should bear in mind that the company might be assessed as an individual for the construction of any public drain in the vicinity of its road, was properly refused.—*Chicago, I. & E. R. Co. v. Winslow*, 60 N. E. 466, 27 Ind. App. 316.

[h] (Sup. 1902)

An instruction that, "If you find in the process of time that the proposed road will reasonably bring added benefits to this land, you may consider how much at this time the benefit would be to this land by establishing this road," was not objectionable as permitting the jury to now charge the land for benefits to accrue in future, as it merely allowed a charge for the value of the present opportunity for future enhancement.—*Fifer v. Ritter*, 64 N. E. 463, 159 Ind. 8.

An instruction that it was proper to consider as a benefit any increase in the value of plaintiff's land, though like benefits accrued to all other lands affected in the community, and that if the benefits resulting from the highway were all bestowed on lands in the neighborhood other than plaintiff's, and did not make plaintiff's land more valuable, "you have no right to consider them," though loose in language, was not objectionable as tending to mislead the jury into thinking the property owner could be charged with any benefit not attaching to his land.—*Id.*

An instruction that the property owner was entitled to the "usable value" of a fringe of timber cut off from the main farm by the road was proper when the court added, "He still owns the title, but, whatever value has been taken from him,—that is, taken from his farm by this cutting off,—that he is entitled to recover."—*Id.*

[i] (Sup. 1904)

On condemnation proceedings on the opening of a street witnesses for the city testified as to the land taken, the structures on it, and as to all its surroundings. *Held*, that it was proper to refuse to instruct that the measure of damages was the difference in value of that part of the land before the street was opened and afterwards, since the jury might have found what effect the improvements would have on the property from the testimony of the city's witnesses, and had a right to consider not only the opinions of the witnesses, but the facts on which such opinions were based.—*Pittsburgh, C., C. & St. L. R. Co. v. Town of Wolcott*, 69 N. E. 451, 162 Ind. 399.

[j] (App. 1905)

In view of the instruction given at plaintiff's request, in proceedings to condemn a right

of way, that in assessing the damages the jury could not take into consideration remote or fanciful injuries, resting wholly in conjecture and not admitting of an estimate in damages, certain particular things being specified which they could not consider, the part of an instruction that in estimating damages the jury could, in addition to certain things, consider "any other things either annoying or hurtful and necessarily incident to the permanent location and operation of a traction line across a farmer's premises," will be considered harmless.—*Indianapolis Northern Traction Co. v. Dunn*, 76 N. E. 269, 37 Ind. App. 248.

[k] (App. 1906)

In proceedings to condemn land for an electric interurban railroad, where the jury were confined by the charge to the consideration of such matters as were shown by a preponderance of evidence, and were instructed to allow only such damages as would compensate defendant for his pecuniary loss, and such as might result from the appropriation of his land and the proper construction and operation of the railroad, other instructions permitting the jury to take into consideration inconvenience in using the land as a farm, resulting from the construction of the railroad across it, the annoyance which might be occasioned to the owners of the land by reason of the operation of the railroad across the farm, the exposure of defendant and his family to injury, and the annoyance and inconvenience which would be experienced in crossing the railroad from one portion of the farm to another, were not erroneous.—*Indianapolis Northern Traction Co. v. Ramer*, 76 N. E. 808, 37 Ind. App. 264.

[l] (App. 1906)

Where, in a proceeding to condemn land for a right of way, the jury were directed to consider the difference caused by the appropriation between the cash market value of the remaining land immediately before the appropriation and its cash market value immediately thereafter; to consider the farm as it then was, and that the damages should be assessed for the farm as a whole, etc., another instruction that defendants had no right to lay water pipes or to construct private drains across the right of way without plaintiff's consent, which was an element of damage for consideration, was not objectionable for failure to confine the jury to the consideration of such pipes and drains as shown by the evidence to be reasonably and properly necessary in the use of the land for farming.—*Union Traction Co. v. Pfeil*, 39 Ind. App. 51, 78 N. E. 1052.

[m] (Sup. 1908)

An instruction in condemnation proceedings that in determining the damages the jury should consider the reduction in value by the appropriation and use of the lands—that is, they should consider not only the value of the part taken, but also the reduction in value of the part not taken, and the inconveniences and annoyances resulting therefrom—was erroneous.

as, in considering the reduction in value of the part not taken, the jury would necessarily have to take into account the inconveniences resulting from the appropriation, and had no right to go further, as they might naturally have been misled to do by the instruction, and consider the inconveniences and annoyances.—*Toledo & C. I. R. Co. v. Wagner*, 171 Ind. 185, 85 N. E. 1025.

The word "annoyances," though used in a kindred sense with the word "inconveniences," in an instruction in condemnation proceedings, authorizing the jury in determining the amount of damages to consider the annoyances and inconveniences resulting from the appropriation, was an injudicious expression, as it ordinarily relates to injuries for which no damages can be recovered, because the amount is so uncertain, speculative, and indefinite.—*Id.*

An instruction in condemnation proceedings that the owner must be compensated for the property taken and the damage resulting from the taking, and that the jury might award such an amount as would fully compensate for the property taken and the damage resulting therefrom, and that would leave the owner in as good a situation as he was before the appropriation, though not to be commended for its precision, yet the latter part made it plain that the owner could not recover more than he had lost by the appropriation, and, as a whole, could not have been misapprehended by the jury.—*Id.*

[n] (Sup. 1910)

An instruction that the jury should take into consideration the nature of the use intended for the property, the present and prospective needs of the community with reference thereto, and its value should be determined on the use to which men of ordinary prudence and wisdom would devote the property if owned by them, considering all the uses, present and prospective, to which it might be devoted, is not subject to the objection that it practically overrides the elements entering into the market value and is indefinite and speculative.—*Muncie & P. Traction Co. v. Hall*, 90 N. E. 312.

[o] (Sup. 1910)

On proceedings for the establishment of a highway, defendants filed remonstrances, alleging that they were the owners of certain land over which the highway would pass, and that the residue would be injured. *Held*, that the burden of establishing such allegations devolved on defendants, and an instruction that, if the jury should find that lands of defendants would be damaged by reason of the location of the road, they would be entitled to compensation was not objectionable on the ground that it permitted the jury to determine, as a matter of fact, whether defendants should be allowed compensation, whereas the Constitution guarantees that their property shall not be taken without.—*Glendenning v. Stahley*, 91 N. E. 234.

[p] (Sup. 1910)

In proceedings to condemn land for an electric railroad right of way, the court instructed that the statute provides that, when private ways are maintained over the right of way of the plaintiff, the owners shall, if said right of way is fenced, erect and maintain substantial gates in the line of such fence or fences, and keep the same securely fastened and closed when not in use by himself or employes, and that in assessing damages, the jury might take into consideration these obligations upon the part of the landowner, but such obligations as an element of damages must be confined to the costs and vigilance required "to maintain" the same. *Held*, that the instruction was not objectionable because there was no direct evidence as to what it would be worth or how much vigilance would be required to keep the gates closed, as evidence upon such incidental matters as the costs and vigilance necessary to keep the gates closed would not have been proper, and the instruction did not direct the jury that they might consider such items in estimating damages, but were told merely to take into consideration in determining damages the costs and vigilance required to maintain the same, and the instruction is not objectionable as introducing uncertain and speculative items into the consideration of the jury. *Rehearing*, 91 N. E. 161, denied.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 720.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 562-567;

25 CENT. DIG. High. § 361.

See, also, 15 Cyc. pp. 902, 903.

## § 223. — Verdict and findings.

Venire de novo, see TRIAL, § 363.

[a] (Sup. 1845)

In a case of ad quod damnum in relation to the erecting or the continuing of a milldam, the petition, the writ, and the inquest, or at least the latter, should name all the proprietors of lands, both above and below the site of the dam, who may be or have been in any way injured by the dam.—*Honeustine v. Vaughan*, 7 Blackf. 520.

[b] (Sup. 1895)

A verdict, in proceedings to establish a highway, that the road would be of public utility, and that remonstrant "is entitled to damages in the sum of \$——," is a finding that he is entitled to no damages, and is sufficient.—*Forsyth v. Wilcox*, 41 N. E. 371, 143 Ind. 144.

[c] (Sup. 1909)

In condemnation proceedings there was no error in refusing to submit interrogatories which did not require the finding of any fact involved in the issues, but only whether the jury assessed any damages on account of certain matters mentioned in the interrogatories and included the same in the general verdict

and to give the amount thereof.—*Muncie & P. Traction Co. v. Hall*, 89 N. E. 484.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 568–573.  
See, also, 15 Cyc. p. 881.

**§ 224. Setting aside verdict and new trial.**

[a] (Sup. 1885)

It being clear from the whole charge that the jury could not have been misled into giving double damages, an assessment will not be set aside on account of an instruction that the measure of damages would be the value of the land taken, with the damages to the residue; "also the cost of fences necessary, and, their maintenance; also inconveniences occasioned by the appropriation in the use and enjoyment of the farm."—*Indiana, B. & W. R. Co. v. Cook*, 102 Ind. 133, 26 N. E. 203.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 574–579.

**§ 225. Assessment by commissioners, appraisers, or viewers.**

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 580–620;  
25 CENT. DIG. High. §§ 367–370.  
See, also, 15 Cyc. pp. 883–894.

**§ 226. — Application and proceedings thereon.**

[a] (Sup. 1877)

The application to the court for the appointment of an appraiser in condemnation proceedings need not be in writing.—*Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 580, 586.

**§ 227. — Qualifications.**

See, also, ante, § 215.

[a] (Super. 1871)

Under Act May 14, 1869, requiring the commissioners of highways to appoint three freeholders to assess benefits, and providing that, if any such freeholders should be disqualified by reason of relationship, etc., the commissioners may appoint another in his stead, and, if no such appointment should be made, then it shall be the duty of the other two to act, a report by two freeholders was valid, though there were three appointed, and the third was not disqualified, but merely failed to act.—*Williams v. Little White Lick Gravel Road Co.*, Wils. 7.

[b] (Sup. 1872)

Under Railroad Act, § 15 (1 Gav. & H. St. p. 509), providing for an appointment of appraisers, freeholders of the county, to assess the damages in a proceeding for the appropriation of land, such appraisers must be freeholders; and, if the court upon exceptions order a new appraisement the appraisers must

possess the same qualifications.—*Louisville, N. A. & St. L. Air Line R. Co. v. Dryden*, 39 Ind. 393; *Same v. Duvall*, Id. 398.

[c] (Sup. 1873)

An appraiser whose sister-in-law and niece own land adjacent to a right of way sought to be condemned is an interested party, and is disqualified from acting.—*High v. Big Creek Ditching Ass'n*, 44 Ind. 356.

[d] (Sup. 1885)

One financially interested in the opening of a street, or one who is the father-in-law of one financially interested, is disqualified from serving as a commissioner to assess damages and benefits.—*Bradley v. City of Frankfort*, 99 Ind. 417.

An objection to a commissioner to assess damages in proceedings to open a street on the ground of his disqualification by reason of interest must be made seasonably, or it will be deemed waived. If not made at the second meeting, of which the objector has been notified, it is not seasonably made if he then knew the fact.—Id.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 581; 25 CENT. DIG. High. § 367.  
See, also, 15 Cyc. p. 885.

**§ 228. — Appointment and removal.**

[a] (Sup. 1856)

Where proceedings are instituted by a land-owner, under 2 Rev. St. 1852, pp. 189, 193, §§ 687, 709, 710, for the appointment of appraisers to assess the damages sustained by the construction of a railroad through his land, neither an order for the collection of costs or of the damages assessed is authorized, where it does not appear that the railroad company had any notice of the appointment or action of the appraisers till after their assessment of damages was made. Notice should have been given before.—*Columbus & S. R. Co. v. Richardson*, 7 Ind. 543.

[b] (Sup. 1872)

Application by a turnpike company for the appointment of appraisers to assess benefits to lands, under Act March 11, 1887, can only be made by a company organized under Act May 12, 1852, and the county commissioners are not required, when such application is made, to ascertain and determine, as a jurisdictional fact, whether the company has been duly and legally organized.—*Rhodes v. Piper*, 40 Ind. 369.

[c] (Sup. 1877)

The warrant under which appraisers are appointed to act in condemnation proceedings must be in writing.—*Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 582.  
See, also, 15 Cyc. p. 883.

### § 231. — Conduct of proceedings in general.

[a] (Sup. 1859)

An owner of condemned land waives his right to submit evidence to viewers respecting the assessment of damages by consenting to an order appointing certain viewers to assess the damages on examination of the premises, and directing them to hear evidence after notice to the parties, if they desire to hear it.—*Piper v. Connersville & L. Turnpike Road Co.*, 12 Ind. 400.

[b] (Sup. 1872)

A report by a majority of the viewers appointed to assess damages for realty sought to be condemned is sufficient.—*Beynon v. Brandywine, B. & S. C. Turnpike Co.*, 39 Ind. 129.

[c] (Sup. 1892)

The award of the appraisers in proceedings for the appropriation of land for railroad purposes need not be agreed to by all to be valid. An appraisalment concurred in by two of the three is sufficient.—*American Cannel Coal Co. v. Huntington, T. C. & C. R. Co.*, 130 Ind. 98, 29 N. E. 566.

[d] (Sup. 1894)

A new appraisalment for land condemned for waterworks must be held to mean and to contemplate the same sort of a proceeding that the first appraisalment was.—*Werley v. Huntington Waterworks Co.*, 37 N. E. 582, 138 Ind. 148.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 585-589.  
See, also, 15 Cyc. p. 888.

### § 233. — Scope of inquiry and questions to be determined.

Constitutional right to trial by jury, see JURY, § 19.

[a] (Sup. 1903)

In a proceeding by an electric railway company to acquire a right of crossing a railroad, the commissioners are not authorized to determine by which of the corporations the expense of establishing the crossing should be paid, as the statute fixes that liability on the company owning the road last constructed, unless otherwise agreed on.—*Wabash R. Co. v. Ft. Wayne & S. W. Traction Co.*, 67 N. E. 674, 161 Ind. 295.

FOR CASES FROM OTHER STATES,

See 15 Cyc. p. 894.

### § 234. — Report and findings, or award.

Failure to record award of as ground for new trial, see NEW TRIAL, § 24.

[a] (Sup. 1847)

The award of damages for injury to land occasioned by the White Water Valley Canal Company should be reported to the secretary of

the company.—*White Water Valley Canal Co. v. Henderson*, 8 Blackf. 528.

[b] (Sup. 1859)

Where the parties to proceedings to procure an assessment of damages sustained by a landowner in consequence of the running of a road through his land agreed that three viewers should examine the premises, the action of a majority of the viewers in assessing the damage was sufficient.—*Piper v. Connersville & L. Turnpike Road Co.*, 12 Ind. 400.

[c] (Sup. 1861)

The owner of an existing mill is entitled, through the writ for the assessment of damages, to obtain permanent record evidence of the height at which he has the right to maintain his dam, specified in feet and inches, or otherwise permanently marked; of the fact that the health of the neighborhood will not be injured, and that his mill is of public utility; and of his right to make embankments, excavations, etc.—*Wright v. Pugh*, 16 Ind. 106.

[d] (Sup. 1892)

While appraisers in proceedings to appropriate lands for railroad purposes should consider all the effects of the proposed appropriation on each tract affected, they need not state separately the damage to each of several tracts belonging to the same owner, and in what it consists. An award of a sum in gross, covering all damages to all such tracts, is sufficient.—*American Cannel Coal Co. v. Huntington, T. C. & C. R. Co.*, 130 Ind. 98, 29 N. E. 566.

[e] (Sup. 1892)

In a report made by viewers appointed to appraise damages for land to be taken for a highway, and approved by the county board in their order for opening the road, an entry of "No damages" raises no presumption that the land was taken without compensation, since the accruing benefits may equal the damages.—*Ras-sier v. Grimmer*, 130 Ind. 219, 28 N. E. 866, 29 N. E. 918.

[f] (Sup. 1894)

In a proceeding to locate and open a highway situated partly in two counties, one whose land is situated wholly in one county cannot object because the judgment of the commissioners provides that the damages awarded him shall be taxed against both counties.—*Bronneburg v. O'Bryant*, 139 Ind. 17, 38 N. E. 416.

[g] (App. 1902)

Where a town record of proceedings to appropriate land for a street fails to show that the report of the commissioners provided for by Burns' Rev. St. 1901, § 4406, was adopted by the board of trustees as required by section 4407, it may be amended nunc pro tunc.—*Terre Haute & L. R. Co. v. Flora*, 64 N. E. 648, 29 Ind. App. 442.

Under Burns' Rev. St. 1901, § 4406, providing that the report of the commissioners appointed in proceedings to appropriate land for



a street shall show what real estate, if any, will be benefited, where such report is silent as to properties that will be benefited it will be presumed that there are no benefits to be assessed.—*Id.*

[h] (Sup. 1903)

In proceedings by an interurban electric railway, under the street interurban railway act of 1901 (Laws 1901, p. 461, c. 207), to acquire a right of crossing a railroad, the report of the commissioners that it should be a grade crossing; that the same shall be a frog crossing constructed of the same weight and kind of rails as are in the tracts of the railroad, and to be of a pattern in general use, and requiring a derailing device so constructed that the electric cars could not be run over the railroad tracks except by connecting the tracks of the electric cars by a lever from the side on which the car was approaching—was sufficiently certain. The provisions of Burns' Rev. St. 1901, § 5158b et seq., relate exclusively to interlocking devices to avoid the necessity for stopping trains before passing over the tracks of intersecting railroads, and have nothing to do with condemnation proceedings under the street and interurban railroad act.—*Wabash R. Co. v. Ft. Wayne & S. W. Traction Co.*, 67 N. E. 674, 161 Ind. 295.

[i] (App. 1904)

The award by appraisers in condemnation proceedings is an adjudication of damages by a competent tribunal, and at the expiration of the time allowed for appeal it is, to an extent at least, in the nature of a judgment.—*Stauffer v. Cincinnati, R. & M. R. R.*, 70 N. E. 543, 33 Ind. App. 356.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 592-600, 603; 25 CENT. DIG. High. §§ 112, 357, 368, 371.

See, also, 15 Cyc. pp. 890-893.

### § 235. — Objections and exceptions.

[a] (Sup. 1854)

Where an exception to an award of arbitrators in proceedings to condemn land for a railroad is based on the ground that the award allowed a deduction for benefits supposed to result to the owner from the construction of the road, an answer to the exception, containing no reply to such allegation, is demurrable.—*McMahon v. Cincinnati & C. Short-Line R. Co.*, 5 Ind. 413.

Errors in matter of fact, as well as law, may be properly set up in the exceptions to the award.—*Id.*

[b] (Sup. 1859)

Objections to the manner and time of holding an inquest ad quod damnum are waived, if the party appears after the return of the inquest and does not make his objections.—*Wood v. Wilson*, 12 Ind. 637.

[c] (Sup. 1868)

Where several exceptions were filed by the owner of lands taken by a railroad to the assessment of damages, each containing some valid objection to the assessment though all might have been included in one general exception that the damages assessed were too small, it was held that demurrers to the exceptions were rightly overruled.—*White Water Val. R. Co. v. McClure*, 29 Ind. 536.

[d] (Sup. 1877)

Under 1 Rev. St. 1876, c. 704, § 17, relating to appropriation of land for railroad purposes, providing that the court shall have power at any time to amend any defect or informality in any of the special proceedings authorized by the act that may be necessary, on appeal to the circuit court from an assessment of damages caused by such an appropriation, at any time pending a motion to strike out exceptions to the assessment, the exceptions may be amended by the filing of additional exceptions presenting a question proper to be tried on such appeal, such as the question of the inadequacy of the damages assessed.—*Pittsburg, Ft. W. & C. R. Co. v. Swinney*, 59 Ind. 100.

[e] (Sup. 1877)

Where, in proceedings to appropriate land for the use of a railroad, the exceptions to the award of the appraisers go only to the regularity of the proceedings and are sustained, it is the duty of the court to order a new appraisal and if not sustained, or, if the party chooses to waive all questions as to the regularity of the proceedings, he may then present the questions as to the adequacy of the damages.—*Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205.

By filing exceptions to an award a party waives any objection he may have had to proof of service of notice to appropriate lands.—*Id.*

Act May 11, 1852 (1 Rev. St. 1876, p. 606), relating to the appropriation of land for railroad purposes, provides that the award of arbitrators may be reviewed by the circuit court, or other court in which such proceedings may be had, on written exceptions filed by either party in the clerk's office within 10 days after the filing of such award, and the court shall take such order therein as right and justice may require by ordering a new appraisement on good cause shown. Section 17 provides that the court shall have power at any time to amend any defect or informality in any of the special proceedings. Act June 18, 1852 (2 Rev. St. 1876, p. 82), § 99, relating to procedure, provides that the court may allow amendments which do not substantially change the claim or defense, and allow a party to file pleadings after the time limited. Section 697, relating to the writ of assessment of damages, provides that issues of law and fact may be made up and tried, and proceedings had as in other actions. *Held*, that where the appellant files his exceptions within 10 days after the award is filed in the clerk's office, or where he has filed them aft-

er the expiration of the 10 days, and the appellee has not taken advantage of the delay at the first opportunity, appellant has effected his appeal; and, when his appeal is effected, it stands for amendments to the exceptions, or for filing additional exceptions by leave of court, and for further proceedings as in other actions.—Id.

[f] (Sup. 1893)

Under Elliott's Supp. § 866, providing that owners of land sought to be appropriated for cemetery uses may except to the report of viewers appointed to appraise it "for any cause," and have a trial thereon in the court wherein the proceeding is pending, such owners may make the defense that the attempted appropriation is not sought for the benefit of the public.—*Farneman v. Mt. Pleasant Cemetery Ass'n*, 135 Ind. 344, 35 N. E. 271.

[g] (Sup. 1896)

The failure of petitioners for the vacation of a highway to move the board of commissioners to set aside the report of reviewers assessing damages to a remonstrant does not waive objections to the assessment, since the report is not in issue in the case, but it is vacated as the direct effect of the appeal, and in the circuit court the question of damages is tried de novo.—*Brandenburg v. Hittel*, 45 N. E. 45, 16 Ind. App. 224.

[h] (Sup. 1904)

An exception to an award of damages in condemnation proceedings by a railroad company, which alleges that certain described lots, in addition to those mentioned in the instrument of appropriation were appropriated in whole or in part by the strip of land described in such instrument, is sufficient to withstand a demurrer for want of facts.—*Chicago, I. & E. R. Co. v. Wysor Land Co.*, 69 N. E. 546, 163 Ind. 288.

[i] (Sup. 1905)

In proceedings by a township to condemn lands for school purposes under Burns' Ann. St. 1901, §§ 6006-6008, an exception to the appraisalment to the effect that the award of damages was erroneous, in that the valuation fixed was too small, and should have been a specified sum, instead of the sum awarded, was a sufficient exception, and justified the overruling of a demurrer to the exception for want of facts.—*Richland School Tp. v. Overmyer*, 73 N. E. 811, 164 Ind. 382.

[j] (App. 1908)

Under Acts 1905, p. 62, c. 48, § 6 (Burns' Ann. St. 1908, § 934), providing that in condemnation proceedings appraisers shall determine and report, first, the value of each parcel sought to be appropriated; second, the value of improvements thereon; third, the damages to the residue of the land of the owner by taking out the part sought to be appropriated; and, fourth, such other damages as will result from the construction of the improvements; and section 8

(page 63), providing that one aggrieved by the assessment of damages may file exceptions thereto, and the cause shall proceed to issue, trial, and judgment as in a civil action, and the court may make such further order and render such findings and judgment as may seem just—the damages contemplated by the fourth clause of section 6 may be submitted to trial, and found under the exceptions to the appraisers' report that the assessment of the damages is too low; that the appraisers allowed no damages for depreciation in value to the remaining property from the appropriation; that the value of the part appropriated is assessed too low; and that no damages to improvements were assessed, whereas the property appropriated will take a part of a storage shed.—*Toledo & C. Interurban R. Co. v. Wilson*, 86 N. E. 508.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 601.

### § 237. — Confirmation or setting aside of report or award.

[a] (Sup. 1846)

If an assessment of damages on a writ of *ad quod damnum* be proved to be too high or too low, the circuit court may set it aside and order another assessment.—*Chapman v. Groves*, 8 Blackf. 308.

[b] (Sup. 1859)

An exception to the amount of damages caused by flowing in consequence of the erection of a milldam, found by a jury of inquest, depending upon questions of fact, must be disposed of before an order confirming the finding is passed.—*Wood v. Wilson*, 12 Ind. 657.

[c] (Sup. 1872)

A motion to set aside a report of viewers in proceedings to condemn land for a turnpike company, on the ground that the viewers deducted supposed benefits, and failed to consider important injuries, is properly overruled, where no proof is offered in support of the motion.—*Beynon v. Brandywine, B & S. C. Turnpike Co.*, 30 Ind. 129.

[d] (Sup. 1894)

Under Act March 6, 1880, providing that persons whose property has been condemned for waterworks may file exceptions to the award of the appraisers, and have the award reviewed by the court on such written exceptions, and requiring the court, on such review, to make such order therein as right and justice may require, by ordering a new appraisalment on good cause shown, it is error for the court to confirm an award without hearing an exception thereto, reciting that the condemning company induced the appraisers to assess the damages at too small a sum by telling them that the owners would not be deprived of the use of the land, and would derive great benefit by having a public highway from their premises, resulting from the appropriation.—*Werley v. Huntington Waterworks Co.*, 138 Ind. 148, 37 N. E. 582.

The fact that the owners consented to the setting aside of a previous award, and the appointment of new appraisers, who made a new award, does not preclude the owners from asking another assessment by new appraisers.—*Id.*

[e] (Sup. 1896)

A town board has power in proceedings to condemn land for a highway to enter of record nunc pro tunc an order inadvertently omitted by the clerk, approving the report of the assessors, and directing the treasurer to pay the landowner the damages awarded to him.—*Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014.

[f] (Sup. 1905)

In a condemnation proceeding, if it should be discovered that the appraisers were disqualified in acting, or that the appraisement had been procured by unlawful means, such facts, if immediately presented by proper exceptions, would on proof of their truth entitle the acceptor to another appraisement.—*Richland School Tp. v. Overmyer*, 164 Ind. 382, 73 N. E. 811.

[g] (App. 1905)

Where the only question litigated on exceptions to the appraisers' award in condemnation proceedings is the value of the land sought to be condemned, the burden of proof of value, and the consequent right to open and close, are on the property owner.—*Indianapolis & C. Traction Co. v. Shepherd*, 74 N. E. 904, 35 Ind. App. 601.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 604-613;

25 CENT. DIG. High. § 368.

See, also, 15 Cyc. pp. 904, 905-917.

§ 238. — Review by court in general.

[a] (Sup. 1846)

An assessment of damages under a writ of *ad quod damnum* may be objected to by the defendant on the ground that the damages are insufficient; and the question as to the validity of the objection will be for the court, and not for a jury, to determine.—*Peck v. Rensselaer*, 8 Blackf. 312.

[b] (Sup. 1847)

An appeal from an award of damages for injury to land occasioned by a canal is governed by the law regulating appeals from justices of the peace; the secretary of the company being regarded as the justice for the purposes of the appeal.—*White Water Valley Canal Co. v. Henderson*, 8 Blackf. 528.

From an award of damages to land lying in "Franklin" county, taken for a canal, the canal company prayed an appeal, directing their secretary, who was, within the charter of the company, the justice for purposes of appeal, to file the papers in "Fayette" circuit court. The papers remained there for a year, when they were filed in the "Franklin" circuit court. *Held*, that it was not the fault of the secre-

tary that the papers were not filed within the statutory time in the last-named court, and that the appeal was defective.—*Id.*

Under section 11 of the White Water Valley Canal Company's charter, which provides that arbitrators assessing damages caused by the construction of the canal through lands shall report their award in writing to the secretary of the company, and that either party may appeal from such award under the law regulating appeals from justices of the peace, regarding the secretary as the justice for all purposes of the appeal, an appeal lies only to the circuit court of the county in which the land is situated.—*Id.*

[c] (Sup. 1848)

Under the charter of the White Water Valley Canal Company, a bond, given on appeal from an assessment of damages for land taken by that company to any other court than the circuit court of the county in which the land lies, is void.—*Parker v. Henderson*, 1 Ind. 62, Smith, 28.

[d] (Sup. 1850)

An owner petitioned the trustees of a company to have his damages assessed for injury occasioned by taking his land. The appraisement was made, and the owner appealed and required the trustees to certify the case to the circuit court, which was refused. *Held*, that mandamus was properly issued to require the case to be certified, since Rev. St. 1838, c. 343, § 17, providing for the assessment of damages for the taking of property, authorizes an appeal from the assessment by the appraisers.—*Trustees of Wabash & E. Canal v. Johnson*, 2 Ind. 219.

[e] (Sup. 1851)

Under the statute of 1836 prescribing the mode by which damages shall be obtained for injury done by chartered companies running their roads through the aggrieved party's land, an appeal from the award of appraisers must be governed by the same rules and regulations as appeals from judgments of justices of the peace, except that no bond is required when the state is a party.—*Pruitt v. Shelbyville Lateral Branch R. Co.*, 2 Ind. 530.

The plaintiffs applied to the Shelbyville Railroad Company for damages occasioned by the road of the company running through their land. Appraisers were appointed, who awarded the plaintiffs \$100. The plaintiffs moved the circuit court to grant them an appeal, on affidavit filed, stating that the applicants were not notified of the award until about 6 months after it was made, and had they been notified they would have taken an appeal within 30 days. *Held*, that these facts did not authorize the circuit court to grant the appeal.—*Id.*

St. 1836, prescribing the mode by which damages shall be obtained for injury done by chartered companies running their roads through the aggrieved party's land, makes the award of appraisers final, unless an appeal is

taken within 30 days after the award is made.—*Id.*

[f] (*Sup.* 1857)

Where an award against the Whitewater Valley Canal Company was made July 2d, and a bond executed August 3d, it was *held* not necessarily too late to take an appeal, though more than 30 days after the award.—*Butler v. Parker*, 9 Ind. 534.

The 30 days allowed do not begin to run until the award is filed with the secretary.—*Id.*

[g] (*Sup.* 1855)

Viewers appointed reported in favor of the road. B., through whose land it passed, remonstrated, and assessors were appointed, who reported in his favor for damages, which the township trustees ordered to be paid out of the town treasury. B. appealed to the county commissioners, but his appeal was dismissed, because the bond was made payable to the township. He further appealed to the common pleas, where the jury gave him increased damages, which, with the costs, were ordered to be paid out of the town treasury. *Held*, that these proceedings were correct.—*Washington Tp. v. Butler*, 13 Ind. 390.

[h] (*Sup.* 1865)

On appeal, the circuit court has the same power as the commissioners to order the payment out of the county treasury of damages on account of the laying out of a highway.—*Logan v. Kiser*, 25 Ind. 393.

[i] (*Sup.* 1868)

The only question presented in the circuit court on an appeal by the owner of the land condemned being the measure of damages, the appellant has the right to begin.—*Evansville & C. R. Co. v. Miller*, 30 Ind. 209.

[j] (*Sup.* 1871)

Where county commissioners refuse to make an order that the damages sustained by remonstrants against the opening of a road or highway be paid out of the county treasury, instead of being assessed on the petitioners for the highway, the proper remedy of the latter is by appeal from the decision of the commissioners. A mandate will not lie to compel the commissioners to make the order.—*Board of Com'rs of Boone County v. State ex rel. Riley*, 38 Ind. 193.

[k] (*Sup.* 1875)

A person appealing to the circuit court in proceedings to lay out and establish a highway, who has not filed a claim for damages either before the board of commissioners or in the circuit court, is not entitled to an assessment of his damages.—*Hays v. Parrish*, 52 Ind. 132.

[l] (*Sup.* 1877)

In a proceeding before the board of county commissioners to establish a highway, a remonstrant took an appeal to the circuit court from the order of the board locating the high-

way, and another appeal to the same court from an order of the board approving the report of the reviewers denying damages to the remonstrant. *Held*, that the two appeals should be consolidated, on motion, as constituting but one cause.—*Jamieson v. Board of Com'rs of Cass County*, 56 Ind. 466.

[m] (*Sup.* 1877)

2 Rev. St. 1876, p. 32, § 15, relative to condemnation proceedings, and providing that the subsequent proceedings on appeal shall only affect the amount of compensation to be allowed, must be construed to mean the proceedings subsequent to the establishment of the regularity of the appraisement.—*Swinney v. Ft. Wayne, M. & C. R. Co.*, 59 Ind. 205.

[n] (*Sup.* 1878)

On appeal to the circuit court by a remonstrant against the opening of a highway, claiming damages, a verdict was rendered "for the plaintiff," and that he would "be damaged by the opening of the contemplated road" in a specified sum. *Held*, that it was proper to remit the case to the commissioners to carry out the findings of the jury.—*Board of Com'rs of Grant County v. Small*, 61 Ind. 318.

[o] (*Sup.* 1880)

1 Rev. St. 1876, p. 302, § 66, provides that any owner of land, or representative thereof, aggrieved by the report of commissioners directed to assess damages and benefits for lands condemned for street purposes, may appeal therefrom, at any time within 30 days after the filing of the report, to any court having jurisdiction thereof. *Held*, that such section authorized an appeal to the circuit court from a commissioner's report declaring that no damages had been suffered by appellants for the taking of land for the extension of a street, after the approval of such report by the city council.—*Hamilton v. City of Ft. Wayne*, 73 Ind. 1.

[p] (*Sup.* 1882)

Where a landowner appeals from the assessment of damages for appropriating his lands, and, pending appeal, he receives the sum assessed from the clerk, to whom it has been paid, he cannot further prosecute his appeal.—*Baltimore, O. & C. R. Co. v. Johnson*, 84 Ind. 420.

[q] (*Sup.* 1890)

Rev. St. 1881, § 3907, limits the time within which exceptions may be filed by either party to the award of appraisers in a proceeding to condemn land by a railroad to ten days after the filing of the award. Section 896 provides that any defendant may appeal and traverse any material fact stated in the inquest for the assessment of damages, or he may plead or show any valid matter in bar to the right of the plaintiff to have the benefit of such writ. *Held*, that conceding that the two statutes, so far as they relate to the same subject, are to be construed in *pari materia*, where exceptions are filed by either party within 10 days after the filing of an award or inquest in proceedings

to condemn land for a right of way by a railroad company, an appeal is thereby effected, and the case stands for amendment or for the filing of additional exceptions or the making of new issues, the same as in other civil actions, and, where an appeal has been affected within 10 days by the filing of exceptions, it is not error to permit the adverse party to file exceptions to the amount of damages awarded after the expiration of 10 days.—*Midland R. Co. v. Smith*, 25 N. E. 153, 125 Ind. 509.

[r] (**App.** 1893)

On a trial in the circuit court of an appeal from the board of turnpike directors on the award to a landowner for the removal of gravel, pursuant to Rev. St. 1881, § 5104, all pleadings and papers in the transcript on appeal are a part of the record, and may be considered by the jury without being formally introduced in evidence.—*Bell v. Pavey*, 7 Ind. App. 19, 33 N. E. 1011.

[s] (**App.** 1893)

Where an appeal is taken from proceedings to condemn land for a street, the city is not compelled to stop work on improving the street while the appeal is pending, and if in the contest in the court to which the appeal is taken the city prevails, the work will be finished under the original proceedings. If the property owner is successful, the city may correct the proceedings or begin anew, in accordance with the determination of the court on appeal, or, if the court on appeal adjudges the entire proceedings void and no appeal is taken from such judgment, and the city does not proceed anew, it amounts to an abandonment of the appropriation of the land, and the title to the property reverts to the owner.—*Morris v. Watson*, 35 N. E. 405, 8 Ind. App. 1.

[t] (**App.** 1895)

Natural gas companies desiring to acquire easements in land under Acts 1889, p. 22 et seq., are placed practically on the same footing with railroad companies in appropriating land under Rev. St. 1894, § 5160, in regard to appeals from the award of the appraisers.—*Consumers' Gas Trust Co. v. Huntsinger*, 40 N. E. 34, 12 Ind. App. 285.

[u] (**App.** 1901)

In an action for the wrongful appropriation of land by a railway company, the answer alleged the institution of condemnation proceedings under the statute, the report of the appraisers, tender of the amount of the award, exceptions thereto, appeal to the circuit court by plaintiff, entire dismissal of the appeal, and that the case was struck from the trial docket. *Held*, that an instruction that, if plaintiff dismissed her exceptions to the award in the appropriation proceedings, she ratified the award, and her only remedy would be by an application for an order for payment thereof, was properly refused, since, on the dismissal of the appeal, the award remained, and the proceedings were as they had been before the excep-

tions were taken, and their withdrawal did not ratify the award.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

[v] (**App.** 1902)

The commissioners' report provided for by Burns' Rev. St. 1901, § 4406, showing the value of the property taken, the damages sustained by the owner, and the benefits, if any, received by other properties, is admissible on the appeal to show that the statute requiring the making thereof has been complied with.—*Terre Haute & L. R. Co. v. Flora*, 64 N. E. 648, 29 Ind. App. 442.

On an appeal from the report of commissioners, in proceedings by a town to appropriate land for a street, the trial is not de novo, but, under the express terms of Burns' Rev. St. 1901, § 4409, no questions can be determined thereon except those of the regularity of the proceedings and of the amount of damages sustained.—*Id.*

The burden of proof on a town to show the regularity of proceedings to appropriate land for the opening of a street is sustained by recitals of its record showing compliance with the statutory requirements, as against an objection alleging that such record did not originally show such compliance, and that it had been amended without authority, but failing to allege that such requirements were not in fact complied with.—*Id.*

Where a town record of proceedings to appropriate land for a street fails to show that the report of the commissioners, provided for by Burns' Rev. St. 1901, § 4406, was adopted by the board of trustees, as required by section 4407, an amendment of it cannot be complained of by one not injured thereby.—*Id.*

Where, on an appeal from the report of commissioners, in proceedings by a town to appropriate a portion of a railroad right of way for a street crossing, the railroad company introduced evidence of the cost of planking the street its full width at the crossing, but there was evidence that it would not be necessary to plank it its full width, evidence as to how the other public crossings in the town were constructed with reference to length and width was admissible on the question of damages as showing what kind of crossing the company would be required to maintain.—*Id.*

[vv] (**Sup.** 1904)

Where a judgment was rendered against a railroad company in condemnation proceedings assessing the damages for the taking of certain land, the payment of the judgment by the company does not estop it from appealing therefrom.—*Cleveland, C. C. & St. L. R. Co. v. Nowlin*, 103 Ind. 497, 72 N. E. 257.

Burns' Ann. St. 1901, § 644, providing that the party obtaining a judgment shall not take an appeal after receiving any money paid or collected thereon, applies only to judgments

made appealable to the supreme or appellate courts.—Id.

Under Burns' Ann. St. 1901, § 5160 (Rev. St. 1881, § 3907; Horner's Ann. St. 1901, § 3907), relative to condemnation of a right of way by a railroad company, providing that on the return of the assessment of damages by the appraisers the company shall pay the clerk the amount assessed, whereupon it may hold the interests in the land so appropriated for the uses of its road; and that such award may be reviewed by the court in which the proceedings are had on exceptions filed by either party within 10 days, provided that, notwithstanding such appeal, the company may take possession of the property, and the subsequent proceedings on the appeal shall affect only the amount of compensation—the right of appeal of the company to the court from such award on exceptions so filed is not affected by its paying to the clerk the amount of the award and taking possession of the land and constructing its road thereon.—Id.

[w] (Sup. 1905)

Where, pending a proceeding to condemn land for a street railway right of way, petitioner was consolidated with another company, which succeeded to all petitioner's rights, titles, and estates in and to the subject of the litigation, the latter company was entitled, on averring such facts, to prosecute an appeal in its own name from the award of damages.—Union Traction Co. of Indiana v. Basey, 73 N. E. 263, 164 Ind. 249; Same v. Bell, 73 N. E. 1134, 164 Ind. 701.

[ww] (App. 1906)

Under Burns' Ann. St. 1901, § 5100, providing that the appraisers' award in condemnation proceedings may be reviewed on written exceptions filed in the clerk's office within 10 days after the filing of the award, the filing of the exceptions will be treated as an appeal from the award.—Cleveland, C., C. & St. L. R. Co. v. Hayes, 74 N. E. 531, 35 Ind. App. 539; Same v. Miller, 74 N. E. 628, 35 Ind. App. 707; Same v. Hayes, Id.; Same v. West, Id.; Same v. Borgman, 74 N. E. 629, 35 Ind. App. 707; Same v. Nowlin, Id.; Same v. Taylor, Id.; Same v. Hayes, 74 N. E. 630, 35 Ind. App. 708; Same v. McKee, Id.; Same v. Shanks, 74 N. E. 630, 35 Ind. App. 707, 708; Same v. Garnier, 74 N. E. 631, 35 Ind. App. 708; Same v. Hayes, Id.; Same v. Miller, Id.; Same v. Nowlin, 74 N. E. 631, 35 Ind. App. 709.

Under Burns' Ann. St. 1901, § 5160, providing that the appraisers' award in condemnation proceedings may be reviewed by the court on written exceptions filed within 10 days after the filing of the award, and requiring the railroad to tender the amount of the award to the landowner, or to pay the same to the clerk, and authorizing it to take possession of the property involved, notwithstanding an appeal, a rail-

road which has in due time filed its exceptions to the award of the appraisers, and has paid the damages assessed by them to the clerk for the use and benefit of the landowner, and has entered upon and taken possession of the property sought to be appropriated, and constructed its road, is not thereby estopped from prosecuting its appeal from the award in order to procure a judicial ascertainment of the damages to be paid by it.—Id.

[x] (Sup. 1906)

Acts 1905, p. 59, § 8 (Burns' Ann. St. 1905, § 900), providing that one aggrieved by the award of appraisers in condemnation proceedings may file exceptions thereto and obtain a civil trial of the cause, restricts the trial to the issues of benefits and damages formed by the exceptions.—Morrison v. Indianapolis & W. R. Co., 166 Ind. 511, 76 N. E. 961, 77 N. E. 744.

[xx] (Sup. 1906)

Under Acts 1901, p. 461, § 5 (Burns' Ann. St. 1901, § 5468e), relating to appeals from awards in condemnation proceedings, questions of law and fact may be set up in the exceptions to an award, and on a hearing thereof in the circuit court the procedure is governed by the rules of procedure in civil cases wherever applicable.—Terre Haute & L. R. Co. v. Indianapolis & N. W. Traction Co., 167 Ind. 193, 78 N. E. 661.

[y] (App. 1906)

Where a traction company, in condemnation proceedings to obtain a right of way, pays into court the amount of the award made by appraisers, it is not estopped by such payment from appealing from the award.—Indianapolis Northern Traction Co. v. Dunn, 37 Ind. App. 248, 76 N. E. 269.

Where a traction company, in proceedings for the condemnation of a right of way, pays into court the amount of the award by appraisers, and the landowner receives the amount, he cannot prosecute an appeal from the award, as a party cannot accept the benefit of an adjudication and allege it to be erroneous.—Id.

[yy] (App. 1906)

Where, in condemnation proceedings by a street railroad, the corporation appealed from the report of appraisers, as authorized by Burns' Ann. St. 1901, § 5468e, after paying the award, and on a trial de novo the award was reduced, it was proper for the court to enter judgment against the landowners for the difference.—Douglas v. Indianapolis & N. W. Traction Co., 76 N. E. 892, 37 Ind. App. 332.

Burns' Ann. St. 1901, § 5468e, providing for the condemnation of land by a street railway company, provides that on making payment of the award of appraisers the corporation may hold the interest in such lands, and that, notwithstanding an appeal from the award of appraisers, the corporation may take possession

of the property, and that the subsequent proceedings shall affect only the amount of compensation. *Held*, that the payment of an award by the condemning corporation gave it authority to take possession of the land for the purpose of constructing its road, but did not preclude it from appealing.—*Id.*

On the filing of exceptions to the report of appraisers in condemnation proceedings by a street railway for a right of way, under Burns' Ann. St. 1901, §§ 5468d, 5468e, as amended by Acts 1903, p. 92, c. 36, the question of damages is triable de novo, regardless of the appraisal.—*Id.*

On such exceptions, the burden is on the landowner to establish his damages.—*Id.*

[z] (Sup. 1903)

Under a statute providing for appeals to the circuit court in condemnation proceedings, the method of taking the appeal being by exceptions to the award, preliminary objections to the service and to the appointment of appraisers were not brought forward by the mere taking of an appeal to the circuit court, and were not reviewable on appeal to the Supreme Court.—*Stoy v. Indiana Hydraulic Power Co.*, 76 N. E. 1057, 166 Ind. 316.

[zz] (Sup. 1910)

Where the only issue on exceptions to the appraisers' award in condemnation proceedings was the value of the land, the landowner was entitled to open and close.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 161.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 614, 619, 658-660, 666, 668, 669, 671, 673, 674, 687; 25 CENT. DIG. High. §§ 370, 372; 36 CENT. DIG. Mun. Corp. § 981.

See, also, 15 Cyc. pp. 904-917.

§ 239. — Trial by jury on appeal.

Constitutional right to trial by jury, see JURY, § 17.

Demand for jury, see JURY, § 25.

Trial de novo on appeal from judgment, see post, § 261.

[a] (Sup. 1856)

S. petitioned the commissioners of T. county to lay out a highway through lands of K. Viewers were appointed, who reported in favor of the laying out. K. remonstrated on the ground of want of public utility. Reviewers reported that it would be of public utility. K. claimed damages. Assessors reported that he would sustain no damage. The road was ordered to be opened. K. appealed to the circuit court. *Held*, that viewers could not again be appointed there to assess K.'s damages, but the case must be tried in that court.—*Kemp v. Smith*, 7 Ind. 471.

[b] (Sup. 1857)

On an appeal to the circuit court from appraisers in the assessment of damages for land

taken by a railroad company, a complaint is unnecessary. The party has a right to appear in that court and demand a jury to retry the question of damages.—*Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558.

[c] (Sup. 1875)

Damages to which a person appealing to the circuit court in proceedings to lay out and establish a highway is entitled are properly assessed by the circuit court or jury trying the cause on appeal, and there is no error in the court's refusing, on his motion, to appoint three disinterested freeholders to assess his damages.—*Hays v. Parrish*, 52 Ind. 132.

[d] (Sup. 1877)

On appeal to the circuit court from an assessment of damages in a proceeding, under 1 Rev. St. 1876, p. 704, § 15, to appropriate land for railroad purposes, where the jury examined the premises, it was error to charge that the sworn testimony given on the stand, bearing on the subject in controversy, and such reasonable deductions as are legitimately to be drawn from it, "in connection with such facts as presented themselves in viewing the premises," constituted the only proper basis on which to rest the verdict, and afforded the only test and criterion by which they were to fix it.—*Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 59 Ind. 100.

[e] (Sup. 1880)

On trial of an appeal from the report of reviewers against the utility of a proposed highway, but fixing damages in favor of several remonstrants in case the highway should be established, the jury found in favor of its public utility, but as to one of the remonstrants found neither for nor against him on the question of damages. *Held*, that the verdict was so defective that a judgment could not be rendered thereon against said remonstrant, and that he was entitled to a new trial of the whole case, including the question of public utility, not only as to him, but also as to the other remonstrants.—*Peed v. Brenneman*, 72 Ind. 288.

[f] (Sup. 1883)

On appeal from proceedings before commissioners concerning the location of a highway, where the remonstrance, as amended in the circuit court, is based upon a claim for damages alone, and raises no question as to the utility of the way, the burden is on the remonstrant, who therefore may open and close.—*Peed v. Brenneman*, 89 Ind. 252.

[g] (Sup. 1885)

An appeal having been taken by both parties in proceedings by a railroad company to condemn land, the landowner is entitled to open and close; Rev. St. 1881, § 3907, providing that the proceedings on appeal shall affect only the amount of compensation to be allowed.—*Indiana, B. & W. R. Co. v. Cook*, 102 Ind. 133, 26 N. E. 203.

[h] (*Sup.* 1886)

Where a landowner remonstrates against the establishment of a public highway, both upon the ground that it is not of public utility and on account of the damages, two issues are presented, which must be tried *de novo* on appeal to the circuit court.—*Reynolds v. Shults*, 106 Ind. 291, 6 N. E. 619.

[i] (*App.* 1895)

Acts 1889, p. 22 et seq., provides for appeals from the assessment of damages by appraisers, in proceedings by a natural gas company to condemn land for the purpose of conducting gas to its patrons, under the same provisions as provided for in appeals from assessments for the condemnation of lands for right of way of railways. Rev. St. 1881, § 3907 (Rev. St. 1894, § 5160), provides that in appeals in the latter cases "the award may be reviewed by the circuit court on exceptions" thereto by either party. *Held*, that on an appeal by a gas company from an award, the appeal having the effect of annulling the appraisalment, the burden of proving the damages is on the landowner, and he is therefore entitled to open and close.—*Consumers' Gas Trust Co. v. Huntsinger*, 12 Ind. App. 285, 40 N. E. 34.

[j] (*App.* 1901)

Where in proceedings to determine the compensation to be paid by a railroad company for right of way, on the trial of an appeal from the award of appraisers, application is made to the court that the jury be directed to view the premises, such application is addressed to the discretion of the court, and its determination thereon should not be reviewed unless abuse of discretion is shown.—*Chicago, I. & E. R. Co. v. Loer*, 60 N. E. 319, 27 Ind. App. 245.

[k] (*App.* 1901)

On appeal from the award of appraisers fixing damages for the condemnation of a railroad right of way, neither party is entitled, as a matter of right, to have the jury view the premises, but such matter is entirely within the discretion of the court, and its action thereon is not cause for reversal, unless an abuse of discretion is shown.—*Chicago, I. & E. R. Co. v. Winslow*, 60 N. E. 466, 27 Ind. App. 316.

In a jury trial to reassess damages fixed by appraisers for appropriation of land for a railroad right of way, evidence that the appraisers making the first assessment were farmers living in the vicinity of the land, and that they made the appraisalment on actual view of the premises, was incompetent.—*Id.*

[l] (*App.* 1902)

An instruction, given on appeal from the report of commissioners in condemnation proceedings, that the jury should assess the damages, if any, sustained by the property owner, was not erroneous as leaving the jury to say whether there was any damage, and thus in contravention of such owner's constitutional right to compensation; since there may have been benefits equaling the damages, thus leaving

no damages to be assessed.—*Terre Haute & L. R. Co. v. Flora*, 64 N. E. 648, 29 Ind. App. 442.

The jury, on appeal from the report of commissioners in condemnation proceedings, is not bound by the testimony and estimates of witnesses as to the damages sustained by one whose property is taken for a street.—*Id.*

[m] (*Sup.* 1904)

Where exceptions to the award of damages in condemnation proceedings go only to the amount of damages, a jury trial is proper.—*Chicago, I. & E. R. Co. v. Wysor Land Co.*, 69 N. E. 546, 163 Ind. 288.

[n] (*Sup.* 1909)

Whether the establishment of a highway across the right of way of a railroad company would interfere with the operation of its railroad was a question for the jury.—*New York, C. & St. L. R. Co. v. Rhodes*, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225.

Requested instructions in a proceeding to establish a highway across the right of way of a railroad company were properly refused where so general and indefinite as to authorize the assessment of damages to which the company was not entitled.—*Id.*

[o] (*Sup.* 1910)

On exceptions to the award of appraisers appointed in proceedings to condemn land for an electric railroad right of way, the jury in assessing damages should not consider the fact that the railroad had failed to fence the right of way, but should consider the obligation resting on the landowner to put in gates at farm crossings and keep the same securely closed.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 161.

Where, on exceptions to the appraisers' award in proceedings to condemn land for an electric railroad right of way, the jury were not advised as to the amount of the award of the appraisers, and the court charged that the landowners could only recover such damages as each had proved, a charge that the railroad had the burden of proving the material allegations of its exceptions complaining of the excessiveness of the award was harmless.—*Id.*

[p] (*Sup.* 1910)

Where, on exceptions to the appraisers' award in proceedings to condemn land for an electric railroad right of way, the jury were not advised as to the amount of the award of the appraisers, and the court charged that the landowners could only recover such damages as each had proved, a charge that the railroad had the burden of proving the material allegations of its exceptions complaining of the excessiveness of the award was harmless. Rehearing, 91 N. E. 161, denied.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 729.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 615-620;  
675, 676, 678, 680.

See, also, 15 Cyc. p. 967.



**§ 241. Requisites and entry of judgment.**

[a] (Sup. 1846)

On a writ of ad quod damnum issued after a dam was built, damages were assessed, and not objected to. The court gave judgment on the assessment, and ordered that, on payment of the damages and costs, the petitioner should "have leave to continue his dam, and to flow said lands as they were flowed by said dam at the time of said inquest." *Held*, that the order gave petitioner leave to continue his dam of the same height it was when the inquest was found, and to flow the lands named in the inquest, and hence was not open to the objection that it confined petitioner's right to flow the lands to the precise quantity flowed at the time of the finding the inquest, without regard to the stage of water at different times.—*Chapman v. Groves*, 8 Blackf. 308.

[b] (Sup. 1853)

The statute providing that, upon payment of damages assessed, the interest in the land shall vest in the railroad corporation, who shall pay costs, a judgment making payment of costs also a condition precedent is bad in form.—*Evansville, I. & C. Straight Line R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, Id. 551.

[c] (Sup. 1863)

In proceedings to assess damages for lands taken for the Evansville & Illinois Railroad Company under their charter (Loc. Laws 1849), it is error to render a common judgment against the corporation for the damages without a decree for the conveyance of the land in question to the corporation upon the payment of the money.—*Evansville & C. R. Co. v. Miller*, 30 Ind. 209.

[d] (Sup. 1873)

In a proceeding under the general railroad law to condemn land, etc., it is not necessary, in rendering judgment in favor of a landowner for the damages assessed, to provide that a deed shall be executed to the railroad company for the land condemned. The title which the company gets is acquired under the statute.—*Indianapolis & St. L. R. Co. v. Smythe*, 45 Ind. 322.

[e] (Sup. 1892)

It is not necessary that it should appear of record that the appraisers or jurors holding an inquest in condemnation proceedings were qualified to serve.—*American Cannel Coal Co. v. Huntington, T. C. & C. R. Co.*, 130 Ind. 98, 29 N. E. 566.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 621-625.

See, also, 15 Cyc. pp. 917-921.

**§ 242. Collateral attack.**

[a] (Sup. 1865)

In proceedings by mandamus, to compel a township trustee to levy a tax to pay the

damages awarded by the circuit court in a proceeding for the location of a township road, it was *held* that it was not competent for the trustee, in answering to the alternative writ, to attack the regularity of the proceedings before the trustees on the trial of the petition for the location of the road. That question could only be presented for review by an appeal on behalf of the trustees from the original judgment.—*Huntington v. Smith*, 25 Ind. 486.

[b] (Sup. 1871)

A railroad company, in appropriating land for railroad purposes, filed its maps and surveys in the office of the clerk of the circuit court, and also its instrument of appropriation, and served a copy on the plaintiff, and applied to the circuit court for the appointment of appraisers, who appraised the damages to the land of plaintiff through which the road passed. The damages appraised were tendered to the plaintiff, and subsequently paid into court. Within the 10 days allowed by law the plaintiff filed exceptions to the award, which were still undetermined. Subsequently plaintiff brought an action for trespass to land and for an injunction. The court granted a temporary injunction upon the affidavit of plaintiff that no attempt had been made by the company to purchase from him before condemning. *Held*, that the proceedings for condemnation could not be questioned in a collateral action.—*Ney v. Swinney*, 36 Ind. 454.

[c] (Sup. 1886)

Upon a collateral attack by a party to appropriation proceedings, in the absence of anything to the contrary, every reasonable presumption must be indulged in favor of the regularity and validity of the proceedings.—*Indiana Oolitic Limestone Co. v. Louisville, N. A. & C. R. Co.*, 107 Ind. 301, 7 N. E. 244.

[d] (Sup. 1887)

Where a judgment has been entered approving the assessment of damages for land taken for railroad purposes, the landowner cannot, by an action of ejectment, collaterally attack the validity of the proceedings on the ground that the description in the instrument of appropriation was defective.—*St. Joseph Hydraulic Co. v. Cincinnati, W. & M. R. Co.*, 109 Ind. 172, 9 N. E. 727.

[e] (Sup. 1888)

A judgment dismissing proceedings to assess damages for the taking of lands by a railroad is conclusive between the parties, even though erroneous, and can be overthrown only by direct attack.—*Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650.

[f] (Sup. 1894)

Where, under Rev. St. 1894, § 4405, providing that, if the owners are unknown or non-residents, notice shall be given by publication, the notice is so given, it will be presumed, in an action by an owner to enjoin the opening of the

alley, such action being a collateral attack, that the trustees, by assuming jurisdiction, found all facts necessary to give the same.—*Graves v. Town of Middletown*, 137 Ind. 400, 37 N. E. 157.

[a] (Sup. 1901)

Where a jury has been appointed by the board of county commissioners to fix damages sustained by a landowner for land taken in the construction of a highway, in a collateral proceeding by such owner to recover of the county the amount so awarded it will be presumed that she filed a written application with the viewers originally appointed to assess the damages, as required by Burns' Supp. 1897, § 6924, since under such statute the board of commissioners had no power to appoint the jury until after the damages had been considered by the viewers.—*Board of Com'rs of Monroe County v. State ex rel. Underwood*, 60 N. E. 344, 156 Ind. 550.

[b] (Sup. 1907)

A judgment of the circuit court, on appeal to it from an award of assessors in condemnation proceedings, dismissing the proceedings and declaring that the rights of the parties had not become vested, the court having jurisdiction of the subject-matter and of the parties, is not void even if erroneous, and hence cannot be collaterally attacked in a subsequent condemnation proceeding on the ground that the rights of the parties had vested.—*Darrow v. Chicago, L. S. & S. B. R. Co.*, 169 Ind. 99, 81 N. E. 1081.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 626; 30

CENT. DIG. JUDGM. § 914.

See, also, 15 Cyc. p. 921.

§ 243. Conclusiveness and effect of award or judgment in general.

Judgment as bar to another action, see JUDGMENT, § 557.

[a] (Sup. 1839)

Judgment on writ ad quod damnum, taken out after dam is built, does not bar an action for the flowage.—*Summy v. Mulford*, 5 Blackf. 202.

[aa] (Sup. 1859)

The appraisal of damages for a railroad right of way is a bar to claims for injuries to buildings, exposing persons or cattle to injury, cutting off the flowage of water, etc., though such damages were unknown to the appraisers from operation of road.—*Lafayette Plank Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

[b] (Sup. 1861)

A petition for a writ of ad quod damnum and the inquest thereon not naming plaintiff's grantor, and the inquest not describing the land sought to be flowed by a dam, the judgment is

not a bar to plaintiff's action for flowage.—*Lane v. Miller*, 17 Ind. 58.

[bb] (Sup. 1866)

Where an assessment was rendered under 1 Gav. & H. St. p. 474, authorizing the construction of plank roads, and no appeal was prosecuted from the decision, the judgment, while unreversed, is final and conclusive.—*Norristown, H. & St. L. Turnpike Co. v. Burket*, 26 Ind. 53.

[c] (Sup. 1868)

A proceeding in regular form before a justice of the peace to obtain the right of way for a gravel road company resulted in a judgment on the report of the jury that no damages would be sustained by the owner of the land. From this judgment the owner appealed to the circuit court, where on his motion, the cause was dismissed over the objection of the company, and the company appealed from the judgment of dismissal to the Supreme Court. Pending this appeal the owner sued the company for trespass. *Held*, that it might be that but for the appeal to the Supreme Court the company would have been estopped by the judgment of dismissal from showing that the proceeding before the justice was regular.—*Jeffries v. Maccown*, 30 Ind. 226.

[d] (Sup. 1872)

Since the county commissioners are not required, when application is made by a turnpike company organized under Act May 12, 1852, for the appointment of appraisers to assess benefits to lands, under Act March 11, 1867, to ascertain and determine, as a jurisdictional fact, whether the company has been duly and legally organized, persons whose lands have been assessed are not concluded by such finding, if made.—*Rhodes v. Piper*, 40 Ind. 369.

[e] (Sup. 1890)

A claim for damages cannot be reserved in proceedings by a railroad company to condemn a street for its use, and, when damages are assessed for an injury resulting therefrom, it bars all actions for future damages.—*White v. Chicago, St. L. & P. R. Co.*, 23 N. E. 782, 122 Ind. 317, 7 L. R. A. 257.

The damages awarded in proceedings by a railroad company to appropriate a street for a right of way do not include damages to an abutting owner resulting from the negligent use of the way by the company, or from an unnecessary change of the established grade of the street or negligently or unnecessarily obstructing the same.—*Id.*

Such use includes the laying of necessary additional tracks or switches.—*Id.*

[f] (App. 1901)

In an action against a railway company for the wrongful appropriation of land, the complainant alleged that plaintiff was the owner of the property, and that defendant, without plaintiff's permission and without payment of compensation, appropriated the land, and

had held exclusive possession, depriving plaintiff of its use and occupation. *Held*, that it was proper to refuse defendant's requested instruction that the appropriation proceedings constituted a judgment fixing the amount to which plaintiff would be entitled on account of the appropriation, and she could not be heard to say in another action that the damages were greater than those awarded.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 205.

[g] (Sup. 1902)

When a railway company failed to present to the board of commissioners for allowance in proceedings to establish a highway across its right of way any claim for damages arising out of the location of the proposed highway, a railway company succeeding to the rights, franchises, and property of the former company after the making of the final order establishing the highway and opening the same, cannot show, in a mandamus proceeding to compel it to construct a highway crossing over the right of way, that it will subject it to considerable expense to construct the crossing; the statute providing ample opportunity for all persons affected by the location of the proposed highway to be heard before, and have their claims for damages adjusted by, the board of commissioners.—*Baltimore & O. S. W. R. Co. v. State ex rel. Greenwood*, 65 N. E. 508, 159 Ind. 510.

[h] (Sup. 1903)

Where the common council of a city had commenced proceedings to condemn property for street purposes under the laws then in force, and such proceedings were pending on appeal when Act 1899, p. 270, became effective for such city, of which section 78 transferred to the board of public works the authority to condemn property, but section 3 provided that proceedings begun prior to the act should be carried forward by the proper department, and section 71 placed upon the city attorney the duty to appear in all appeals in which the city was interested, it will be assumed that the city attorney, in asking for a judgment on the verdict in the appeal, over objections of the property owner, was discharging his duty and acting with full authority, and such judgment will bind the city.—*Heinl v. City of Terre Haute*, 66 N. E. 450, 161 Ind. 44.

[i] (App. 1904)

The owner of land is not compensated by an assessment of damages for a railroad right of way as to wrongful acts after the acceptance of the deed or the making of an appropriation.—*Baltimore & O. S. W. R. Co. v. Quillen*, 72 N. E. 661, 34 Ind. App. 330, 107 Am. St. Rep. 183.

[j] (App. 1906)

The award of the appraisers in a proceeding to condemn land for the right of way of a traction company is only an initiatory step in the proceedings, which is only final at the option of the parties.—*Indianapolis Northern Trac-*

*tion Co. v. Dunn*, 37 Ind. App. 248, 76 N. E. 269.

[k] (App. 1906)

In a proceeding to condemn land for a railroad right of way, all damages, present and future, arising from the proper construction and operation of the railroad must be recovered and such damages not recovered in that proceeding cannot be recovered in a subsequent action.—*Union Traction Co. v. Pfeil*, 39 Ind. App. 51, 78 N. E. 1052.

[l] (Sup. 1907)

Where an act of condemnation for a railroad right of way included the right of the railroad to take materials for the construction and repair of the road and the right of way over the land sufficient to enable it to repair and construct the road, and the right to convey water by drains and to make proper drains, such rights were for the benefit of the railroad, and did not require it to restore a ditch for the drainage of surface water across its right of way destroyed by the construction of its embankment.—*New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 551, 627-629, 700; 30 CENT. DIG. Judgm. §§ 1071, 1072, 1306; 41 CENT. DIG. R. R. § 362.  
See, also, 15 Cyc. pp. 922-927.

§ 244. Effect of award or judgment as to right to possession of property.

[a] (Sup. 1868)

A proceeding before a justice of the peace to obtain the right of way for a gravel road company resulted in a judgment, on the report of the jury, that no damages would be sustained by the owner of the land. From this judgment the owner appealed to the circuit court, where, on his motion, and against the objection of the company, the cause was dismissed. The company appealed from the judgment of dismissal to the supreme court. Pending this appeal, the owner sued the company for trespass. *Held*, that the proceeding before the justice gave the right of entry, which the order of dismissal could not devert.—*Jeffries v. Maccown*, 30 Ind. 226.

[b] (Sup. 1882)

Where, on appeal, the amount awarded an owner for land taken by a railroad company in condemnation proceedings was greatly increased, and final judgment rendered, an application for appeal to the supreme court, and a statement of intention to prosecute the same, did not suspend the judgment, nor entitle the railroad company to possession of the land, pending such appeal, without payment.—*Lake Erie & W. R. Co. v. Kinsey*, 87 Ind. 514.

[c] (Sup. 1885)

Where the owner appeals from the decision giving him a certain sum as damages for taking his land by a railroad company, the pay-

ment into court of the amount operates only as a license to the company to take possession pending appeal.—*Terre Haute & L. R. Co. v. Crawford*, 100 Ind. 550.

[d] (*Sup.* 1892)

A statute authorizing the taking of land under the right of eminent domain is not objectionable because it permits the condemning party to take possession upon paying the assessed damages into court for the use of the landowner, even though an appeal is taken from the award by the condemning party.—*Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505.

[e] (*App.* 1902)

*Burns' Rev. St. 1901, § 4406*, requires the commissioners appointed in proceedings to appropriate land for street purposes to ascertain the value of the land, and what real estate, if any, will be benefited, with the proportion of benefits and damages; section 4407 requires the board of trustees, on the filing and acceptance of the commissioners' report, to direct the town treasurer to tender the property owner the amount of his damages, less benefits; section 4408 provides for the collection of the benefits assessed, if any; and section 4409 provides that, after the damages have been tendered, the municipality may proceed to open the street, even though an appeal is taken from the commissioners' report. *Held*, that the assessment and collection of benefits is not a condition precedent to the opening of the street and payment of damages for the land appropriated therefor.—*Terre Haute & L. R. Co. v. Flora*, 64 N. E. 648, 29 Ind. App. 442.

[f] (*Sup.* 1903)

*Burns' Rev. St. 1901, § 5468a, cl. 5*, gives interurban street railway companies authority to cross any railroad tracks, and requires that, in case the compensation for crossing cannot be settled, the same must be determined by commissioners appointed as under the statute in respect to the taking of lands. This statute (section 5468e) requires the corporation taking the land to file in court "a description of the rights and interests intended to be appropriated." *Held*, that a complaint for an injunction by a street railway, stating that it was authorized to cross a certain railroad track, and being unable to agree on compensation, it had filed an instrument of appropriation, that commissioners had fixed the amount, etc., but that said railroad interfered with its right to cross, was sufficient without setting out the instrument of appropriation or averring that it stated the jurisdictional facts.—*Wabash R. Co. v. Ft. Wayne & S. W. Traction Co.*, 67 N. E. 674, 161 Ind. 295.

*Burns' Rev. St. 1901, § 5468e*, in respect to the taking of lands, made applicable to street railways crossing railroads by section 5468a, directs that on failure to agree on compensation the court may on application appoint appraisers, and, on the return of their assess-

ment of damages, the amount assessed must be paid to the clerk or tendered to the party in whose favor it is made. The award may be reviewed on exceptions by either party, but it is expressly enacted that notwithstanding such appeal the appropriating company may take possession of the property. *Held*, that a railroad company that had filed exceptions to proceedings by a street railway to acquire a crossing, and had taken an appeal, had no right to interfere with the street railway and prevent it constructing the crossing.—*Id.*

[g] (*App.* 1905)

*Burns' Ann. St. 1901, § 5160*, authorizing a railroad to take possession of property involved in condemnation proceedings, on payment or tender of the award, notwithstanding an appeal, constitutes a license to the railroad to enter into and continue in possession pending litigation.—*Cleveland, C., C. & St. L. R. Co. v. Hayes*, 74 N. E. 531, 35 Ind. App. 539; *Same v. Miller*, 74 N. E. 628, 35 Ind. App. 707; *Same v. Hayes, Id.*; *Same v. West, Id.*; *Same v. Borgman*, 74 N. E. 629, 35 Ind. App. 707; *Same v. Nowlin, Id.*; *Same v. Taylor, Id.*; *Same v. Hayes*, 74 N. E. 630, 35 Ind. App. 708; *Same v. McKee, Id.*; *Same v. Shanks*, 74 N. E. 630, 35 Ind. App. 707, 708; *Same v. Garnier*, 74 N. E. 631, 35 Ind. App. 708; *Same v. Hayes, Id.*; *Same v. Miller, Id.*; *Same v. Nowlin*, 74 N. E. 631, 35 Ind. App. 709.

[h] (*App.* 1906)

Where a traction company pays the amount awarded by appraisers in condemnation proceedings for its right of way, it has a right to the possession of the land and has a prima facie claim thereto, and, if no appeal is taken therefrom within the time fixed by statute, the title of the land vests and relates back to the date of payment.—*Indianapolis Northern Traction Co. v. Dunn*, 37 Ind. App. 248.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 630-636.  
See, also, 15 Cyc. pp. 926, 927.

**§ 245. Right to compensation awarded.**

[a] (*Sup.* 1878)

On appeal to the circuit court by a remonstrant against the opening of a highway, claiming damages, a verdict was rendered "for the plaintiff," and that he would "be damaged by the opening of the contemplated road" in a specified sum. *Held*, that the petitioners might pay the damages at their option, until which payment the highway could not be opened.—*Board of Com'rs of Grant County v. Small*, 61 Ind. 318.

[b] (*Sup.* 1890)

Where a railroad company, in proceedings instituted by it to condemn land for its right of way, pays the damages awarded by the circuit court to the clerk thereof, and enters into possession of the land, the fact that the company has perfected an appeal from the judgment of the circuit court does not justify the clerk

in refusing to pay over the damages to the owner, or prevent the latter from taking proceedings to recover the same, and it is wholly immaterial that the company notified the clerk not to pay over the money.—*Meyer v. State ex rel. Day*, 126 Ind. 335, 25 N. E. 351.

[c] (Sup. 1892)

A condition, attached to a payment into court by the condemning party of the damage assessed, that the same shall not be paid to the owner until the appeal prosecuted by the former is determined, is without force where the condemning party enters upon the land, as the condemning party is not entitled to enter upon the land and to appeal from the award at the same time.—*Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505.

[d] (App. 1894)

Rev. St. 1894, § 3633, provides that the city commissioners shall estimate the benefits and damages to all real estate affected by the opening of a street and determine what part of the expense ought to be paid out of the general fund, and report to the common council. *Held*, that where a city becomes liable for all damages in excess of benefits because of the common council having approved the report, though it fails to state the amount to be paid out of the general fund, the landowner is immediately entitled to the damages.—*City of Terre Haute v. Blake*, 36 N. E. 932, 9 Ind. App. 403.

[e] (App. 1905)

Though defendants in condemnation proceedings file no exceptions to the award of appraisers, but, on the amount thereof being paid into court, receive it, yet, plaintiff having excepted to the award and had a trial on the issues so raised, it must pay the additional amount of damages then found, or lose all rights in the land.—*Indianapolis Northern Traction Co. v. Dunn*, 76 N. E. 269, 37 Ind. App. 248.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 637.

See, also, 15 Cyc. p. 929.

§ 246. Effect of abandonment or dismissal of proceedings.

[a] (Sup. 1870)

A proceeding was commenced before a justice of the peace to condemn a right of way for a turnpike, in which damages were assessed to the landowner, who appealed to the circuit court. After appeal the company tendered the amount assessed and took possession of the land, and the circuit court dismissed the cause and rendered judgment for costs. *Held*, that such judgment, not being appealed from, estopped the company from showing that the proceedings before the justice were regular, and the owner was entitled to recover possession.—*Keicher v. Killbuck Turnpike Co.*, 33 Ind. 333.

[b] (Sup. 1873)

After the council has accepted the report of the commissioners appointed to assess damages, etc., by opening a new street, and made the proper order for the appropriation of the land necessary for the street, the right of the landowner to the damages assessed becomes absolute, and the city liable at once for its payment. The council cannot set aside the assessment, nor, by refusing to open the street, avoid the payment of such damages.—*City of Lafayette v. Shultz*, 44 Ind. 97.

[c] (Sup. 1884)

Under Rev. St. 1881, § 3180, providing that, in proceedings to widen a street, "appeals shall not prevent such city from proceeding with the proposed appropriation, nor from making the proposed change," and "if, upon appeal, the report of the commissioners as to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings," *held*, that the city might dismiss the proceedings after verdict on appeal, though it had taken possession of the land sought to be appropriated.—*Brokaw v. City of Terre Haute*, 97 Ind. 451.

[d] (Sup. 1884)

A railroad company which enters on land under proceedings to appropriate, which it subsequently abandons, becomes, by such abandonment, a trespasser ab initio.—*Pittsburgh, Ft. W. & C. Ry. Co. v. Swinney*, 97 Ind. 586.

[e] (App. 1894)

Where a highway has ceased to be such because not opened or used within six years from the time it was laid out, as required by Rev. St. 1881, § 5032, the judgment for damages rendered on such laying out also ceases to be of force, and is not evidence of the landowner's damages, on a new proceeding to lay out another highway over the same route.—*Decker v. Washburn*, 8 Ind. App. 673, 35 N. E. 1111.

[f] (App. 1894)

A right of action against a city for damages for taking property for a street accrues when the common council accepts the report of the city commissioners assessing the damages thereto, and orders the appropriation of the property; and a subsequent discontinuance of the proceedings cannot affect such right of action.—*City of Terre Haute v. Blake*, 9 Ind. App. 403, 36 N. E. 932.

[g] (Sup. 1908)

Acts 1890, p. 312, c. 152, § 83 (Burns' Ann. St. 1901, § 4190e3), relating to condemnation proceedings by cities, and providing that, if on appeal to the circuit court the report of the board of public works as to benefits or damages is greatly diminished or increased, the city may discontinue such proceedings, recognizes the right to discontinue before or when the cause is disposed of in the circuit court by some final

order or judgment therein; but a city may not discontinue where judgment against the city for damages was made on March 16th, and a motion for new trial, after remaining in court until October 17th, was denied, after which the city gave notice of appeal to the Supreme Court.—*City of Terre Haute v. Sachs*, 171 Ind. 679, 86 N. E. 45.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 647-657.  
See, also, 15 Cyc. pp. 941, 942; note, 86 Am. Dec. 202.

### § 248. Lien of award or judgment.

[a] (Sup. 1897)

Owners of land formally appropriated by a railroad company have a lien for the value of the same, as found in the award, which is superior to that of any previous or subsequent mortgage by the company upon the same property.—*Coburn v. Sands*, 48 N. E. 786, 150 Ind. 141.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 644, 645.  
See, also, 15 Cyc. p. 933.

### § 249. Enforcement of award or judgment.

By independent action, see post, § 270.

[a] (Sup. 1870)

The petitioners for the establishment of a highway may appeal from an order of the board of county commissioners refusing to pay out of the county treasury the damages assessed by viewers to one through whose land the road would run.—*Smith v. Scearce*, 34 Ind. 255.

[b] (Sup. 1872)

When the damages which will result from opening a highway are ordered to be paid out of the county treasury, the county commissioners may treat the case as one where the amount is deposited in the county treasury for the use of the parties entitled to the same, and may proceed to order the road to be opened and kept in repair; and no one except the parties entitled to receive the amount of the damages can maintain any form of action requiring the payment thereof.—*Rudisill v. State ex rel. Bird*, 40 Ind. 485.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 646; 25 CENT. DIG. High. §§ 370, 372.  
See, also, 15 Cyc. p. 934.

### § 250. Appeal.

Decisions reviewable, see APPEAL AND ERROR, § 80.

Estoppel to appeal by pleading judgment in bar, see ESTOPPEL, § 67.

Review of report or award of commissioners, appraisers, or viewers, see ante, §§ 238, 239.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 658-687;  
25 CENT. DIG. High. § 370.  
See, also, 15 Cyc. pp. 944-960.

### § 252. — Appellate jurisdiction.

Appellate jurisdiction as between particular courts, see COURTS, § 220 (11).

Appellate jurisdiction as dependent on amount or value in controversy, see COURTS, § 220 (14).

Appellate jurisdiction as dependent on whether title to real property is involved, see COURTS, § 220 (13).

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 659.  
See, also, 15 Cyc. p. 947.

### § 253. — Decisions reviewable.

Review as dependent on finality of determination, see APPEAL AND ERROR, § 69.

[a] (Sup. 1851)

Section 15 of the charter of the Lawrenceburgh & Upper Mississippi Railroad Company does not prevent the company from prosecuting a writ of error to the supreme court from an award of damages for land taken by the company in the formation of their road, although that section states that the judgment of the circuit court shall be final.—*Lawrenceburgh & U. M. R. Co. v. Smith*, 3 Ind. 253.

[b] (Sup. 1859)

The general law providing for appeals to the Supreme Court (2 Rev. St. p. 158, § 550) repeals 1 Rev. St. p. 395, § 7, making the judgment of the circuit court final in proceedings for the assessment of damages sustained by a landowner in consequence of the running of a road through his land.—*Piper v. Connersville & L. Turnpike Road Co.*, 12 Ind. 400.

Under the provisions of 2 Rev. St. p. 158, § 550, an appeal lies from the judgment of the circuit court upon the assessment of land damages in consequence of running a turnpike through petitioner's land.—*Id.*

[c] (Sup. 1886)

In proceedings of condemnation to open a highway, it is only when the board of commissioners by whose orders the matters are conducted has made an order disposing of the entire matter that an appeal will lie, and not from any interlocutory order, such as an order appointing viewers to appraise the land to be taken.—*Freshour v. Logansport & N. Turnpike Co.*, 104 Ind. 463, 4 N. E. 157.

[d] (Sup. 1903)

Act March 3, 1899, p. 270, c. 152, provides for the government of cities having between 23,000 and 35,000 inhabitants. Section 3 declares that the city officers and the council shall have the powers conferred by the act, and no others, but provides that proceedings of a public nature commenced prior to the taking effect of the act shall be carried forward by

the proper officers. Other sections transfer the jurisdiction in condemnation proceedings for streets from the common council to the board of public works. Section 82 grants an appeal in such proceedings to the circuit or superior court, and section 83 provides that such court shall rehear the matter of assessment de novo, and that the judgment therein shall be final. *Held*, that in proceedings for the assessment of damages for property taken for a public street, pending for trial on appeal to the circuit court at the time the act became effective, the subsequent judgment of the circuit court is final, and no further appeal can be prosecuted.—*Evansville & T. H. R. Co. v. City of Terre Haute*, 67 N. E. 686, 161 Ind. 26.

## [e] (Sup. 1904)

No appeal lies from an order of the circuit court refusing to appoint appraisers in proceedings under Burns' Ann. St. 1901, §§ 4833, 4834 (Rev. St. 1881, §§ 3702, 3703; Horner's Ann. St. 1901, §§ 3702, 3703), to condemn land for the construction of a dam, and dismissing such proceedings.—*Noblesville Hydraulic Co. v. Evans*, 72 N. E. 126, 163 Ind. 700.

## [f] (Sup. 1904)

No appeal lies from an order of the circuit court denying an application for the appointment of appraisers in a proceeding to condemn lands for the purpose of a right of way, instituted under Burns' Ann. St. 1901, § 5160, providing for the condemnation of land for railroad purposes.—*Lafayette & I. Rapid Ry. Co. v. Butner*, 70 N. E. 529, 162 Ind. 460.

## [g] (Sup. 1907)

A motion for a new trial is not permissible in presenting for review questions arising on an interlocutory order adjudging the land subject to condemnation for a railroad right of way and appointing appraisers to make the award.—*Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

## [h] (Sup. 1908)

No appeal lies from a decision refusing to appoint appraisers under Burns' Ann. St. 1901, § 5160, providing for the condemnation of land for railroad purposes.—*Westport Stone Co. v. Thomas*, 170 Ind. 91, 83 N. E. 617.

Acts 1905, p. 59, c. 48, provides in section 5 (page 61) that any defendant may object for want of jurisdiction of the subject-matter or of the person, or that plaintiff has no right to exercise the power of eminent domain for the use sought, or for any other reasons, provided that amendments to pleadings may be made upon leave of court, and, if any such objection be sustained, the plaintiff may amend his complaint, or may appeal, as appeals are taken from final judgments in civil actions. *Held*, that a plaintiff, defeated on the preliminary hearing, has only the same right of appeal given generally in civil actions; and hence, where defendant's objections to the proceedings denying plaintiff's right to exercise the power of eminent domain

for the use sought, and challenging the sufficiency of the allegations of the complaint to show such right, were sustained by the court, and thereupon plaintiff refused to plead further, but no final judgment was entered, an appeal was premature.—*Id.*

## [i] (Sup. 1910)

Burns' Ann. St. 1908, § 932, authorizes a court, in condemnation proceedings, to appoint appraisers if satisfied of the regularity of the proceedings and the right of plaintiff to exercise the power of eminent domain for the use sought. Section 933, after providing for the filing of objections by defendants in condemnation proceedings, provides that, "if such objections are overruled, the court or judge shall appoint appraisers as provided for in this act, and, from such interlocutory order overruling such objections and appointing such appraisers, such defendants or any of them may appeal." *Held*, that no appeal lies from the mere overruling of objections to the complaint, but an appeal may be taken from the order appointing appraisers.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 660-664.

See, also, 15 Cyc. pp. 948-950.

## § 254. — Right of review.

Estoppel to appeal in general, see APPEAL AND ERROR, §§ 154, 158.

## [a] (Sup. 1908)

The right of appeal in condemnation proceedings is statutory, and may be given or withheld in the discretion of the Legislature.—*Westport Stone Co. v. Thomas*, 170 Ind. 91, 83 N. E. 617.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 665.

See, also, 15 Cyc. pp. 944-946.

## § 255. — Presentation and reservation in lower court of grounds of review.

## [a] (Sup. 1872)

Where, in a condemnation proceeding, no question is raised in the court below as to costs, it cannot be insisted on in the supreme court.—*Beynon v. Brandywine, B. & S. C. Turnpike Co.*, 39 Ind. 129.

## [b] (Sup. 1882)

Where, in a proceeding for the opening and widening of a street, an objection was made to a certain map put in evidence on the ground of its immateriality and that the street did not appear on it, only such objections could be urged in the Supreme Court.—*Hays v. City of Vincennes*, 82 Ind. 178.

## [c] (Sup. 1892)

In a proceeding for laying out a street, damages were awarded the landowner, and he, instead of relying upon the fact that no tender

of the damages had been made, and resorting to proceedings to prevent the opening of the street, appealed from the decision of the commissioners. *Held*, that the landowner could not raise an objection, in such case, in the appellate court, for want of tender of the damages assessed.—*Lake Erie & W. R. Co. v. City of Kokomo*, 130 Ind. 224, 29 N. E. 780.

[d] (Sup. 1904)

Where one whose land is taken for the opening of a street makes no motion before the board of trustees or in the circuit court on appeal to set aside or vacate the report of the commissioners, the only question to be determined is the amount of damages sustained.—*Pittsburgh, C., C. & St. L. R. Co. v. Town of Wolcott*, 69 N. E. 451, 162 Ind. 399.

[e] (Sup. 1906)

Where the trial court struck out all of defendant's exceptions to award in condemnation proceedings, except the one concerning damages, and defendant took no exceptions to the ruling, no questions as to such exceptions can be raised on appeal.—*Stoy v. Indiana Hydraulic Power Co.*, 166 Ind. 316, 76 N. E. 1057.

[f] (Sup. 1906)

Under Act Feb. 27, 1905, § 5 (Acts 1905, p. 59, c. 48; 4 Burns' Supp. 1905, § 893 et seq.), providing that in condemnation proceedings there shall be no pleadings except the complaint, defendant's written objections, and the exceptions to the report of the appraisers, and that appeal may be taken from an interlocutory order overruling the objections in the manner that appeals are taken from final judgments in civil actions, and making no provision for a motion for a new trial, no such motion need be made in respect to such hearing.—*Morrison v. Indianapolis & W. R. Co.*, 76 N. E. 961, 77 N. E. 744, 166 Ind. 511.

[g] (Sup. 1907)

An objection to condemnation proceedings under Acts 1905, p. 59, c. 48, filed under section 5, p. 61, authorizing the filing of objections, that the court had no jurisdiction over defendant, in that the proceedings were not instituted according to law, is too general to raise the question of a defect of parties.—*Darrow v. Chicago, L. S. & S. B. R. Co.*, 169 Ind. 99, 81 N. E. 1081.

A motion for new trial is not authorized or necessary to present for review any ruling or decision of the court at the preliminary hearing for the appointment of appraisers in condemnation proceedings, under Acts 1905, p. 59, c. 48.—*Id.*

[h] (Sup. 1908)

Under Eminent Domain Act, § 5 (Laws 1905, p. 61, c. 48; Burns' Ann. St. 1908, § 930), relating to objections in condemnation proceedings, the objections are intended to serve the purpose of a demurrer in so far as they are directed to the face of the complaint, in which case they raise an issue of law, and a plea or

answer when they set up facts sufficient to defeat plaintiff's right to condemn; and, if an objection addressed to the face of the complaint is sustained, plaintiff must except to preserve the question for review, and, if objections presenting issues of fact are overruled, the defendant must except to preserve the question.—*Toledo & I. Traction Co. v. Toledo & C. I. R. Co.*, 171 Ind. 213, 86 N. E. 54.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 666.

## § 256. — Parties.

[a] (Sup. 1884)

Where, in proceedings to change a highway, the county commissioners are directed by the circuit court to pay a certain amount to landowners, the board is not a proper party to an appeal.—*Conaway v. Ascherman*, 94 Ind. 187.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 667.

See, also, 15 Cyc. p. 954.

## § 257. — Taking and perfecting appeal.

[a] (Sup. 1872)

Where, in a proceeding before a justice of the peace for condemnation of realty, the record does not show which party appealed, but the transcript of the proceedings before the justice is filed in the circuit court, and the parties appear and proceed as if an appeal had been taken, the cause will be regarded as having been regularly appealed.—*Beynon v. Brandywine, B. & S. C. Turnpike Co.*, 39 Ind. 129.

[b] (App. 1902)

Burns' Rev. St. 1901, § 5158a, provides that when a railroad company desires to cross another's tracks, and the manner of crossing cannot be agreed to, the circuit court, or the judge in vacation, may ascertain and define the mode of crossing that will inflict the least injury, and, if practicable, prevent a grade crossing. Sections 5159 and 5160 provide for special proceedings directing the appointment of appraisers, whose award may be reviewed by the court on exceptions, filed within 10 days, and that the court shall make such orders as justice shall require, by ordering a new appraisal, and that notwithstanding the appeal the company may take possession, and the subsequent proceedings shall only affect the amount of the compensation. The circuit court, in a proceeding to appropriate a right of way, fixed a point of crossing, and appointed commissioners to determine compensation for a crossing at grade. Exceptions were filed to the decree establishing the grade crossing, and on the commissioners' presenting their award the court approved it before the expiration of the time for filing exceptions, and by decree vested in complainant the right of way, and defendant excepted. Other proceedings were had, and the cause was appealed to the appellate court. *Held*, that the exceptions to the award in the



circuit court constituted an appeal thereto, and until that court reviewed the award, and finally disposed of it, no appeal lay to the appellate court.—*Wabash R. Co. v. Cincinnati, R. & M. R. R.*, 63 N. E. 325, 29 Ind. App. 546.

[c] (Sup. 1910)

Burns' Ann. St. 1908, § 932, authorizes a court, in condemnation proceedings, to appoint appraisers if satisfied of the regularity of the proceedings and the right of plaintiff to exercise the power of eminent domain for the use sought. Section 933, after providing for the filing of objections by defendants in condemnation proceedings, provides that, "if such objections are overruled, the court or judge shall appoint appraisers as provided for in this act, and, from such interlocutory order overruling such objections and appointing such appraisers, such defendants or any of them may appeal." *Held*, that it is not necessary that an appeal be formally prayed both from the overruling of objections and the appointment of appraisers.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 668-671, 674.

See, also, 15 Cyc. pp. 951-954.

#### § 258. — Effect of appeal and supersedeas.

[a] (Sup. 1906)

Where an appeal is taken in condemnation proceedings, neither the filing of an instrument of appropriation nor the payment of an award gives plaintiff any title to the land sought to be condemned, but during such appeal plaintiff is a licensee only.—*Terre Haute & I. Ry. Co. v. Indianapolis & N. W. Traction Co.*, 167 Ind. 193, 78 N. E. 661.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 672.

See, also, 15 Cyc. p. 961; note, 2 L. R. A. (N. S.) 313.

#### § 259. — Record.

[a] (Sup. 1858)

The sufficiency of the evidence to sustain a verdict granting damages for the condemnation of land cannot be reviewed on appeal, if there is nothing in the record showing the information which was conveyed to the minds of the jury by a physical view of the premises.—*Evansville, I. & C. Straight Line R. Co. v. Cochran*, 10 Ind. 560.

[b] (App. 1908)

Where the record on appeal recites that the court appointed three disinterested freeholders to assess the damages which the owner of the real estate herein asked to be condemned may sustain and be entitled to by reason of such appropriation, and directs the clerk to issue the proper notice and warrant to the ap-

praisers, to which appointment of appraisers the defendant excepts, and from said order overruling said objections and appointment of appraisers the defendants pray an appeal, it shows that the appeal was taken from the overruling of the objections and from the appointment of appraisers.—*Slider v. Indianapolis & L. Traction Co.*, 42 Ind. App. 304, 85 N. E. 372, 721.

[c] (Sup. 1910)

Burns' Ann. St. 1908, § 932, authorizes a court in condemnation proceedings to appoint appraisers if satisfied of the regularity of the proceedings and the right of plaintiff to exercise the power of eminent domain for the use sought. Section 933, after providing for the filing of objections by defendants in condemnation proceedings, provides that, "if such objections are overruled, the court or judge shall appoint appraisers as provided for in this act, and, from such interlocutory order overruling such objections and appointing such appraisers, such defendants or any of them may appeal." *Held*, that the appeal from the order appointing the appraisers may include and present for decision all prior adverse rulings to which exceptions have been duly saved by the appellant.—*Sexauer v. Star Milling Co.*, 90 N. E. 474, 26 L. R. A. 609.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 673, 674.

See, also, 15 Cyc. p. 954.

#### § 261. — Trial de novo.

Trial by jury on appeal from award of commissioners, appraisers, or viewers, see ante, § 239.

[a] (Sup. 1868)

On appeal from a proceeding before a justice of peace to assess damages for land taken under the act incorporating the Evansville & Illinois Railroad Company (Loc. Laws 1849), the circuit court, sitting as a court of chancery, may take the opinion of a jury upon a single question of fact.—*Evansville & C. R. Co. v. Miller*, 30 Ind. 209.

[b] (Sup. 1875)

Under a turnpike charter providing for condemnation proceedings before a justice, with an appeal to the circuit court, there being no provision as to the manner of trial on appeal, proceedings appealed from a justice are triable de novo, and the circuit court has no jurisdiction to remand the proceedings to that justice.—*Heady v. Vevay, Mt. S. & V. Turnpike Co.*, 52 Ind. 117.

[c] (Sup. 1880)

On a petition to establish or make changes in a public highway, a remonstrance by a landowner against its public utility, or on account of damages he will sustain, or on both grounds, presents issues which must be examined by the commissioners and tried on appeal to

the circuit and supreme courts.—*Schmied v. Keeney*, 72 Ind. 309.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 675-680.

See, also, 15 Cyc. pp. 966-969.

## § 262. — Review.

[a] (Sup. 1870)

On appeal from a condemnation proceeding before a justice of the peace to the circuit court, the latter court can inquire into the entire case, and not merely as to the damages.—*Keicher v. Killbuck Turnpike Co.*, 33 Ind. 333.

[b] (Sup. 1872)

On appeal in a condemnation proceeding, the supreme court will not examine statements of witnesses to determine whether more than three witnesses testified to the same fact to decide as to the taxation of costs.—*Louisville, N. A. & St. L. Air Line R. Co. v. Dryden*, 39 Ind. 303; *Same v. Duvall*, Id. 308.

[c] (Sup. 1884)

On appeal from a commissioner's order locating a highway, appellant asked his witnesses on the question of damages whether, in their opinion, his land would be benefited by the road. *Held*, that he could not ask for reversal of judgment because appellee had introduced rebutting opinions.—*Lowe v. Ryan*, 94 Ind. 450.

[d] (Sup. 1886)

Where a notice in condemnation proceedings has been served in conformity with Rev. St. 1881, § 3368, providing that notice shall be given by personal service or by leaving the same with the owners or agents of lots or lands on or through which the public improvement or street or alley is proposed to be made, and the board has determined that the notice was due notice to the county as one of the owners, their finding is conclusive against others who were properly served.—*Town of Rensselaer v. Leopold*, 5 N. E. 761, 106 Ind. 20.

[e] (Sup. 1886)

In a proceeding for the establishment of a highway, the question of the amount of the damages sustained by a landowner is for the jury under proper instructions, and, where the evidence is conflicting, the Supreme Court will not interfere unless the jury has been erroneously instructed.—*Kyle v. Miller*, 8 N. E. 721, 108 Ind. 90.

[f] (Sup. 1888)

Where a petition by a railroad company to condemn a right of way across the track of another company is materially defective in that it does not allege failure of the two companies to agree as to the compensation, an appeal from the assessment of the commissioners will not limit the investigation to the question of compensation, under Rev. St. § 3007, providing that, notwithstanding an appeal from the award of arbitrators, the company may take possession of the property, "and the subsequent proceed-

ings on the appeal shall only affect the amount of compensation," but the question as to agreement by the companies may be considered.—*Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 116 Ind. 578, 19 N. E. 440.

Rev. St. 1881 grants to a railroad company power "to cross, intersect, join, and unite its railroad with any other railroad already constructed," and provides that, "if the two corporations cannot agree upon the amount of compensation or the points or manner of such crossings and connections, the same shall be assessed and determined by commissioners," etc. A petition alleged that, "having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to, the compensation therefor," plaintiff took, etc. *Held* that, though the allegation did not allege any attempt to agree as to the point and manner of crossing, it will not be presumed on appeal that there has been a waiver of the effort to agree, where objections are seasonably and appropriately made.—*Id.*

[g] (Sup. 1891)

In condemnation proceedings, defendant claimed that he would be permanently damaged by reason of the overflow of water on his land caused by the construction of plaintiff's road; but the jury found that he would not be so damaged. *Held*, that the refusal of court to allow plaintiff, after the trial had begun, to amend its articles of appropriation so as to show that it agreed to construct such an embankment as would prevent any overflow, was not prejudicial error.—*Chicago & I. C. Ry. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477.

[h] (Sup. 1895)

On appeal in proceedings to establish a highway, the supreme court will not disturb findings, supported by the evidence, as to public utility and the damages sustained by remonstrant.—*Forsyth v. Wilcox*, 41 N. E. 371, 143 Ind. 144.

[i] (App. 1901)

Where, in proceedings under Rev. St. 1881, §§ 3006, 3007, providing that, where a railroad company is unable to agree with the landowner as to compensation to be paid for its right of way, appraisers may be appointed to fix the amount, and on exceptions by either party the amount may be determined by jury, when there is abundant evidence justifying a verdict fixing such amount the verdict should not be set aside as contrary to the evidence or excessive, though the evidence is conflicting.—*Chicago, I. & E. R. Co. v. Loer*, 60 N. E. 319, 27 Ind. App. 245.

[j] (Sup. 1908)

Error cannot be predicated on the action of the court in overruling a motion to strike out exceptions, or answer, filed in condemnation proceedings.—*Ft. Wayne & S. W. Traction Co. v. Ft. Wayne & W. R. Co.*, 170 Ind. 49, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

## [k] (Sup. 1908)

Where, in condemnation proceedings, the jury might naturally have been misled by an instruction to consider "inconveniences and annoyances," in determining the amount of damages in addition to the reduction in value of the land not taken, and the appraisers appointed by the court assessed the damages at \$150, and the jury awarded \$800, there should be a retrial, as it cannot be said that the error in the instruction did not contribute to the result.—*Toledo & C. I. R. Co. v. Wagner*, 171 Ind. 185, 85 N. E. 1025.

## [l] (Sup. 1908)

Under Burns' Ann. St. 1901, §§ 4183, 4184, 5160, relating to condemnation of real property, an appeal from an interlocutory order appointing or refusing to appoint appraisers was not authorized. This rule was changed by Acts 1905, p. 61, c. 48, § 5, providing that an appeal might be taken from such an order. Burns' Ann. St. 1908, §§ 675, 676 (Acts 1895, p. 179, c. 86), changed the existing rule that all parties affected by the judgment appealed from must be included in the appeal by authorizing an appeal by any part of coparties against whom a judgment has been taken when the appeal is taken under section 650, Burns' Ann. St. 1901, relating to term time appeals. *Held* that, since the existing rule as to parties on appeal was changed by sections 675, 676, only as to appeals taken under section 650, sections 675 and 676 do not apply to appeals authorized by Acts 1905, p. 61, c. 48, § 5, and hence an appeal under such latter section in which all coparties are not made parties on appeal will be dismissed.—*Lake Shore Sand Co. v. Lake Shore & M. S. R. Co.*, 171 Ind. 457, 86 N. E. 754.

## [m] (Sup. 1908)

Where, in condemnation proceedings, the damages allowed were double the amount awarded by the appraisers, and there was a conflict between the witnesses who testified for petitioners and defendant as to the damages sustained, an erroneous instruction permitting the recovery of remote and speculative damages was not harmless.—*Indianapolis & W. R. Co. v. Hill*, 172 Ind. 402, 86 N. E. 414.

Where the damages in proceedings to condemn land were unliquidated and the evidence as to the amount thereof was conflicting, the Supreme Court on appeal could not interpose its judgment as to the correctness of the assessment.—*Id.*

## [n] (Sup. 1909)

Where findings of the trial court in proceedings by drainage commissioners are fully sustained by evidence, the judgment will not be disturbed.—*Zehner v. Milner*, 172 Ind. 493, 87 N. E. 209, 24 L. R. A. (N. S.) 383.

## [o] (Sup. 1909)

Where in condemnation proceedings the only question submitted to the jury was the amount of defendant's damages, defendant was not prejudiced by the refusal of the court to

allow the jury on retiring for deliberation to take with them the award of damages made by the appraisers.—*Muncie & P. Traction Co. v. Hall*, 89 N. E. 484.

## [p] (Sup. 1909)

In condemnation proceedings, it was not reversible error to refuse to permit the jury to take the award of the appraisers to the jury room, nor to deny plaintiff permission to state its contents to the jury, nor to permit the jury to take defendant's exceptions to the award to the jury room.—*Muncie & P. Traction Co. v. Black*, 89 N. E. 845.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 681-686.

See, also, 15 Cyc. pp. 956-960.

## § 263. — Determination and disposition of cause.

## [a] (Sup. 1871)

Where, on appeal in a condemnation proceeding, no briefs for either party are filed, and the court aided by the assignments of error alone find no error in the record, the judgment will be affirmed.—*Barber v. City of Lafayette*, 38 Ind. 138.

## [b] (Sup. 1883)

It being necessary to reverse the judgment for the defect of the petition in not alleging failure to agree, it is not necessary, in order to dispose of all "questions arising on the record," within the meaning of Const. art. 7, § 5, to decide whether, under the above act, one railroad can condemn a portion of the right of way of another for the purpose of laying a track parallel with the existing track.—*Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 116 Ind. 578, 19 N. E. 440.

## FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 687.

See, also, 15 Cyc. pp. 961-965.

## § 265. Costs, fees, and expenses.

## [a] (Sup. 1853)

Where a statute creating a corporation authorizes it to condemn realty for its use, and provides for an appeal from decisions of arbitrators selected by the parties according to the rules that prevail in cases taken from a justice's judgment, the company is entitled to costs, where it appeals from the decision of the arbitrators and reduces the award over \$5.—*Centre-ville & A. Turnpike Co. v. Jarrett*, 4 Ind. 213.

## [b] (Sup. 1855)

Where an act for the condemnation of realty provides for an appeal on assessment of damages, as in other cases, and on appeal in other cases, defendant may recover costs where the judgment for plaintiff is reduced \$5 or more, defendant, in such condemnation, is entitled to costs, where he reduces plaintiff's demand more than \$5 on the appeal.—*Indiana Cent. Rty. Co. v. Atkinson*, 6 Ind. 149.

[c] (*Sup.* 1882)

On remonstrance of one claiming damages, a petition for change of road was dismissed, and one of the petitioners appealed to the circuit court, where the judgment of the commissioners was affirmed. *Held*, that the party appealing was prima facie liable for all costs.—*Reader v. Smith*, 88 Ind. 440.

[d] (*Sup.* 1888)

Where plaintiff's remonstrance before the county board against the establishment of a highway was on the ground of public utility and damage to his land, a verdict on appeal in the circuit court making the proposed road narrower, and assessing his damages at a larger amount, is not a verdict favorable to him, so as to entitle him to all costs of the appeal.—*Mathews v. Droud*, 114 Ind. 268, 16 N. E. 599.

[e] (*Sup.* 1892)

The provision of the laws that costs shall be taxed to the appellee, on appeal to the district court, where the judgment in favor of appellant is increased, has no application where, on appeal by a landowner from the decision of commissioners awarding \$25 damages for the opening of a street, and assessing benefits to the landowner at the same sum, the judgment is increased to \$45, but the benefits also are increased to the same amount.—*Lake Erie & W. R. Co. v. City of Kokomo*, 130 Ind. 224, 29 N. E. 780.

[f] (*App.* 1906)

*Burns' Ann. St.* 1901, § 5468c, in relation to the condemnation of land by street railway companies, provides that all costs up to and including the award of appraisers shall be paid by the corporation, except where the corporation shall, prior to the assessment of damages, tender to the landowner an amount equal to the award afterwards made, exclusive of costs. Section 590 provides that in all civil actions the party recovering judgment shall be entitled to costs, and section 603 provides for the recovery of costs in favor of the party in whose behalf an issue is determined. *Held* that, inasmuch as condemnation proceedings are civil actions, where the corporation appealed from the award of appraisers and the award was reduced on trial de novo, the corporation was entitled to recover the costs on such trial.—*Douglas v. Indianapolis & N. W. Traction Co.*, 76 N. E. 892, 37 Ind. App. 332.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 690-693;  
25 CENT. DIG. High. § 373.

See, also, 15 Cyc. pp. 973-977.

#### IV. REMEDIES OF OWNERS OF PROPERTY.

Action against railroad as barred by conveyance by part of plaintiffs of land in suit, see *ASSIGNMENTS*, § 32.

Change of remedy as impairing vested rights, see *CONSTITUTIONAL LAW*, § 105.

Estoppel by permitting improvement, see *ESTOPPEL*, § 93.

Right of action as assets of estate of deceased landowner, see *EXECUTORS AND ADMINISTRATORS*, § 49.

#### § 266. Nature and grounds in general.

Action of debt, see *DEBT, ACTION OF*, § 3.

[a] (*Sup.* 1838)

Where a party sustains an injury by a milldam which was not foreseen or estimated by the jury on a writ of inquiry of damages, he has the same remedy therefor as if the inquiry had not been taken.—*Smith v. Olmstead*, 5 Blackf. 37.

[b] (*Sup.* 1881)

The purchaser of a lot in a town or city, laid out in accordance with the statutes, being entitled to the fee of the street in front of his lot to the center line of such street, may have the usual remedies against a railroad company, which has run its track for 15 years along his side of the street, with the authority of the city, but without his consent, the company never having demanded of him a relinquishment of his title to the street, or offered him a fair compensation therefor, which its charter required it to do before it could enter and take possession of lands needed for its purposes.—*Terre Haute & I. R. Co. v. Scott*, 74 Ind. 29.

[c] (*Sup.* 1884)

Where a railroad company takes possession and enters into the use of real estate without the consent of the owner and without taking the necessary measures to acquire the title it assumes to assert, the owner may resort to any or all of the usual remedies known to the law for the protection of his estate in the property.—*Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 586.

[d] (*Sup.* 1887)

The maxim "De minimis non curat lex" is never applied to the positive wrongful invasion of property; and where a railroad company wrongfully lays and maintains its track across a gravel road without the consent of the gravel-road company, and without tendering compensation therefor, or taking proper proceedings to condemn, a cause of action exists, regardless of the degree of damages.—*Indianapolis & C. Gravel Road Co. v. Belt R. Co.*, 110 Ind. 5, 10 N. E. 923.

[e] (*Sup.* 1888)

When land is taken by a railroad, all damages for such taking must be recovered in one action, and the owner cannot maintain successive actions therefor.—*Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650.

[f] (*Sup.* 1888)

Where a railroad company enters upon the land of another without the consent of the owner, and not by the exercise of the right of eminent domain, it may be ejected from the land

or enjoined from appropriating or using it, if the owner shall proceed with reasonable promptitude.—*Bravard v. Cincinnati, H. & I. R. Co.*, 17 N. E. 183, 115 Ind. 1.

[g] (*Sup.* 1890)

The owner of the fee of a street may maintain an action against a railroad company which wrongfully builds its track upon the street, and, where there is no element of waiver or estoppel, the owner may maintain ejectment, or he may have equitable relief by injunction.—*Porter v. Midland R. Co.*, 25 N. E. 556, 125 Ind. 476.

[h] (*App.* 1901)

In an action for the wrongful appropriation of land by a railway company, the answer alleged the institution of condemnation proceedings under the statute, the report of the appraisers, tender of the amount of the award, exceptions thereto, appeal to the circuit court by plaintiff, and entire dismissal of the appeal, and that the case was struck from the trial docket. *Held*, that it was proper to refuse an instruction that, plaintiff having appeared in the appropriation proceedings, she had made her election of remedies, and could not afterwards withdraw therefrom and resort to any other action, since she had the right to dismiss her appeal and withdraw her exceptions to the award without losing her right of action for damages.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 604–606, 702, 703, 705.

See, also, 15 Cyc. pp. 979–995; note, 5 Am. St. Rep. 537.

### § 267. Statutory provisions and remedies.

[a] Where the Legislature has authorized a public work, and has provided by statute a method for the assessment and payment of damages to individuals, the parties injured are confined to the remedy prescribed by the statute.—(1849) *Kimble v. White Water Val. Canal Co.*, 1 Ind. 285; (1851) *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588.

[b] (*Sup.* 1853)

The statute of 1836, enacting that applications for damages for property taken for the construction of public works should be made within two years next after the same was taken possession of, or they should not be paid, is not founded on the presumption that the damages have been actually paid within two years, but on the ground that two years is a reasonable time for asserting the claim, and that, if it is not asserted in that time, it should be disregarded, and the Legislature had the power to enact such a law.—*Null v. White Water Valley Canal Co.*, 4 Ind. 431.

The reason of the rule that where private property is taken for public use, under the authority of a statute pointing out the mode in

which compensation shall be made therefor, that mode and no other can be pursued to obtain compensation, is that as the law authorizes the property to be taken the corporation appropriating it commits no wrongful act, and hence the common-law doctrine as to cumulative remedies is not applicable.—*Id.*

The internal improvement act of 1836, except so far as it conflicts with the acts transferring the various public works, has not been repealed.—*Id.*

[c] (*Sup.* 1855)

The different acts incorporating a railroad company gave it the power to appropriate private property, so far as necessary for the construction of its road, and devolved upon the board of directors the duty of having the damages assessed, upon application made to them, in the manner provided in the internal improvement law of 1836. This, being the special remedy given by statute, must be followed in all cases. Trespass will not lie.—*Lafayette & I. R. Co. v. Smith*, 6 Ind. 249.

[d] (*Sup.* 1857)

Where a street is taken by a railroad company, the remedy of an abutter for an injury thereby is not by statute, but the ordinary one at law to recover for a consequential injury.—*Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467, 68 Am. Dec. 650.

[e] (*Sup.* 1859)

Where no part of the property of an existing company or of an individual is taken, unless the statute plainly authorizes a proceeding to assess damages for consequential injuries, such damages may be recovered in an ordinary action at law.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

[f] (*Sup.* 1862)

Quere, whether the present statute on the subject of assessment of damages for property taken or injured for public use (which includes public works and milldams) does not limit the mode of redress for injury done by the erection of a milldam to that provided in the statute.—*Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370.

[g] (*Sup.* 1863)

In a case where the private property of infants is taken by a railroad company, if the company has come into possession of the property without unnecessary damage or encroachment, though not in the manner contemplated by their charter, the owners are still confined to their statutory remedy.—*Indiana Cent. Ry. Co. v. Oakes*, 20 Ind. 9.

[h] (*Sup.* 1864)

2 Gav. & H. St. p. 310, authorizing any person injured by a milldam already built to have damages assessed, or the dam declared a nuisance, by writ of assessment, and providing that any assessment paid within a year after confirmation shall bar recovery for the same in

any other action, does not deprive such person of his common-law action, unless the damages are paid as provided.—*Lane v. Miller*, 22 Ind. 104.

[i] (Sup. 1870)

A railroad charter provided that, in all cases where the owners of land necessary for the use of the road refused to accept a fair compensation therefor, it should be lawful for the corporation to take possession and use the same, avoiding unnecessary damage to the owner, and then provided the mode of the assessment and payment of damages. *Held* that, so far as any damage was likely to result to the landowner from improper construction of the road, the remedy was by the mode pointed out by the charter; but, if the property was unnecessarily damaged, the alleged owner might recover therefor in an action for damages as at common law.—*Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274.

[j] (Sup. 1877)

Where the board of county commissioners opened a highway, the property owner has an adequate remedy at law under Highway Act (1 Rev. St. 1876, p. 532), §§ 19, 20, authorizing aggrieved persons to set forth their grievances by way of remonstrance, and thus have an assessment of damages, and section 26, providing that a person aggrieved by the final decision of the board is entitled to an appeal to the circuit court, and there have a decision of all the questions, whether of law or fact, involving the original cause or proceedings.—*Sparling v. Dwenger*, 60 Ind. 72.

[k] (Sup. 1890)

A railroad company having entered on land without right, and constructed its road thereon, the owner may sue in trespass for the injury sustained, and is not confined to the statutory remedy for the assessment of damages, though, by his delay to commence proceedings, he has lost the right to maintain ejectment, or to enjoin the further use of the land for the construction and operation of the road.—*Strickler v. Midland R. Co.*, 125 Ind. 412, 25 N. E. 455.

[l] (App. 1894)

Where the owner of land acquiesces in the appropriation thereof by a railroad company, he need not proceed under the special statute for the assessment of damages, but may bring an action for damages.—*Pittsburgh, C., C. & St. L. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

[m] (App. 1906)

Where township supervisors, in the exercise of the state's right of eminent domain, entered on land, and appropriated material for the repair of highways, the township was not liable for the damages sustained, nor could it be sued on a quantum meruit; the landowner's remedy being limited to an assessment of dam-

ages, as provided by Burns' Ann. St. 1908, § 7775.—*Posey Tp., Franklin County, v. Senour*, 42 Ind. App. 580, 86 N. E. 440.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 717-724.

See, also, 15 Cyc. pp. 979-982, 1017, 1018.

§ 268. Recovery of possession of property.

[a] (Sup. 1866)

Where a railroad corporation enters into possession of the lands of an individual for the use of its road, without his consent and without first having assessed the damages and tendered compensation therefor, he may maintain an action against the company to recover possession of the land.—*Graham v. Columbus & I. C. R. Co.*, 27 Ind. 260, 89 Am. Dec. 498.

[b] (Sup. 1874)

If a railroad company enter into possession of the land of an individual for the use of the road, without first having his damages assessed and tendered, the owner may maintain an action to recover possession of the land.—*Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

[c] (Sup. 1874)

An action for the recovery of the possession of real estate may be maintained against a railroad company occupying such real estate, being a street in a city, by virtue of a grant from the city council.—*Sharpe v. St. Louis & S. E. R. Co.*, 49 Ind. 296.

[d] (Sup. 1882)

Where a railroad paid the amount awarded in condemnation proceedings for land condemned to the clerk, and the owner was awarded much larger damages on appeal, and the judgment remained unpaid for more than six months thereafter, the owner was entitled to recover possession in ejectment.—*Lake Erie & W. R. Co. v. Kinsey*, 87 Ind. 514.

[e] (Sup. 1883)

The owner of a lot abutting on a street owns to the center, subject only to the public easement, and may maintain ejectment against a railroad company which has placed its track upon that portion of the street belonging to him, without offering compensation.—*Terre Haute & S. E. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 697, 736-740, 742.

See, also, 15 Cyc. p. 986.

§ 269. Compelling proceedings to assess compensation.

[a] (App. 1908)

Burns' Ann. St. 1908, § 7775, provides that township supervisors, having made demand and given notice of intention, may enter on land

and take material for the repair of highways, the damages to be assessed by the supervisors and two disinterested persons, etc. *Held*, that the provisions as to demand and notice were exclusively for the landowner's benefit, which he could waive, so that the supervisors' failure to make a demand and give notice was no defense to the landowner's claim for an assessment, but that the provisions requiring assessment were mandatory.—*Posey Tp., Franklin County, v. Senour*, 42 Ind. App. 580, 86 N. E. 440.

Where a township supervisor neglects or refuses to assess damages for materials taken for the repair of highways, as required by *Burns' Ann. St. 1908, § 7775*, he may be compelled to perform that duty by proper proceeding.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 698, 699.

### § 270. Recovery of compensation.

Enforcement in condemnation proceedings of award or judgment therein, see ante, § 249.

[a] (Sup. 1892)

An action against a railroad company to recover the amount of an award, for land condemned by defendant's predecessor and occupied by defendant in operating its road, is to enforce the award and judgment in the condemnation proceedings, on the ground that defendant had adopted and ratified the same, and therefore the six-years statute of limitations does not apply.—*New York, C. & St. L. R. Co. v. Hammond*, 32 N. E. 83, 132 Ind. 475.

[b] (Sup. 1901)

Where a jury appointed to assess damages sustained by a landowner in the laying out of a road returned an award in favor of such landowner, and, in a petition by her to recover a balance of the sum so awarded, she alleged that there was sufficient money in the county treasury liable for the payment of a warrant for such balance, but the court failed to find, in conformity with such allegation, that there was money applicable thereto, a judgment requiring the payment of such balance will be reversed, since such claims can only be paid from the particular fund applicable to the construction of roads, and not from general county funds.—*Board of Com'rs of Monroe County v. State ex rel. Underwood*, 60 N. E. 344, 156 Ind. 550.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 706-716, 741; 25 CENT. DIG. HIGH. § 372.

See, also, 15 Cyc. p. 984.

### § 271. Recovery of damages.

[a] (Sup. 1856)

An owner cannot maintain an action for damages occasioned by the construction of a road through his lands, as his remedy is only enforceable as prescribed by the company's charter.—*Leviston v. Junction R. Co.*, 7 Ind. 597.

[b] (Sup. 1858)

Where an injury necessarily results to private property from the construction of a railroad, and no remedy therefor is given by its charter, the company is liable as at common law.—*Indiana Cent. R. Co. v. Boden*, 10 Ind. 96.

[c] (Sup. 1859)

In the construction of the work for which the property of another is taken, reasonable care and skill must be exercised, or the party will be liable to an action for the tort as at common law.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

[d] (Sup. 1874)

The construction of a railroad track along a street, on which locomotives and trains of cars are used, is a new use or appropriation of the soil, and entitles the owner of the fee to an action for damages and to all other remedies provided by law for the protection of rights in real property.—*Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

[e] (Sup. 1882)

Act March 3, 1877 (Acts 1877, p. 87) § 11, authorizing the board of commissioners to purchase stone and gravel and material for the construction of a road, and providing that, if they cannot agree with the owner, the county judge may on their application appoint appraisers to assess the value, makes no provision for the owner of the premises to have damages assessed, and there is no statutory mode prescribed by which he can recover his damages, and it cannot be contended that where the board of commissioners fails to purchase or to make an agreement for the property, or to take any statutory steps to have the damages assessed, the owner of the damaged premises is without any remedy at common law.—*Board of Com'rs of Montgomery County v. Miller*, 82 Ind. 572.

[f] (Sup. 1888)

Where a company enters upon land without right, and, with the knowledge and acquiescence of the owner, constructs a railroad thereon, and operates it in the public service until public rights have been acquired, this will, on the ground of public policy, preclude him from severing the line by a possessory action, but not from recovering compensation.—*Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446.

[g] (Sup. 1888)

Where a railroad company enters on land without the owner's consent, and without condemning it, and the owner stands by and acquiesces until the company has constructed its road, and made it at that point a part of its railroad line, he forfeits every remedy against the company, except an action for damages.—*Bravard v. Cincinnati, H. & I. R. Co.*, 115 Ind. 1, 17 N. E. 183.

[h] (Sup. 1888)

One who has taken no steps to prevent the location and construction of a railroad on the

street in front of his lot cannot, after the road has been fully completed and put in operation, eject the company from the street, but is confined to his action for damages.—*Louisville, N. A. & C. R. Co. v. Soltwedde*, 116 Ind. 257, 19 N. E. 111, 9 Am. St. Rep. 582.

[i] (Sup. 1889)

Either on grounds of public policy or under Rev. St. 1881, § 3953, one who has taken no steps to prevent a railroad company from taking a portion of his lot until its tracks over it are completed, and its road in operation, cannot maintain ejectment nor enjoin the company, but is confined to his suit for damages.—*Louisville, N. A. & C. R. Co. v. Beck*, 119 Ind. 124, 21 N. E. 471.

[j] (Sup. 1890)

There can be no recovery by an abutting owner because a railroad company occupies a street, where there are no substantial damages shown, for the right to recover damages is purely statutory.—*Burkam v. Ohio & M. R. Co.*, 23 N. E. 799, 122 Ind. 344.

[k] (Sup. 1890)

Though an abutting owner has by acquiescence lost the right to an injunction, or to bring ejectment against a railroad constructing a track along the street, he may have an action for damages.—*Porter v. Midland R. Co.*, 125 Ind. 476, 25 N. E. 556.

[l] (Sup. 1894)

The owner of land cannot maintain ejectment against a railroad company which entered upon the land, constructed a depot, and occupied it for six years, as his remedy is confined to the recovery of damages for its use.—*Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 591, 36 N. E. 642.

[m] (App. 1910)

That a railroad was constructed along a street with the knowledge and consent of an abutting owner is not a bar to his right to recover damages for injuries done to his property.—*Indianapolis Southern R. Co. v. Shea*, 90 N. E. 329.

[n] (App. 1910)

An owner of land abutting on a street may sue a railroad for damages for the construction of a track along the street and over a part of the land owned by him.—*Chicago, I. & L. R. Co. v. Johnson*, 90 N. E. 507.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 725-736, 741.

See, also, 15 Cyc. p. 985.

§ 272. Injunction.

Permanent injunction or alternative relief, see post, § 306.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 743-774.

See, also, 15 Cyc. pp. 987-992.

§ 273. — Grounds of relief in general.

[a] (Sup. 1871)

Where the owner appeared in condemnation proceedings by a railroad company to appropriate his property, filed his exceptions, and took his appeal from the amount awarded him, he could not, while those proceedings were pending, seek another remedy by injunction or otherwise.—*Ney v. Swinney*, 36 Ind. 454.

[b] (Sup. 1874)

If a railroad company enters into possession of the land of an individual for the use of the road without first having his damages assessed and tendered, the owner may enjoin the use of his land by the railroad company until his damages are assessed and tendered.—*Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

[c] (Sup. 1885)

On appeal to the circuit court, under Rev. St. 1881, § 3907, from the assessment of damages made by the appraisers, by filing exceptions to their award, after the compensation has been ascertained, the only remaining thing for the court to do is to render judgment against the railroad company for the amount, and it cannot restrain and enjoin the company from using or occupying the land as a means of enforcing payment of the amount.—*Chicago & G. S. R. Co. v. Jones*, 103 Ind. 386, 6 N. E. 8.

[d] (Sup. 1888)

A landowner who stands by and acquiesces until a railroad has expended money and constructed its track across his land, so that the track at that point has become part of its line, cannot enjoin a corporation which has succeeded to its right and franchises, by purchase at foreclosure sale, without notice of any claim or objection on the part of such landowner.—*Midland R. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 743-749, 752, 754-764.

See, also, 15 Cyc. p. 987.

§ 274. — Restraining taking of or injury to property.

[a] (Sup. 1859)

A party proceeding under the statute to recover damages resulting from the construction of a railroad may have an injunction till the damages are paid; and perhaps to control the location. In the proceeding for the assessment of damages the question of location is examinable.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

[b] An injunction will be granted to restrain a turnpike company from taking land for its road before a just compensation therefor has been first assessed and tendered.—(Sup. 1864) *Sidener v. Norristown, H. & St. L. Turnpike Co.*, 23 Ind. 623; (1866) *Norristown, H. & St. L. Turnpike Co. v. Burket*, 26 Ind. 53.



[c] (Sup. 1885)

The owner of land may enjoin a railroad company from entering upon and appropriating any part of the premises until his damages have been first assessed and paid; but that rule does not apply where the railroad company has entered and is in possession under a license either from the owner or conferred by statute.—*Chicago & G. S. R. Co. v. Jones*, 6 N. E. 8, 103 Ind. 380.

When a railroad company in its efforts to take and appropriate land for railroad purposes places itself in a condition to be restrained from further proceedings in the matter of such appropriation, the application to have it so restrained must be based upon a complaint making a proper case for such relief.—*Id.*

[d] (Sup. 1890)

Where a municipal corporation, in the petition, resolution, and notice, specifically describes certain property which it purposes to appropriate for public uses, injunction will lie to restrain it from taking any other property.—*Bass v. City of Fort Wayne*, 121 Ind. 389, 23 N. E. 259.

[e] (Sup. 1891)

Where officers of a city had no jurisdiction to appropriate land for street purposes which had already been appropriated and was being used as a railroad right of way, injunction was the proper remedy.—*City of Seymour v. Jeffersonville, M. & I. R. Co.*, 26 N. E. 188, 126 Ind. 466.

[f] (Sup. 1897)

Injunction is the proper remedy by a landowner against a town to restrain the taking of his land for a street without compensation.—*Town of Hardinsburg v. Cravens*, 148 Ind. 1, 47 N. E. 153.

[g] (Sup. 1897)

Const. art. 1, § 21, provides that property shall not be taken by law without just compensation. The federal constitution provides that property shall not be taken without due process of law. Rev. St. 1894, § 3636, provides that on application of persons whose property has been assessed on taking land for public improvement, but who have not had notice, the commissioners shall hear and determine the claims of such persons on five days' notice, and report to the council, and, if they are entitled to damages, the same shall be paid out of the city treasury. Rev. St. 1894, § 3644, provides that no injunction shall lie to restrain the proceedings, unless the council proceeds to appropriate property on which damages have been assessed, without first causing the same to be paid or tendered. *Held*, that such statutes do not afford a legal remedy or deny an injunction to the owner of land over which a city is about to open a street, where such owner had no notice of such proceedings, and his damages were not considered paid or rendered.—*City of Ft. Wayne v. Ft. Wayne & J. R. Co.*, 48 N. E. 342, 149 Ind. 25.

[h] (Sup. 1904)

The fact that a court in condemnation proceedings may make an erroneous ruling does not entitle the aggrieved party to an injunction, but the remedy is by appeal from the ruling if authorized by statute, or, if not, by appeal from the final judgment.—*Boyd v. Logansport, R. & N. Traction Co.*, 69 N. E. 398, 161 Ind. 587; *Murdock v. Logansport R. & N. T. Co.*, 162 Ind. 693, 69 N. E. 1134.

[i] (App. 1906)

The taking by a municipality of property to open new streets or to widen or straighten existing streets is unauthorized until the statutory provisions have been complied with or the consent of the owner otherwise obtained; and hence a complaint by a property owner, alleging that defendant city, without complying with the statute, is about to take plaintiff's property for street purposes, and praying that the defendant be enjoined from so doing until it has taken proper proceedings therefor, is sufficient, although not alleging that defendant was insolvent or unable to pay any damages which plaintiff may sustain, or specifying the amount of land that defendant threatens to take or its value.—*Town of Syracuse v. Weyrick*, 76 N. E. 559, 37 Ind. App. 56.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 753, 765–768.

See, also, 15 Cyc. p. 987.

### § 275. — Restraining construction of works.

[a] (Sup. 1884)

An injunction lies to restrain a city from taking land for a street without instituting proceedings for condemnation, and without payment of compensation.—*City of New Albany v. White*, 100 Ind. 206.

[b] (Sup. 1888)

A railroad may be enjoined from entering land without consent of the owner, condemnation, or compensation, and constructing its road thereon.—*Midland R. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256.

[c] (Sup. 1892)

Opening up a road across land without the permission of the owner does not amount to a mere trespass, for which injunction will not lie, but to an attempt to permanently deprive the owner of his land.—*Kern v. Isgrigg*, 132 Ind. 4, 31 N. E. 455.

[d] (Sup. 1893)

Where the owner of land abutting on a street does not own the fee in the street, he cannot enjoin a railroad company from laying its tracks on the street unless such occupation of the street will result in damage to his property different from that suffered by the landowners generally in that vicinity.—*Decker v. Evansville, S. & N. R. Co.*, 133 Ind. 493, 33 N. E. 349.

[e] (Sup. 1897)

Where a city had no authority to extend a street across the freightyard of a railroad company and tracks, already devoted to a public use, injunction was the appropriate remedy as provided by Burns' Rev. St. 1894, § 3644.—*City of Terre Haute v. Evansville & T. H. R. Co.*, 46 N. E. 77, 149 Ind. 174, 37 L. R. A. 189.

[f] (Sup. 1904)

The right of a corporation to exercise the power of eminent domain is a question to be determined in condemnation proceedings, and a suit to enjoin a corporation from building on land for the appropriation of which right of way proceedings had been commenced by it cannot be maintained.—*Boyd v. Logansport, R. & N. Traction Co.*, 69 N. E. 398, 161 Ind. 587; *Murdock v. Logansport R. & N. T. Co.*, 162 Ind. 693, 69 N. E. 1134.

[g] (Sup. 1904)

An abutting property owner is not entitled to an injunction against the construction of a street railroad if the use of the streets by the railroad in the manner proposed, and upon the conditions set forth in the contract between the railroad and the city, do not create an additional burden upon the street, and a deprivation of the property owner's beneficial interest therein. The mere anticipation of breaches by the railroad of its contract with the city, and of consequent injuries to the abutting owner's property, will not entitle him to such an injunction.—*Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 71 N. E. 642, 163 Ind. 268, 66 L. R. A. 105, 106 Am. St. Rep. 222.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 769-773.

See, also, 15 Cyc. p. 987.

## § 276. — Restraining operation of works.

[a] (Sup. 1838)

Where a milldam is erected without authority, a party whose land is overflowed in consequence of the dam may file a bill in chancery to prevent the continuance of the injury, where his legal title has been previously established at law or is admitted.—*Smith v. Olmstead*, 5 Blackf. 37.

[b] (Sup. 1874)

When a landowner enters into a written contract with a railroad company to sell, and, within a specified time, to convey, to such company a strip of ground for a roadbed, and gives possession to the purchaser, who thereupon proceeds to construct the road through such land, the vendor cannot enjoin the use and possession thereof by the railroad company when the latter is not in default in performing the terms of the contract. By the agreement to sell and convey, the seller waives his constitutional right to have his damages assessed and tendered before possession can be taken by the

railroad company.—*Baltimore, P. & C. R. Co. v. Highland*, 48 Ind. 381.

[c] (Sup. 1893)

A landowner cannot enjoin the operation of a railroad over his land after he has permitted the company to build its tracks, and equip and operate the road, though he had had an assessment of damages, conditioned that until payment no title or right should vest in the company, and the latter took possession by force, and refused to pay the damages assessed.—*Midland Ry. Co. v. Smith*, 135 Ind. 348, 35 N. E. 284.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 774.

See, also, 15 Cyc. pp. 987-992.

## § 277. Conditions precedent to action.

[a] (App. 1901)

In an action against a railway company for the wrongful appropriation of land, the complaint alleged that at the date of the appropriation plaintiff was the owner and in possession of certain real estate, and that defendant, without plaintiff's permission and without payment of compensation, appropriated the land, and had since held exclusive possession and deprived plaintiff of its use and occupation. *Held*, that an instruction that if defendant was, at all times after tender, ready and willing to pay the amount of the award in appropriation proceedings, it could not be made a wrongdoer from the start in taking plaintiff's land, unless plaintiff made a proper demand for the money and it was refused, and that she could not make such demand through an agent unless defendant knew of the agency, was properly refused, since, if defendant refused to comply with the demand of plaintiff's duly-authorized agent, it assumed the risk of such refusal.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 704.

## § 278. Defenses.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 701, 775-781.

See, also, 15 Cyc. p. 1001.

## § 279. — In general.

[a] (Sup. 1866)

Defendants threatened to take possession of a part of the lands of the plaintiff, remove his fences and throw open a great portion of his lands to the public, and deprive him of the use thereof, for the purpose of opening a highway through the same, under an order of the board of county commissioners, alleged to be void. *Held*, that an injunction would be refused, as the injury threatened is not an irreparable one.—*Lewis v. Rough*, 26 Ind. 398.

## [b] (Sup. 1870)

A judgment of the circuit court, on appeal by a property owner from proceedings before a justice to condemn a right of way for a turnpike, dismissing the cause, not appealed from, concludes the turnpike company; and, though it tendered the amount of the award and took possession of the land, it is estopped to claim the regularity of the proceedings in defense to an action of ejectment by the landowner.—*Keicher v. Killbuck Turnpike Co.*, 33 Ind. 333.

## [c] (Sup. 1887)

A construction company which had a contract to build defendant's road was placed in the hands of a receiver. The receiver in completing the contract appropriated land belonging to plaintiff, and subsequently published a notice requiring all persons "having claims against any fund or funds involved in this case" to present them. *Held*, that plaintiff's failure to present his claim to the receiver was no bar to his action against the defendant railroad company; since, as neither the construction company nor its receiver had any power to appropriate land, nor to own or operate a railroad, the act of the receiver must be considered as the act of an agent of the defendant by which they had benefited, so that plaintiff's claim was really not against the fund in the receiver's hands, and he was not barred by failure to present it.—*Bloomfield R. Co. v. Grace*, 13 N. E. 680, 112 Ind. 128.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 775, 776, 781.

**§ 280. — Consent or acquiescence of owner.**

## [a] (Sup. 1890)

An abutting owner who expressly consents to the occupancy of a street by a railroad company cannot afterwards ask a court to enjoin the use of the street by the company or award him damages.—*Burkam v. Ohio & M. R. Co.*, 23 N. E. 799, 122 Ind. 344.

## [b] (App. 1901)

Where, in an action for the wrongful appropriation of land by a railway company, the answer alleged the institution of condemnation proceedings under the statute; the report of the appraisers; tender of the amount of the award; exceptions thereto; appeal to the circuit court by plaintiff; her dismissal of the appeal; and that the cause was stricken from the trial docket.—it was not error to refuse an instruction, requested by defendant, that plaintiff, by appearing in the appropriation proceedings, waived all objection thereto, since as plaintiff was not bound to proceed under the statute for the assessment of damages, but could maintain an independent action for the injury sustained, her acquiescence was not a waiver of her right to damages.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

## [c] (Sup. 1906)

Though a landowner or other person interested in land stands by and permits a railroad company to appropriate the land or his interest therein, he is entitled, under Acts 1905, p. 59, § 11 (*Burns' Ann. St.* 1905, § 903), to have his damages appraised.—*Vandalia Coal Co. v. Indianapolis & L. R. Co.*, 168 Ind. 144, 79 N. E. 1082.

## [d] (Sup. 1907)

Where a landowner has acquiesced in a railroad's wrongful taking of land, until the railroad has entered on its duties as a common carrier, it can maintain neither ejectment nor injunction.—*McClarren v. Jefferson School Tp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 776.

**§ 283. — Former adjudication.**

## [a] (Sup. 1819)

Under St. Sept. 17, 1807, providing for the form of proceedings and for the issuance of a writ of ad quod damnum, where one owning the bed or a creek and land on one side wishes to build a mill, etc., and providing that the inquest and opinion of the court on the writ shall not bar any prosecution or action which any person would have had in law, had the said act not have been made other than for such injuries as were actually foreseen and estimated by the jury, neither a landowner nor his grantee can, after assessment of damages, have a common-law remedy to recover damages for any injury which at the time of executing the writ was foreseen and contemplated by the jury.—*Kepley v. Taylor*, 1 Blackf. 492.

## [b] (Sup. 1838)

Though damages caused by the erection of a milldam have been assessed by a jury on a writ of ad quod damnum, yet, if they have not been paid, the assessment will not constitute a bar to a bill in equity.—*Smith v. Olmstead*, 5 Blackf. 37.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 701, 778.

**§ 284. Persons entitled to sue.**

## [a] (Sup. 1872)

No one except the parties entitled to receive the amount of the damages can maintain any form of action requiring the payment thereof.—*Rudisill v. State ex rel. Bird*, 40 Ind. 485.

## [b] (Sup. 1890)

Where a municipal corporation, for the purpose of maintaining a system of waterworks, proposes to take the water collected in a millpond in order to secure the necessary head of water, the owner of the dam and mill with the right to use the water, who is not the owner of the land, cannot enjoin the city from taking the water from such pond.—*Bass v. City of Fort Wayne*, 121 Ind. 389, 23 N. E. 259.

[c] (Sup. 1906)

Burns' Ann. St. §§ 4708d, 4708e, 4708f, providing for the enjoining of the construction of a railroad on ground held for cemetery purposes on complaint of any person, authorizes a suit to enjoin the construction of a railroad by those holding land for cemetery purposes, irrespective of whether they hold the absolute title or hold it in trust.—McCann v. Trustees of Mt. Gilead Cemetery, 77 N. E. 1090, 166 Ind. 573.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 789, 790.  
See, also, 15 Cyc. p. 1001.

### § 285. Corporations or persons liable.

[a] (Sup. 1895)

Where a railroad company succeeds to the rights and privileges of another company, it is liable for damages for appropriation of land for a right of way, though the land was taken by the other company.—Midland R. Co. v. Galey, 39 N. E. 940, 40 N. E. 801, 141 Ind. 483.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 791.

### § 286. Jurisdiction.

[a] (Sup. 1857)

Loc. Laws 1849, p. 92, § 3, amending the act incorporating the T. H. & R. R. Co., and providing for the owner aggrieved at the company taking his land making complaint before the nearest justice, and for proceeding to recover damages therefor, the circuit court had no jurisdiction, and the owner could not proceed in that court under the general laws to recover his damages.—McCormack v. Terre Haute & R. R. Co., 9 Ind. 283.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 782.

### § 288. Limitations and laches.

Accrual of right of action, see LIMITATION OF ACTIONS, § 55.

Application of general statutes of limitation, see LIMITATION OF ACTIONS, § 32.

In action by remainderman, see REMAINDERS, § 17.

Limitation of action for damages as affected by pendency of appeal in condemnation proceedings, see LIMITATION OF ACTIONS, § 106.

[a] (Sup. 1853)

A canal company in 1845 took possession of land of plaintiff for the construction of a canal, and in the possession of the work diverted water from plaintiff's mills. In about 18 months afterward the water was returned to plaintiff and to its natural channel by a freshet that washed away the canal. The company subsequently in repairing the channel again diverted the water. Held, that the statute of 1836, enacting that applications for damages for property taken for the construction of public works should be made within

two years next after the same was taken possession of, or they should not be paid, commenced running at the first diversion of the water in 1845.—Null v. White Water Valley Canal Co., 4 Ind. 431.

[b] (Sup. 1877)

In an action by a grantee of the state of Indiana of a canal to quiet his title to certain real estate, alleged to have been appropriated under the provisions of the act for the construction thereof, the complaint averred "that, in the course of the construction of said canal, the state of Indiana, in the exercise of her power of eminent domain, through the agency of her proper officers and in the manner directed by law, appropriated said land, \* \* \* to be used in the construction of said canal and constructed said canal upon and across the same, \* \* \* prior to the 27th day of January, 1836, \* \* \* that no record was kept of such appropriation, or of the quantity or location of the land appropriated, or, if any was kept, it has been lost or destroyed, and cannot be found, or the contents of it ascertained." Held, that under section 4 of the "act to provide for the further prosecution of" such canal (Acts 1835, p. 25), approved February 6, 1835, the owner of the land taken must have made his application for assessment of his damages therefor within two years after such "appropriation," or, if that time had expired before the approval of such act, then within two years thereafter.—Nelson v. Fleming, 56 Ind. 310.

[c] (Sup. 1889)

When the presumption of a grant is raised by 20 years' occupancy, it cannot be said that damages may be awarded against an occupant for having done that which he might legally do as owner of the land. When time has made the occupancy right and legal, it has swept away all claims for damages by reason of that occupancy.—Sherlock v. Louisville, N. A. & C. R. Co., 17 N. E. 171, 115 Ind. 22.

In an action against a railway company to recover damages for the occupation of land, a count alleging that the company erected its road on the land 31 years before the action was brought, and praying for perpetual injunction, is bad on demurrer, as the company has acquired title by prescription.—Id.

In an action to recover damages for the occupation of land by a railway company, a count alleging that the company has been in possession for more than 20 years without consent of the owner, and praying for the ejectment of the company, is bad on demurrer, as the right of action is barred by the 20-year statute of limitations, and no damages can be recovered under such count.—Id.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 783-788.  
See, also, 15 Cyc. pp. 997-999.

**§ 290. Pendency of other action.**

[a] (Sup. 1892)

Where an appeal from condemnation proceedings is pending, an independent action to recover damages for taking the land cannot be brought.—*City of Ft. Wayne v. Hamilton*, 32 N. E. 324, 132 Ind. 487, 32 Am. St. Rep. 263.

[b] (App. 1893)

Under Rev. St. 1881, §§ 881-912, providing that the jury in condemnation proceedings shall, in assessing the value of the land taken, examine the adjacent lands or any improvements, and, if injured, assess damages therefor, and any other damages sustained by the property owner, while an action for taking a portion of a lot and for injuries to the remaining real estate is pending, another action for injuries to the house situated thereon and annoyance to the occupants by the smoke and noise of the trains cannot be maintained.—*Rehman v. New Albany B. & T. R. Co.*, 8 Ind. App. 200, 35 N. E. 292.

**FOR CASES FROM OTHER STATES,**

SEE 18 CENT. DIG. Em. Dom. § 779.

See, also, 15 Cyc. pp. 997, 1001.

**§ 293. Pleading.**

Aider by verdict or judgment, see PLEADING, § 433.

Pleading ownership, see PLEADING, § 33.

Pleading right of plaintiff in general, see PLEADING, § 56.

[a] (Sup. 1833)

In trespass q. c. f. the defendant justified under the statutes of 1832, relating to the Wabash and Erie Canal, and authorizing the canal commissioners and their agents to enter on and use any land and take any materials necessary for the work without the owners' consent, and without previously making compensation. *Held*, that it was not necessary to aver that the commissioners had taken proper measures to ascertain the damages.—*Rubottom v. McClure*, 4 Blackf. 505.

[b] (Sup. 1854)

In an action of trespass against a railroad company for entering plaintiff's land, the company, to avail itself of a defense that the injuries were committed by it in acting under its charter in the construction of its road, must specially plead such defense.—*Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252.

[c] (Sup. 1855)

A claim for damages governed by the provisions of Rev. St. 1838, pp. 343, 344, § 17, for an injury to claimant's land occasioned by the construction of a railroad, stated that the land was injured, etc., to the amount, etc., as follows: That the road as located, "angled" through claimant's land, and passed over the same, etc., to the distance, etc., and over a part which was improved and cultivated, wherefore, etc. *Held*, that the statement was suffi-

cient to enable claimant to recover for the injury occasioned by the grading of the road, and the division of his land into inconvenient parts.—*Martinsville & F. R. Co. v. Bridges*, 6 Ind. 400.

[d] (Sup. 1856)

A statute of this state enacts that, in suits against railroad companies to recover damage for laying out and constructing a railroad through the complainant's land, he shall particularly set forth the nature and locality of the injury complained of. On the trial of a complaint of this kind, evidence was received of the injury done to a crop of wheat on the land, and of the expense of fencing, of neither of which was anything said in the complaint. *Held*, that the admission of this evidence was error.—*Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74; *Graham v. Evansville, I. & C. Straight Line R. Co.*, Id. 276.

[e] (Sup. 1875)

A complaint against a railroad company, alleging that the plaintiffs are owners of lots abutting on a certain street in a city, that the defendant has taken possession of said street in front of said lots, and has laid down its track thereon and used the same, but not alleging that the defendant intends or threatens to continue such use, to the injury of the plaintiffs, or at all, does not show a good ground for an injunction to prevent the defendant from continuing to maintain and use such railway.—*Roelker v. St. Louis & S. E. R. Co.*, 50 Ind. 127.

[f] (Sup. 1876)

A complaint in an action by an owner against a railway company to recover damages for constructing its road on his land, without first condemning it, describing the land so taken, alleging the title in plaintiff, and averring an injury thereto, is good on demurrer.—*Anderson, L. & St. L. R. Co. v. Kernodle*, 54 Ind. 314.

[g] (Sup. 1879)

In an action by a landowner against a city to enjoin defendant from opening a street across plaintiff's land until damages awarded to plaintiff in condemnation proceedings are paid by defendant, an answer averring that for many years before such proceedings were had the land appropriated was an open and public highway, and that all the interest plaintiff then had or now has therein was and is the ownership of the fee, and that such proceedings were had on behalf of the city by mistake, and in ignorance of the fact, on the part of the officers of the city, that the land for which the damages were assessed was already a public street, was bad on demurrer, since it failed to show that the ground appropriated was a street by user, by grant by dedication or appropriation, or that it was established in any manner known to the law.—*City of Elkhart v. Simonton*, 69 Ind. 196.

## [h] (Sup. 1881)

A complaint alleging that plaintiffs were the owners of certain described lots and of the fee of the street on which they abutted, that defendant railroad without right, etc., or assessment of damages entered on the portion of said street belonging to plaintiffs and laid its tracks thereon, and had maintained and used said tracks without plaintiff's consent, and asking for damages and an injunction, stated a cause of action.—*Terre Haute & I. R. Co. v. Scott*, 74 Ind. 29.

## [i] (Sup. 1886)

In an action against a railroad company for damages caused by constructing and using railroad tracks along a street, part of which the plaintiff claims to own, a complaint which fails to show that the tracks were constructed and trains run on that part of the street owned by plaintiff, or that the grievances complained of were different from those sustained by the general public, is bad on demurrer.—*Terre Haute & I. R. Co. v. Bissell*, 108 Ind. 113, 9 N. E. 144.

## [j] (Sup. 1888)

In an action against a railroad for injuries to plaintiff's land, a complaint alleging that some of the injuries occurred since plaintiff became the owner of the land is good on demurrer, though other injuries complained of occurred before.—*Terre Haute & I. R. Co. v. McCoy*, 113 Ind. 498, 16 N. E. 395.

## [k] (Sup. 1891)

A complaint in action against a railroad company for damages caused by the occupation of plaintiffs' land, which does not allege the value of the land, is insufficient.—*Morgan v. Lake Shore & M. S. Ry. Co.*, 130 Ind. 101, 28 N. E. 548.

## [l] (Sup. 1892)

In an action against a railroad company for damages by reason of the construction of a railroad across lands which plaintiff had inherited from her parents, it was proper for the court to take from the consideration of the jury evidence with reference to the administration and settlement of the estate of plaintiff's father, where it appeared that the complaint proceeded on the theory that there was an original entry on the land by defendant and a construction of the railroad after plaintiff became the owner and entered into possession.—*Harshbarger v. Midland R. Co.*, 27 N. E. 352, 30 N. E. 1083, 131 Ind. 177.

## [m] (Sup. 1893)

A complaint against a railroad company alleged that defendant's predecessor, which constructed the road, offered to purchase the right of way over plaintiff's land, but the latter, because he could not estimate his damages until the road was built, permitted it to build across his land under an agreement that it would afterwards pay the damages, when ascertained; that it never paid such damages, and the road

was sold on foreclosure, and finally became the property of defendant, which also refused to pay such damages; and that plaintiff then demanded possession, and revoked the license under which defendant was using the right of way. The prayer was for damages, for recovery of possession, and all other proper relief. *Held*, that the complaint did not seek to recover for a tortious appropriation by defendant of plaintiff's land, but was a statement of facts showing the creation of an equity to damages for the taking and use of land without compensation to the owner.—*Chicago & I. Coal Ry. Co. v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231.

## [n] (Sup. 1894)

In an action against a railroad company for damages for obstructing an alley 20 feet wide, on which plaintiff's property abutted, in violation of the terms of the grant of the right of way through it, the complaint alleged that, after one track had been constructed on the north half of the alley, plaintiff executed a release to defendant for all damages he had suffered thereby, and granted it a right of way over the alley. After the release was given, the city authorized defendant to build a second track, but required it to be placed on the south half of the alley, 12 feet from the other track, and also prohibited the running of trains over the same at a greater rate of speed than 5 miles per hour; but defendant placed the second track within 6 feet of the first, and ran its trains over the tracks at a greater rate of speed than 5 miles per hour, thereby depriving plaintiff of the safe and unobstructed use of the alley. *Held* that, as the complaint did not show that the placing of the tracks 6 feet apart instead of 12 feet, or the running of trains at a greater rate of speed, increased the obstruction of the alley, it was demurrable.—*Haus v. Jeffersonville, M. & I. R. Co.*, 138 Ind. 307, 37 N. E. 805.

## [o] (App. 1894)

In an action for a wrongful appropriation of plaintiff's land for a railroad track, though the strip taken was not sufficiently described, the complaint would not be bad if it showed injury to the remainder of the land on which the dwellings were situated.—*Pittsburgh, C., C. & St. L. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

The complaint, in an action for a wrongful appropriation of plaintiff's land for a railroad track, after describing plaintiff's land, alleged that on the described tract there were three dwellings occupied by her tenants, each of which dwellings fronted on an open way 20 feet wide, which then was and had been left open along the south side of such land, and adjacent to defendant's railroad right of way for the entire distance along such land, "and being a part" thereof. *Held*, that this showed that the strip on which the track was constructed was a part of the land described, of which it was averred that plaintiff was owner.—*Id.*

[p] (**APP.** 1895)

In an action to recover damages assessed for the taking of gravel for a road, under Rev. St. 1894, § 6836 (Elliott's Supp. § 1558), it is necessary only to allege the damages assessed, and that they have not been paid.—*Clear Creek Tp. v. Rittger*, 12 Ind. App. 355, 39 N. E. 1052.

[q] (**APP.** 1895)

In an action against a city for trespass, where plaintiff's pleadings fairly showed that his land had been appropriated by defendants for permanent use as a street, it was not necessary for him to aver a willingness to convey the land in order to recover its value, as his recovery of damages ipso facto worked a dedication of the land to the city.—*City of Huntington v. Kenower*, 12 Ind. App. 456, 40 N. E. 550.

[r] (**APP.** 1895)

Rev. St. 1894, §§ 6780-6784 (Rev. St. 1881, §§ 5052-5056), requires the county to compensate a landowner when a highway is moved to the rear of his building from a bank of a stream which has become unsafe, or when his fence is removed for the purpose of relocating such highway on account of such unsafe bank. *Held*, that a complaint merely alleging that a highway along the front of plaintiff's land was washed away and caved into the river, and that the public and the road superintendent moved on plaintiff's land, and took a strip for a public highway, instead of the highway washed away, does not authorize a recovery of compensation from the county.—*Neal v. Posey County*, 12 Ind. App. 535, 40 N. E. 708.

[s] (**SUP.** 1899)

A complaint alleging that plaintiff is the owner in fee of described land, of certain value, and in peaceable possession thereof under claim of title, and that defendant, a railroad company, wrongfully appropriated the land, whereby plaintiff sustained damages, for which he demands judgment, states a cause of action, as against a demurrer.—*Pittsburgh, C., C. & St. L. R. Co. v. Beck*, 53 N. E. 439, 152 Ind. 421.

In an action against a railroad company for wrongfully appropriating a right of way for a side track, it is proper to refuse to strike from the complaint an allegation that in the use of the side track "a great noise was kept up, and that such use occasioned confusion and detriment to the plaintiff."—*Id.*

[t] (**SUP.** 1899)

Where plaintiffs are entitled to recover damages to an interest owned by them in land at the time the same was appropriated by a railroad company, the mere fact that they also seek to recover damages to an interest owned by their ancestor in the land at the time of such appropriation does not render the complaint bad on demurrer.—*Indianapolis & V. R. Co. v. Price*, 53 N. E. 1018, 153 Ind. 31.

[u] (**SUP.** 1901)

In a bill to enjoin a telephone company from laying conduits in front of plaintiff's

lot, an allegation that defendant is acting "wrongfully" is not sufficient to put defendant to its answer of authority; the company being a quasi public corporation, with power of condemnation, and presumptively acting within its authority, and plaintiff's right to object depending entirely on the city's failure to authorize defendant to take such action.—*Coburn v. New Telephone Co.*, 59 N. E. 324, 106 Ind. 90, 52 L. R. A. 671.

[v] (**APP.** 1901)

An instruction that, in estimating the amount of plaintiff's damages from the wrongful appropriation by the railway company, the jury might consider the danger of fire, was properly given, though the danger therefrom was not averred in the complaint, since the danger from fire is a well-known element of damages, and recovery may be had as a necessary result from the acts of appropriation.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

Where the complaint, in an action against a railway company for wrongful appropriation of land, alleged that at the date of the appropriation plaintiff was the owner and was in possession of certain real estate; that defendant, without plaintiff's permission, and without payment of compensation, appropriated the land, and has since held exclusive possession, and deprived plaintiff of its use and occupation,—it was not demurrable because it did not show an appropriation without right, nor aver an appropriation without having the damages first assessed and tendered to plaintiff or paid to the clerk of the court, and does not negative defendant's compliance with the statute in condemnation proceedings, they being matters of defense.—*Id.*

[w] (**APP.** 1910)

A complaint for damages against a railroad for the construction of its road over a street averred that plaintiff erected on his property a dwelling house at the expense of \$5,000, which he occupied as a family residence, and that the use of the street by defendant for its road totally destroyed the value of the house as a residence, and "depreciated the value of said property" in the sum of \$5,000. *Held*, a sufficient averment as to damages, since the depreciation in the value of the property could only be understood to mean the market value.—*Indianapolis Southern R. Co. v. Shea*, 90 N. E. 329.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 797-802.  
See, also, 15 Cyc. pp. 1003, 1004.

#### § 294. Evidence.

#### FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 803-814.  
See, also, 15 Cyc. pp. 1006-1010.

**§ 295. — Presumptions and burden of proof.**

[a] (Sup. 1859)

In an action in the nature of an action on the case to recover damages resulting from the construction of a railroad, it may be presumed that the plaintiff had claimed and recovered under the statute such damages as the location selected would occasion.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

[b] (Sup. 1896)

Under Rev. St. 1894, § 3644 (Rev. St. 1881, § 3181), providing that no injunction shall lie to restrain proceedings for widening a street unless the council proceeds to appropriate property on which damages have been assessed, without first causing the same to be paid or tendered, the burden is on plaintiff in an action to restrain the appropriation of property for such purpose, to show that the damages have not been paid.—*City of New Albany v. Endres*, 42 N. E. 683, 143 Ind. 192.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 803.

See, also, 15 Cyc. p. 1006.

**§ 296. — Admissibility in general.**

[a] (Sup. 1861)

A person not named in the inquest of a jury, in which the names of persons whose lands were likely to be affected were set forth, and not having been notified, afterwards sued the builder for damages. *Held*, that the record of the proceedings upon a writ of ad quod damnum upon the petition of the builder was not admissible in evidence to show that the defendant had a right to build his dam.—*Lane v. Miller*, 17 Ind. 58.

[b] In an action for the destruction of the means of ingress to and egress from an owner's property by the construction of a railroad track on the adjacent towpath of a canal, evidence relating to the owner's putting in crossings over the canal and railroad track was admissible on the question whether the owner's means of ingress to and egress from the property had been destroyed.—(App. 1904) *Cincinnati, R. & M. R. R. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; (1906) *Same v. Troutman*, 38 Ind. App. 700, 75 N. E. 277; *Same v. Paterson*, 39 Ind. App. 702, 77 N. E. 1199.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 804-806.

See, also, 15 Cyc. p. 1007.

**§ 297. — Value of property.**

Opinion evidence, see EVIDENCE, § 488.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 807.

See, also, 15 Cyc. p. 1008.

**§ 298. — Damages.**

Opinion evidence, see EVIDENCE, § 497.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 807.

See, also, 15 Cyc. p. 1009.

**§ 299. — Benefits.**

[a] (Sup. 1855)

The defendant in an action for overflowing plaintiff's land by the erection and maintenance of a dam offered to show the mill and dam were a public benefit, and a benefit to the plaintiff. The evidence was *held* inadmissible.—*Engard v. Frazier*, 7 Ind. 294.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 808, 809.

See, also, 15 Cyc. p. 1010.

**§ 300. — Weight and sufficiency.**

[a] (Sup. 1859)

In an action against a railroad company to recover damages resulting from the construction of defendant's road, defendant in its answer set up a release of such damages. Plaintiff in his reply averred that the release was procured from him by fraudulent representations in regard to the location of the road through his lands. *Held*, that oral testimony of witnesses, as to what their opinion had been in reference to the permanent location of the road previous to the execution of the release, is only matter of opinion, and not sufficient to establish fraud in its procurement.—*Ohio & M. R. Co. v. Bath*, 11 Ind. 538.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 811-814.

**§ 301. Damages and amount of recovery.**

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 815-819.

See, also, 15 Cyc. p. 995.

**§ 302. — In general.**

[a] (Sup. 1906)

A landowner is entitled to both direct and consequential damages caused by the taking of his land for a railroad right of way and by the operation of trains thereon.—*Vandalia Coal Co. v. Indianapolis & L. R. Co.*, 168 Ind. 144, 79 N. E. 1082.

[b] (Sup. 1908)

An owner of property abutting on a street on which interurban cars were operated may recover damages sustained up to the time of the bringing of an action for damages resulting from the improper operation of the cars.—*Kinsey v. Union Traction Co.*, 169 Ind. 563, 81 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 815, 819.

See, also, 15 Cyc. p. 995.



### § 303. — Compensation for property taken or for injury.

[a] (Sup. 1876)

Where an action is brought against a railway company for constructing its road on plaintiff's land without first condemning it, the damages assessed may include compensation for the injury, but not the value of the land so appropriated, as the company by such trespass acquired no title to the land.—*Anderson, L. & St. L. R. Co. v. Kernodle*, 54 Ind. 314.

[b] (Sup. 1892)

Where, in taking private property on account of the opening of a street, a city, through an irregularity in the proceeding, lost the benefit of having the benefits to other landholders assessed against them, it was the result of its own failure to proceed according to law, of which it could not complain in an action by the property owner against it for the taking of his land.—*City of Ft. Wayne v. Hamilton*, 32 N. E. 324, 132 Ind. 487, 32 Am. St. Rep. 263.

[c] (App. 1894)

Where a railroad company wrongfully appropriates the land for constructing and maintaining a second track thereon, the probable duration of the injury was a proper inference for the jury from the fact of the use the company was actually making of the siding and the land on which it was constructed.—*Pittsburgh, C., C. & St. L. R. Co. v. Harper*, 37 N. E. 41, 11 Ind. App. 481.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 815–817.  
See, also, 15 Cyc. p. 995.

### § 304. — Exemplary damages.

[a] (Sup. 1876)

The damages recoverable in a civil action against a railroad company for unlawfully entering upon and appropriating plaintiff's land for their road may include compensation for the wrong, and such exemplary damages as the evidence may warrant, but should not include the value of the land taken; for the judgment in such action does not vest the land in the company.—*Anderson, L. & St. L. R. Co. v. Kernodle*, 54 Ind. 314.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. § 818.  
See, also, 15 Cyc. p. 995.

### § 306. Permanent injunction or alternative relief.

[a] (Sup. 1889)

A bill to enjoin the condemnation of land, or gravel thereon, for the construction of a free gravel road, which alleges that the commissioners have established a second gravel road, for which plaintiff's land will be taxed; that the gravel on his land can easily be used for the construction of the second road; and that the cost of its construction will be much greater if the gravel is taken for the first road,—cannot be

maintained, as *Rev. St. 1881, §§ 896, 905*, relating to assessment of damages to land by the construction of such roads, furnish an adequate remedy.—*Smith v. Goodknight*, 121 Ind. 312, 23 N. E. 148.

[b] (Sup. 1890)

The question whether a property owner is entitled to compensation for a line of pipes laid in the highway abutting his property is one to be tried on appeal from the assessment of damages, and cannot be raised in injunction proceedings.—*Bass v. City of Ft. Wayne*, 121 Ind. 389, 23 N. E. 259.

Under *Rev. St. 1881, § 3266*, relating to the condemnation of private property by a municipal corporation for public purposes, and providing for an appeal from the appraisal of the commissioners appointed for such purposes, an aggrieved person cannot enjoin the proceedings on the ground that the commissioners thus appointed were not disinterested. His remedy is by appeal.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 744–749.

### § 307. Trial.

[a] (Sup. 1862)

In a suit against a railroad company for damages occasioned by the building of the road, resulting in a general verdict for the plaintiff, and a special finding that competent engineers were employed by the company and no willful or unnecessary damage done, the special finding does not authorize a judgment for the company in spite of the verdict.—*New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

[b] (Sup. 1892)

In an action to recover the value of land appropriated for a railroad right of way a finding of the court in favor of plaintiff for a specific sum was proper.—*New York, C. & St. L. Ry. Co. v. Hammond*, 32 N. E. 83, 132 Ind. 475.

[c] (Sup. 1896)

*Rev. St. 1894, § 3644*, provides that in highway proceedings, if the commissioners make a report to the common council as provided, no injunction shall lie to restrain proceedings unless the council shall proceed to appropriate property on which damages have been assessed without first causing the same to be paid or tendered, but all other questions shall be raised and tried by appeal in cases where damages have been paid or tendered; and section 3645 declares that it shall be the duty of the city treasurer to pay or tender, or cause to be paid or tendered, the damages assessed to the person to whom assessed. *Held*, that a finding that damages had not been tendered did not involve a finding that they had not been paid, since an actual offer of money might have been made which, though insufficient to constitute a statutory tender, and made after suit brought, would be sufficient to defeat the action.—*City*

of *New Albany v. Endres*, 42 N. E. 683, 143 Ind. 192.

[d] (App. 1901)

In an action against a railway company for the wrongful appropriation of land without plaintiff's permission and without payment of compensation, an instruction that the tender of the amount of the award, to be sufficient, must have been made to plaintiff, the person entitled thereto, was not objectionable as implying that the tender might have been made to some other woman at plaintiff's home, and using her name, and therefore not pertinent.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

Where, in an action against a railway company for wrongful appropriation of land, the jury had been instructed that they were the judges of the facts, while it was the duty of the court to state the law applicable to the case, on whom rested the responsibility for the correctness of such statements, and, no matter what the jury's individual opinions on the law might be, they should accept the law as given by the court, and apply it to the facts, an instruction that plaintiff must show, by a preponderance of the evidence, that the land was taken unlawfully, without right or license, and that the things complained of were unlawfully done, was not objectionable as directing the jury to determine the law in a civil case, and could not have misled them.—*Id.*

In an action against a railway company for wrongful appropriation of land without payment of compensation, it was proper to refuse an instruction that defendant had the right to rely on the fact that certain parties were plaintiff's attorneys because they filed exceptions to the award for her, and afterwards withdrew them; and hence defendant was under no obligation to take notice of any correspondence had with another party in which a demand was made for payment of the award, without some information of plaintiff having changed attorneys or added such person to the list, since the action was not on the award, but for damages for the wrongful acts of appropriation.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 820-824.  
See, also, 15 Cyc. pp. 1010, 1011.

### § 309. Effect of judgment for damages as to title to property.

[a] (Sup. 1876)

Where an action is brought by an owner against a railway company for damages for constructing its road on his land without first condemning it, the court cannot render judgment giving title to the railway company to the land so appropriated.—*Anderson, L. & St. L. R. Co. v. Kernodle*, 54 Ind. 314.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. § 825.

### § 315. Appeal and error.

Appellate jurisdiction as between particular courts, see **COURTS**, § 220 (11).

[a] (Sup. 1868)

On an appeal in an action for trespass, where defendant justified the entry under an order of county commissioners establishing a township road, the petition, remonstrance, report of the reviewers, and the final order are a part of the record.—*Ruston v. Grimwood*, 30 Ind. 364.

[b] (App. 1901)

Where, in an action for wrongful appropriation of land by a railway company, the evidence was conflicting, but fairly tended to support a judgment for plaintiff, it will not be disturbed on appeal.—*Chicago, I. & E. R. Co. v. Patterson*, 59 N. E. 688, 26 Ind. App. 295.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 829-833.  
See, also, 15 Cyc. pp. 1015, 1016.

## V. TITLE OR RIGHTS ACQUIRED.

Effect of judgment for damages, see *ante*, § 309.

### § 317. Nature of estate or interest acquired.

[a] (Sup. 1846)

The possession and use of the land taken by a canal company for its construction, by eminent domain, are upon a condition subsequent, that it will not be in default with respect to the payment as prescribed in the charter, nor with respect to the erecting of the works for which the land is taken.—*Hankins v. Lawrence*, 8 Blackf. 266.

[b] (Sup. 1849)

Arbitrators appointed under Charter of White Water Valley Canal Company, § 11, for the assessment of land damages, are to assess the whole value of property injured by being taken for the canal; and, upon payment of the amount so assessed, the property so taken vests absolutely in the company.—*Kimble v. White Water Val. Canal Co.*, 1 Ind. 285.

[c] (Sup. 1872)

Acts 1832, p. 6, § 9, provided that canal commissioners authorized to construct the Wabash & Erie Canal should enter upon and take possession of any lands or waters necessary for the construction of the canal, and that compensation be made therefor. Act Feb. 6, 1835, pp. 25, 26, § 4, directed the commissioners to file applications for damages, and required a board of appraisers to assess the damages, and provided that, on payment of the award, a fee simple to the premises so appropriated should vest in the state. Act 1836, p. 6, provided for a general system of internal improvement, including the Wabash & Erie Canal, and authorized the board of internal improvement, which was created in the stead of the canal commis-

sioners, to enter upon, take possession of, and use lands for the completion of any of the contemplated improvements. It also provided that the board should pay the amount of damages fixed by appraisers, but omitted to state what should be the tenure or quantity of the estate acquired. Section 21 repealed so much of the laws in force as provided for creating a state board of appraisers. *Held*, that the acts were in pari materia, and intended to vest a fee of lands taken in the state.—*Waterworks Co. of Indianapolis v. Burkhart*, 41 Ind. 364.

[d] (Sup. 1877)

In an action by a grantee of the state of Indiana of a canal to quiet his title to certain real estate alleged to have been appropriated under the provision of an act for the construction thereof, the complaint averred "that, in the course of the construction of said canal, the state of Indiana, in the exercise of her power of eminent domain, through the agency of her proper officers and in the manner directed by law, appropriated said land, \* \* \* to be used in the construction of said canal, and constructed said canal upon and across the same, \* \* \* prior to the 27th day of January, 1836; \* \* \* that no record was kept of such appropriation, or of the quantity or location of the land appropriated, or, if any was kept it has been lost or destroyed, and cannot be found, or the contents of it ascertained." *Held* that, if the owner of land taken failed within the time prescribed to apply for assessment of his damages, he waived his right thereto, and the title to such real estate vested in the state in fee simple, as fully as if such assessment had been made and paid.—*Nelson v. Fleming*, 56 Ind. 310.

[e] (Sup. 1877)

Land that has been condemned for street purposes under 1 Rev. St. 1876, p. 267, §§ 61-67, is taken by the city discharged from the lien of a previous judgment, but not from a mortgage lien.—*Gimbel v. Stolte*, 59 Ind. 446.

[f] (Sup. 1882)

Where land is condemned for highway purposes, the county acquires only an easement, and the title and all consistent uses remain in the owner or occupant.—*Ilagaman v. Moore*, 84 Ind. 496.

[g] (Sup. 1883)

A railroad by charter was authorized to enter on and condemn land, not exceeding 60 ft. in width, for right of way, and a subsequent act authorized the company to enter upon, and take and hold in fee simple, all estate, etc., necessary for that purpose. The company, under the original charter and amendment, constructed its road over the land of plaintiff's ancestor, without any conveyance or gift, and without any claim or proceeding instituted for the assessment of damages. *Held* that, by such entry and a construction of its road, the company acquired a fee-simple title to a strip across the land of plaintiff's ancestor to the full width al-

lowable within the charter.—*Prather v. Western Union Tel. Co.*, 89 Ind. 501.

[h] (Sup. 1883)

Where the state took lands under the general improvement act of 1836, and no claim was filed within the time limited and possession was held by the state and her grantees for a period of more than 40 years, it must be concluded that a fee vested in the state's grantee.—*Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580.

[i] (Sup. 1892)

The right acquired by a railroad company by the appropriation of a right of way under the statute is a mere easement.—*Chicago & W. M. R. Co. v. Huncheon*, 30 N. E. 636, 130 Ind. 529.

[j] (App. 1904)

Under Burns' Ann. St. 1901, § 5160 et seq., providing that railroads appropriating land shall deposit with the clerk of court a description of the rights and interests to be appropriated, and that such land, rights, and interest shall belong to the company on making payment, and further providing that appraisers shall consider the injuries sustained by the owner, and return their assessment of damages to the clerk, setting forth the value of, or injury to, the property, the appraisers should value the land taken with the buildings on it, and it will be presumed that the buildings are included in the award.—*Stauffer v. Cincinnati, R. & M. R. R.*, 70 N. E. 543, 33 Ind. App. 356.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. Em. Dom. §§ 834-840;

8 CENT. DIG. Canals, §§ 9, 10.

See, also, 15 Cyc. pp. 1018-1021; note, 53 C. C. A. 604.

§ 318. Extent of right to use of property.

[a] (Sup. 1883)

Where a railroad company acquired a fee-simple title to land for a right of way, it was competent for the company, within the limits of such right of way, to erect, or contract with the owner to erect, telegraph poles, and maintain a telegraph line along such right of way.—*Prather v. Western Union Tel. Co.*, 89 Ind. 501.

[b] (Sup. 1885)

Where land is appropriated, under the right of eminent domain, for a canal, the presumption is that all direct benefits to the owner were included as part of the assessment of damages; and where there is a direct benefit to the owner, by reason of the construction of an embankment which protects his land from overflow, it will be presumed, after the expiration of the time prescribed by the statute of limitations for instituting an action, that the owner received, as part of the consideration for the right of way, the benefit thus secured to his land, and such benefit cannot be taken from him by destroying the embankment.—*Burk v. Simonson*, 104 Ind.

173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304.

[c] (App. 1906)

Where an interurban railroad company condemned land for the right of way, it acquired the right as against adjoining landowners to construct additional tracks on such right of way, and to run any number of cars thereon in the proper management of its business.—Union Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 841-846.

See, also, 15 Cyc. pp. 1023-1025.

**§ 319. Estate and rights remaining in owner.**

[a] (Sup. 1861)

The fee of land over which the public acquires a right of way by condemnation remains in the owner.—Vaughn v. Stuzaker, 16 Ind. 338.

[b] (Sup. 1888)

Where a strip of land 60 feet wide, taken by a railway company, is necessary to the operation of its road, and has been in its possession for more than 20 years, an owner of the adjoining land cannot build a fence on the strip, or ask damages for its removal by the company.—Sherlock v. Louisville, N. A. & C. R. Co., 115 Ind. 22, 17 N. E. 171.

[c] (Sup. 1892)

In highway proceedings the public does not appropriate the material of which fences on the property are composed, but only an easement over the land.—Hire v. Kniseley, 20 N. E. 1132, 130 Ind. 295.

[d] (App. 1904)

Where a railroad is entitled to the possession of land through condemnation proceedings, the facts, if true, that it only acquired an easement therein, and that the dwelling house of a property owner did not pass to the railroad in the condemnation proceedings, but remained the property of the former owner, and that the appraisers made their award, without reference to the value of the building, on the theory that it did not pass to the railroad, do not give the former property owner a right to go on the land and remove the building.—Stauffer v. Cincinnati, R. & M. R. R., 70 N. E. 543, 33 Ind. App. 356.

[e] (Sup. 1910)

In exercising the power of eminent domain a party may limit the rights to be appropriated, and reserve in the owner of the land privileges not inconsistent with the public use to be acquired, but a proprietary right reserved in the owner and not appropriated is a different thing from a promissory stipulation made by the condemning party on its own motion.—Indianapolis & C. Traction Co. v. Wiles, 91 N. E. 161.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 847-850.

**§ 320. Time of passing of title or right.**

[a] (Sup. 1885)

Where the owner appeals from the decision giving him a certain sum as damages for taking his land, the payment into court of the amount does not vest title in the company until the determination of the appeal.—Terre Haute & L. R. Co. v. Crawford, 100 Ind. 550.

[b] (Sup. 1908)

Acts 1901, p. 463, c. 207, § 5 (Burns' Ann. St. 1901, § 5468e), authorizes street railway companies to exercise the right of eminent domain, and provides that the company shall deposit with a designated officer a description of the rights and interests to be appropriated, and that such lands, rights, and interests shall belong to the company, to use for the purpose specified by making or tendering payment. The section further provides that, if the parties cannot agree upon the compensation, notice shall be served by delivering a copy of the instrument of appropriation, or, if the owner be a nonresident of the county, that he may be served by publication, and that, upon the filing of the act of appropriation and delivery of such copy or publication, three appraisers shall be appointed on the application of either party, who shall return their assessment of damages. *Held*, that the filing of the instrument of appropriation with the designated officer was a seizure and appropriation of the land therein described, and constituted the final act of taking, upon which title passed, and all damages resulting from the taking thereupon vested in the then owner of the land as a personal claim.—Ft. Wayne & S. W. Traction Co. v. Ft. Wayne & W. R. Co., 170 Ind. 49, 83 N. E. 665, 16 L. R. A. (N. S.) 537.

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 851, 852.

**§ 322. Transfer of rights.**

[a] (Sup. 1897)

Under Rev. St. 1894, § 5160 (Rev. St. 1881, § 3907), providing the manner for the appropriation of land by a railroad company and for assessing damages therefor, as soon as the appropriation has been made and possession taken the rights of both parties vest; but parties can waive their rights, and where an award made in 1880 was never paid, and no demand was made until 1889, and no effort was made by the railroad company to take formal possession of the land for which the award was made until 1887, when it suffered itself to be dispossessed a few days afterwards by another company, to which last company the original owners gave a warranty deed for the land, both the original owners of the land and the railroad company to which same was first awarded will be held to have abandoned their claims under the condemnation proceedings.—Coburn v. Sands, 48 N. E. 786, 150 Ind. 141.

FOR CASES FROM OTHER STATES,

SEE 15 Cyc. p. 1029; note, 25 L. R. A. 139.

**§ 325. Reversion.**

[a] (App. 1909)

The title to land condemned for highway purposes reverts to the owner of the fee on the abandonment of the highway, and he is entitled to damages for its use by an interurban street railway company.—*Miller v. Cincinnati, L. & A. Electric St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102.

The title to property condemned for a railroad reverts to the owner of the fee on the company's abandonment of it, and he is entitled to damages for its use by an interurban street railway.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 18 CENT. DIG. EM. DOM. §§ 854-856, 859.

See, also, 15 Cyc. p. 1026.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EQUITY.

## Scope-Note.

[INCLUDES administration of equity as a distinct system of jurisprudence, either by separate courts of chancery or by other courts exercising chancery powers; nature, grounds, limits, and subjects of jurisdiction in equity in general; principles and maxims of equity jurisprudence; and procedure peculiar to suits in equity.

[EXCLUDES jurisdiction of courts of equity and its exercise over particular classes of persons or species of property or estates therein (see *Infants*; *Partnership*; *Trusts*; and other specific heads); particular equitable estates, rights, and defenses (see *Estates*; *Assignments*; *Mortgages*; *Liens*; *Estoppel*; *Set-Off and Counterclaim*; and other specific heads); particular equitable remedies (see *Injunction*; *Quieting Title*; *Cancellation of Instruments*; *Reformation of Instruments*; *Specific Performance*; *Account*; *Discovery*; and other specific heads); equitable relief and equitable defenses in actions at common law or under practice acts or codes abolishing distinction between actions at law and suits in equity (see *Action*; *Pleading*; and titles of particular proceedings in actions); appeals from decrees or orders in equity (see *Appeal and Error*); costs in equitable cases (see *Costs*); and organization and general conduct of business of courts of equity (see *Courts*). For complete list of matters excluded, see cross-references, post.]

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## I. JURISDICTION, PRINCIPLES, AND MAXIMS.

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Of superior courts. COURTS, § 132 (3).

INJUNCTION, §§ 11-22.

#### § 1. Nature and source of jurisdiction.

[a] (Sup. 1892)

Courts of general jurisdiction have power to grant equitable relief, not only under the code of practice, but inherently, as necessary to the complete administration of justice.—*Ratliff v. Stretch*, 30 N. E. 30, 130 Ind. 282.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1, 3, 6.

See, also, 16 Cyc. pp. 23-30.

#### § 3. Grounds of jurisdiction in general.

[a] (Sup. 1855)

A person who, with his eyes open, purchases property for a sum greatly exceeding its value, cannot obtain relief in equity on that account.—*Marshall v. Billingsly*, 7 Ind. 250.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 7-12.

See, also, 16 Cyc. p. 30.

#### § 4. Accident.

[a] (Sup. 1890)

When an accident occurs which was not anticipated and provided for when the contract was made, and which leaves one of the parties remediless in a court of law, the jurisdiction of a court of equity may then be invoked to give relief against the accident.—*City of Bloomington v. Smith*, 23 N. E. 972, 123 Ind. 41, 18 Am. St. Rep. 310.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 13, 20.

See, also, 16 Cyc. pp. 66, 67.

#### § 5. Mistake.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 14-20.

See, also, 16 Cyc. pp. 66-75.

#### § 6. — In general.

[a] (Sup. 1864)

A person cannot obtain relief from a contract on the ground of mistake, where he alleges that it was not drawn for the purpose of expressing and conforming to and with the intention of the parties, as understood and agreed to in a previous contract, but that, by inadvertence of the draftsman, it failed to express the intention of the parties in a certain particular.—*Oiler v. Gard*, 23 Ind. 212.

Relief will be granted in cases of mistake in written instruments only when there is a plain mistake clearly made out by satisfactory proofs.—Id.

[b] (App. 1909)

Equity will relieve from a mutual mistake of fact, of mixed fact and law, and sometimes of law.—*McCord v. Bright*, 87 N. E. 654.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 14.

See, also, 16 Cyc. p. 68.

#### § 7. — Of law.

[a] (Sup. 1865)

A mistake purely of law is no ground of relief in equity, but it may be accompanied by such circumstances as will entitle the party to relief.—*Carley v. Lewis*, 24 Ind. 23.

[b] (Sup. 1883)

Equity will not relieve a party against mistakes of law.—*Hollingsworth v. Stone*, 90 Ind. 244.

Equity will relieve from mistakes of law where they are accompanied by special circumstances, such as misrepresentation, undue influence, or misplaced confidence.—Id.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 15, 16.

See, also, 16 Cyc. pp. 73-75; note, 10 Am.

Dec. 323; note, 55 Am. St. Rep. 494.

**§ 8. — Of fact.**

[a] (Sup. 1865)

Mistake or ignorance of facts on the part of parties to a contract is a proper subject of relief only where it constitutes a material ingredient in the contract, and disappoints the intention of the parties by a mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, lays no foundation for equitable interference.—*Beaver v. Trittipio*, 24 Ind. 41.

[b] (Sup. 1883)

A party will be relieved against his own mistake or carelessness where no rights of third persons have intervened, but not where rights have been lost and money parted with, on the faith of the apparent facts, without fault of any one except the party seeking relief.—*Gray v. Robinson*, 90 Ind. 527.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 14, 17-20.  
See, also, 16 Cyc. pp. 68-72; note, 45 Am. Dec. 631; note, 55 Am. St. Rep. 494.

**§ 9. — Of expression.**

[a] (Sup. 1842)

A court of chancery has no authority to correct a mistake in the description of the land in a petition and notice for partition.—*Mahan v. Reeve*, 6 Blackf. 215.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 17-20.

**§ 10. Fraud.**

Ground of action for account, see ACCOUNT, § 7.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 21-26.  
See, also, 16 Cyc. pp. 81-88.

**§ 11. — In general.**

[a] (Sup. 1864)

A person is not entitled to the aid of a court, on the ground of fraud, where he only alleges that the other party acted under a contract with an intention to defraud him.—*Oiler v. Gard*, 23 Ind. 212.

[b] (App. 1910)

Equity aims to protect against fraud in its infinite variety, but takes notice only of the basic wrongs made so by the relation existing between the parties to a particular transaction and accomplished through manipulations, concealment, and fraud made possible by the disparity between them as to information, intelligence, and confidence inspired by previous dealings and associations.—*Yuster v. Keefe*, 90 N. E. 920.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 21, 23, 24.  
See, also, 16 Cyc. p. 81.

**§ 12. — Actual fraud.**

[a] (Sup. 1906)

Where a bankrupt's trustee joined several creditors, alleged to have received a fraudulent preference, as defendants to a single bill to recover the same, alleging that the bankrupt entered into a conspiracy with each defendant to defraud all his other creditors, but it did not appear that the conspiracy was in progress when the bankrupt made the several transfers or payments complained of, but only that he made them in fulfillment of fraudulent designs, and plaintiff demanded a recovery from each separate defendant of the amount of the payment made to him, the bill was not maintainable on the ground of conspiracy.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529, 166 Ind. 427.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 22.  
See, also, 16 Cyc. p. 86.

**§ 13. — Inequitable or unconscionable transactions.**

[a] (Sup. 1854)

R. agreed to convey to S. certain land, in consideration whereof S. was to assign to R. two land warrants. R. was to have possession of the land until the following spring, and S. was to be entitled to R.'s interest in the crop. For the performance of these conditions a certain penalty was annexed to the agreement. A bill filed by S. alleged a tender of the land warrants, and a demand upon R., and refusal by him to deliver the deed. The bill further alleged that, before the making of the contract, R. mortgaged the land, and that after S. took possession in the said spring he was compelled to pay off the mortgage. The prayer of the bill was that S. be allowed to retain the warrants at their value, and that R. be compelled to make a deed in pursuance of the contract, and be decreed to pay to S. the amount paid by him to satisfy the mortgage, deducting the value of the land warrants. The answer denied the tender of the land warrants, and alleged that S. made fraudulent representations to induce R. to execute the contract. *Held* that, as it appeared that the contract was unconscionable and tainted with fraud, equity would not grant the relief prayed for, but would leave the parties to their remedy at law.—*Reed v. Rudman*, 5 Ind. 409.

[b] (Sup. 1855)

Where a person under the pressure of pecuniary embarrassment with greatly weakened powers of mind, and suffering from the resistless demands of an appetite for liquor, yields to the purchase of property of no appreciable value as the only condition of obtaining a loan in no respect adequate to the use to which it was ostensibly to be applied, equity may grant

relief against the transaction.—*Marshall v. Billingsly*, 7 Ind. 250.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 26.

See, also, 16 Cyc. p. 84.

**§ 15. Subjects of jurisdiction in general.**

[a] (Sup. 1837)

To give jurisdiction to a court of chancery of a bill to recover rents and profits, there must be shown, not only a right to them, but some peculiar equitable ground for interference, as fraud, mistake, etc.—*Grimes v. Wilson*, 4 Blackf. 331.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 27–36.

**§ 18. Community or uncertainty of ownership or interest.**

[a] (Sup. 1903)

Where a party is entitled to legal relief, and there exists between him and a number of others entitled to relief a common interest, relation, or question as against another party that can be determined by one suit, such facts afford a distinct basis for an appeal to equity.—*Muncie Natural Gas Co. v. City of Muncie*, 66 N. E. 436, 160 Ind. 97, 60 L. R. A. 822.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 43, 44.

**§ 21. Fiduciary rights and obligations.**

[a] (Sup. 1855)

When a party to a contract places a known trust and confidence in the other party in a mixed question of law and fact, and acts on his opinion, and the party in whom such trust was reposed misleads him, equity will relieve.—*Peter v. Wright*, 6 Ind. 183.

[b] (Sup. 1886)

When the property is conveyed in trust, its proper management and application for the purposes of the trust become the peculiar subjects of equitable jurisdiction.—*Naylor v. Siden-er*, 6 N. E. 345, 106 Ind. 179.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 48, 49.

**§ 23. Contracts in general.**

Illegal contracts, see post, § 25.

[a] (Sup. 1885)

A court of equity will not protect a party who has negligently entered into a harsh contract.—*Birke v. Abbott*, 1 N. E. 485, 103 Ind. 1, 53 Am. Rep. 474.

[b] (App. 1910)

Equity will ascertain, uphold, and enforce rights and duties springing from the real intention of the parties to a contract.—*State Life Ins. Co. of Indianapolis v. Nelson*, 92 N. E. 2.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 63–68.

**§ 24. Penalties and forfeitures.**

[a] (Sup. 1851)

A bill stated that complainant was seised in fee of certain land, that defendant had a life estate as tenant in dower in a part of said premises, that she committed great waste by means whereof her estate had become forfeited, and that she was not a resident of the state, and prayed that the lands be decreed forfeited, and such other relief given as may be meet. *Held*, that the bill was bad on demurrer, as seeking to enforce a forfeiture.—*Lefforge v. West*, 2 Ind. 514.

[b] (Super. 1874)

Equity will relieve a tenant from a condition providing for a forfeiture on nonpayment of rent, when it appears that the forfeiture "has been incurred by neglecting to pay any certain sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant withholding payment.—*Bacon v. Western Furniture Co.*, Wils. 567.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 69–76.

See, also, 16 Cyc. pp. 75–80; note, 68 Am. Dec. 85; note, 86 Am. St. Rep. 48.

**§ 25. Illegal contracts, combinations, and transactions.**

Specific performance of illegal contracts, see SPECIFIC PERFORMANCE, § 55.

[a] (Sup. 1866)

A divorced wife brought an action against her late husband to recover possession of, and to quiet her title to, land which she alleged he had conveyed to her during coverture for a valuable consideration paid by her, as well as upon the meritorious consideration of a desire to provide for her. The answer denied that the defendant had ever received anything from his wife except two horses and a saddle, which had been used for the common benefit of the family, without any promise to account therefor, and averred that the only consideration for the conveyance was a desire to quiet the plaintiff's importunities, and induce her to remain with the defendant as a contented wife; that the land so conveyed was all the real estate owned by the defendant, and that he did not possess other property more than sufficient to pay his debts. The answer also charged the wife with adultery, and alleged that soon after the execution of the deed she abandoned the defendant, and fraudulently obtained a divorce. *Held*, upon demurrer, that the answer presented such a case as to forbid the exercise of the chancery power of the court to uphold a conveyance void at law, as this was.—*Bunch v. Bunch*, 26 Ind. 400.

## [b] (Sup. 1872)

A right in equity cannot grow out of a transaction that is illegal and void.—*Mattox v. Hightshue*, 39 Ind. 95.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 77-85.

See, also, note, 7 Am. St. Rep. 587.

## § 37. Retention of jurisdiction acquired.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 103-118.

See, also, 16 Cyc. pp. 106-117.

## § 39. — Complete relief.

## [a] (Sup. 1851)

Equity takes jurisdiction to restrain waste by injunction, and, in some particular cases, to obtain a discovery and account, and having for these objects obtained jurisdiction of a cause, it proceeds, to avoid multiplicity of suits, to compensate for damages done; but the jurisdiction itself must rest in the first instance on the necessity for an injunction, or discovery and account.—*Lefforge v. West*, 2 Ind. 514.

## [b] (Sup. 1859)

A party defendant in ejectment could have successfully defended it, but could not at law have her title cleared from certain defects; whereupon judgment was suffered, and the party brought her bill. *Held*, that part of the relief prayed as to clearing the title gave equitable jurisdiction, and therefore that they would proceed to determine the whole controversy; and thereupon the execution, which might have been set aside at law, was relieved against.—*Murphy v. Blair*, 12 Ind. 184.

## [c] (Sup. 1884)

Where equity assumes jurisdiction, it will retain it and decide all questions arising in the cause.—*Faught v. Faught*, 98 Ind. 470.

## [d] (Sup. 1890)

A court of chancery, having jurisdiction for one purpose, will retain it for all purposes and do complete justice as between the parties.—*Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157.

## [e] (Sup. 1890)

Where a court of chancery takes jurisdiction of a cause for any purpose, it retains it under its control for all purposes and administers such relief as the justice of the case may require.—*Spidell v. Johnson*, 25 N. E. 889, 128 Ind. 235.

## [f] (Sup. 1894)

Where a court of chancery assumes jurisdiction of a case for one purpose, it will retain jurisdiction for all purposes, and, if a specific decree will not afford adequate relief, it will award compensation.—*Doherty v. Holliday*, 32 N. E. 315, 36 N. E. 907, 137 Ind. 282.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 104-114.

See, also, 16 Cyc. pp. 106-117.

## § 41. — Denial of equitable relief.

## [a] (Sup. 1806)

Where a bill in equity was sought to be sustained on the theory that a conspiracy existed between a bankrupt and the defendants, who were preferred creditors, but no conspiracy was proved, complainant was not entitled to a decree, though he established a cause of action warranting a judgment at law.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529, 166 Ind. 427.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 116-118.

See, also, 16 Cyc. p. 111.

## § 42. Waiver of objections.

## [a] (Sup. 1845)

A bill showing that plaintiff has no equity may be objected to at any stage of the proceedings.—*Muir v. Clark*, 7 Blackf. 423.

## [b] (Sup. 1851)

A bill stated that complainant was seised in fee of certain land, that defendant had a life estate as tenant in dower in a part of said premises, that she had committed great waste by means whereof her estate had become forfeited, and that she was not a resident of the state, and prayed that the lands be decreed forfeited, and such other relief given as may be meet. *Held*, that the objection to the bill that it sought to enforce a forfeiture might be taken at the hearing.—*Lefforge v. West*, 2 Ind. 514.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 119, 120.

See, also, 16 Cyc. pp. 127, 128.

## (B) REMEDY AT LAW AND MULTIPLICITY OF SUITS.

## Remedy at law as bar to particular actions or proceedings.

## See—

CANCELLATION OF INSTRUMENTS, §§ 9-15.

CREDITORS' SUIT, §§ 3-6.

Equitable relief against judgment. JUDGMENT, § 408.

Establishment and enforcement of trust. TRUSTS, § 359.

INJUNCTION, §§ 15-19.

Setting aside transfer in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, § 239.

SPECIFIC PERFORMANCE, § 5.

Suit by taxpayer against county. COUNTIES, § 196.

## § 43. Existence of remedy at law and effect in general.

## [a] (Sup. 1836)

It is a good defense at law to an action on a bond, given for the purchase money of land, that the vendor has no title to the land sold; and hence it is not ground for relief in equity.—*Bryan v. Blythe*, 4 Blackf. 249.



## [b] (Sup. 1840)

Where the assignor, in an assignment under seal of a judgment for a sum of money, binds himself to pay the amount if the judgment cannot be collected, the assignee's remedy for breach of the assignment is at law, and not in equity.—*Jones v. Burtch*, 5 Blackf. 372.

## [c] (Sup. 1841)

Where the property of an absconding debtor may be reached at law by a foreign attachment, a bill in equity will not lie to subject it.—*Latham v. Barlow*, 6 Blackf. 97.

## [d] (Sup. 1844)

The assignee of a note cannot resort to a court of chancery for relief against the assignor, on account of the maker's insolvency, if there be no fraud in the assignment.—*Clark v. Spears*, 7 Blackf. 96.

## [e] (Sup. 1846)

If A. agree with B. to cause a debt due from C. to B. to be secured by a mortgage on certain lands of C., and fail to perform the agreement, B.'s remedy for the breach is against A. by an action at law for damages.—*Coquillard v. Suydam*, 8 Blackf. 24.

For a debt for goods sold and delivered, the remedy is at law.—*Id.*

## [f] (Sup. 1846)

The personal liability of the assured on his premium note is a matter, not of chancery, but of common law, jurisdiction.—*McCulloch v. Indiana Mut. Fire Ins. Co.*, 8 Blackf. 50.

## [g] (Sup. 1849)

The remedy of heirs, for the rents and profits of real estate occupied by the testator's widow, is at law; and equity will not interfere without some especial reason.—*Egbert v. Thomas*, 1 Ind. 393, *Smith*, 206.

## [h] (Sup. 1850)

A. executed to B. a bond to convey certain land, and acknowledged the receipt of the purchase money. A. had previously sold and conveyed the same land to C., and taken a mortgage thereof to secure the payment of the notes. The first note was paid by C., and A. obtained a judgment on the second, which remained unsatisfied. Improvements upon the land were made by C. Before the date of the bond, A. assigned the mortgage to D., as an indemnity for becoming surety for A. on a note of \$500. Judgment was obtained by E. and F. against C., and the land sold to D. on execution, who took possession under the deed. *Held*, that B.'s only remedy was by an action at law upon the bond.—*Mitchell v. Jones*, 2 Ind. 38.

## [i] (Sup. 1852)

Where A., for a valuable consideration, promised B. to pay him a debt due from C. to B., the remedy for the breach is by an action at law.—*Eastman v. Ramsey*, 3 Ind. 419.

## [j] (Sup. 1862)

In equity, the future enjoyment of an executed parol license, granted upon considera-

tion, or upon the faith of which money has been expended, will be enforced, where adequate compensation in damages cannot be obtained.—*Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370.

## [k] (Sup. 1868)

Equity will not entertain jurisdiction where there is an adequate remedy at law.—*Kyle v. Frost*, 29 Ind. 382; (1881) *Shoemaker v. Artell*, 78 Ind. 561.

## [l] (Sup. 1869)

Where mortgaged real estate has been sold by the mortgagor to the mortgagee, there being a junior judgment lien thereon, and the mortgagee, without actual notice of such judgment lien, has expended money in valuable improvements, without which the value of the property would not exceed the mortgage, though the judgment plaintiff has a complete legal remedy to enforce his lien by execution, yet, on the application of the mortgagee, he will be required to exercise his legal right, subject to the equitable right of the mortgagee, for whom the mortgage will be kept on foot, and to whom the value of the improvements will be allowed.—*Troost v. Davis*, 31 Ind. 34.

## [m] (Sup. 1883)

A suit in equity will not be sustained, where a plain, adequate, and complete remedy may be had at law.—*Hardy v. Brier*, 91 Ind. 91.

## [n] (Sup. 1891)

The surety on a note who has not yet been compelled to pay the debt cannot sue in equity to compel the holder of the note to bring suit to collect it; for Rev. St. 1881, §§ 1210, 1211, furnish an adequate remedy at law by providing that the surety may serve notice on the creditor to sue on the note, after which his failure to do so will release the surety.—*Barnes v. Sammons*, 128 Ind. 596, 27 N. E. 747.

## [o] (Sup. 1896)

A co-tenant of personalty who is out of possession has no remedy at law against the tenant in possession, whose dealings with the goods have not amounted to a conversion.—*Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679, 52 Am. St. Rep. 417.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 127-140, 164-166.

See, also, 16 Cyc. pp. 30, 58, 59.

## § 44. Exclusive or concurrent jurisdiction.

## [a] (Sup. 1823)

Where courts of law and of equity have concurrent jurisdiction, the suitor has his election to which tribunal he will apply, and it is no objection to his relief in chancery that he can have full relief at law.—*Peck v. Braman*, 1 Blackf. 544.

[b] (Sup. 1833)

Courts of equity have jurisdiction concurrent with courts of law of a suit by creditors against the heirs or personal representatives of the deceased debtor.—*Martin v. Densford*, 3 Blackf. 295.

[c] (Sup. 1847)

The assignee of a judgment filed a bill against the infant heirs of the judgment debtor. The bill alleged that the judgment debtor died insolvent, leaving certain land on which the judgment was a lien, and prayed that the land might be sold for payment of the judgment. Held that, in such suits, courts of law and equity have concurrent jurisdiction.—*Bryer v. Chase*, 8 Blackf. 508.

[d] (Sup. 1853)

Where a debtor is dead and a creditor has to proceed against his heirs, a court of equity has concurrent jurisdiction with a court of law, and the creditor may elect into which he will bring his suit.—*Unknown Heirs of Whitney v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638.

Where a remedy exists at law as well as in equity, the two jurisdictions are concurrent.—Id.

[e] (Sup. 1906)

Courts of law and equity have concurrent jurisdiction in suits to recover unlawful preferences in bankruptcy, where the amount is definite, no accounting is necessary, and no fiduciary relation exists.—*Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 141-145;  
13 CENT. DIG. Courts, §§ 1203, 1230,  
1244, 1253.

See, also, 16 Cyc. p. 33.

#### § 45. Adequacy of legal remedy.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 151-163;  
13 CENT. DIG. Courts, § 89.  
See, also, 16 Cyc. pp. 41-59.

#### § 46. — In general.

[a] (Sup. 1862)

Equity will not refuse relief because of the existence of a remedy at law, unless such remedy is adequate.—*Snowden v. Wilar*, 19 Ind. 10, 81 Am. Dec. 370.

[b] (Sup. 1891)

Where the remedy at law is inadequate, and will not adjudicate the entire controversy and grant full relief, equity will assume jurisdiction.—*McAfee v. Reynolds*, 28 N. E. 423, 130 Ind. 33, 18 L. R. A. 211, 30 Am. St. Rep. 194.

[c] (Sup. 1895)

A party is not bound to seek a legal remedy, if it is not as practicable and efficient, both in respect to the final relief and the mode of obtaining it, as the equitable remedy.—*Mich-*

*ener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 151, 152,  
157, 159-163.

See, also, 16 Cyc. p. 41.

#### § 48. — Performance or breach of contract.

[a] (Sup. 1837)

A bill will lie to recover the mesne profits, after a recovery in ejectment, where the bill claims a discovery and shows a right to it.—*Elliott v. Armstrong*, 4 Blackf. 421.

[b] (App. 1905)

An action for the balance due under a violated contract, the remedy at law being adequate, is not cognizable in a court of equity. Judgment (1904) 72 N. E. 473, affirmed on rehearing.—*Hoosier Const. Co. v. National Bank of Commerce of Seattle*, 73 N. E. 1006, 35 Ind. App. 270.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 156, 158;  
13 CENT. DIG. Courts, § 89.

#### § 51. Multiplicity of suits.

Ground for injunction, see INJUNCTION, § 19.

[a] (Sup. 1906)

A bill in equity by a bankrupt's trustee to recover alleged fraudulent preferences from several creditors alleged to have been preferred was not maintainable, for the purpose of avoiding a multiplicity of suits, on mere allegations of a saving of expense and a promotion of convenience, where the effect would be to deprive the defendants of a right to a jury trial.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529, 166 Ind. 427.

[b] (App. 1909)

Equity will not grant relief because of a multiplicity of actions, where they may be consolidated at law.—*Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47.

Equity has jurisdiction to determine controversies arising out of a right claimed by one against many, or by many against one.—Id.

Bills of peace were used, first, to prevent vexatious recurrence of litigation by several asserting the same right, and, second, to prevent reiteration of an unsuccessful claim.—Id.

Equity takes jurisdiction to prevent multiplicity of suits where the controversy is between but two persons and plaintiff has established his right at law, or where defendants are so numerous as to require injunction.—Id.

Jurisdiction is assumed to prevent multiplicity of actions only where successive actions involve some question of law and a similar state of facts, and where decree would determine controverted questions as to all defendants.—Id.

Community of interest in the joint parties is requisite to give equity jurisdiction to prevent a multiplicity of actions, and exists only where some right common to all joint parties is in controversy.—Id.

Where the same person is sued or is liable to be sued by several persons on separate causes of action, equity cannot interfere.—Id.

Equity will not entertain jurisdiction of a suit to prevent a multiplicity of actions unless such act will promote justice.—Id.

Litigation is intended to establish justice, and courts are disposed to disregard formalism in determining justice of litigation.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 167-171.

See, also, 16 Cyc. pp. 60-64, 6 Cyc. p. 288; note, 126 Am. St. Rep. 991.

#### § 53. Waiver of objections.

[a] (Sup. 1890)

It is unnecessary to create an estoppel that the conduct of the parties should be characterized by intent to deceive.—*Maxon v. Lane*, 24 N. E. 683, 124 Ind. 592.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 173-176.

See, also, 16 Cyc. pp. 127, 128.

#### (C) PRINCIPLES AND MAXIMS OF EQUITY.

Estoppel by acts making injury possible as between actor and another equally blameless, see ESTOPPEL, § 72.

#### § 54. Application and operation in general.

[a] (Sup. 1891)

The maxim is that "equity acts specifically" and, where a specific decree is required, there is an exercise of equity jurisdiction, so that necessarily the main feature of the case is equitable, and as such controls incidents.—*Brighton v. White*, 27 N. E. 620, 128 Ind. 320.

#### FOR CASES FROM OTHER STATES,

See 16 Cyc. p. 133.

#### § 56. Equity regards substance rather than form.

[a] (App. 1909)

Equity regards the substance of a transaction, and not the form, where the substantial merits of the transaction would bestow rights on the parties.—*McCord v. Bright*, 87 N. E. 654.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 178.

See, also, 16 Cyc. p. 134.

#### § 57. Equity regards that as done which ought to be done.

[a] (Sup. 1882)

Where by the terms of a mortgage it is to be released in favor of any one who may take a second mortgage for a sum named, and a third mortgage made to the holder of the first, an attempt to accomplish such change of the securities will not be defeated by mistaken descriptions of the premises in the second or third mortgages, nor by subsequent conveyances and mortgages to parties not bona fide purchasers, nor by failure of the holder of the first mortgage to release it, as in such a situation equity treats as done what ought to have been done.—*Randall v. White*, 84 Ind. 509.

[b] (App. 1895)

Where a member of a fraternal insurance society, who was entitled to be transferred from one class of beneficiaries to another, repeatedly requested that the transfer should be made, but died before his request was complied with, the principle that equity will regard that as done which ought to have been done will be applied, and his beneficiaries will be given that benefit which they would be entitled to had the transfer been properly made.—*Sourwine v. Supreme Lodge Knights of Pythias of the World*, 40 N. E. 646, 12 Ind. App. 447, 54 Am. St. Rep. 532.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 179.

See, also, 16 Cyc. p. 135.

#### § 61. Where equities are equal, the law will prevail.

Equitable right to subrogation and other rights, see SUBROGATION, § 36.

[a] (Sup. 1882)

A purchaser of real estate, in actual ignorance of attachment liens against it, made valuable improvements, and, as they were made in good faith, he claimed that the property should be subject to the lien of the judgment only to the extent of its value; but it appeared that the owner of one judgment lien had purchased a prior judgment, and it did not appear that he had notice of the purchaser's claim to an equity as against such judgment when he took the assignment. *Held*, that the rule that, where equities are equal, the law will prevail, applied, and the property could not be released from the judgment lien until it was fully paid.—*Taylor v. Morgan*, 86 Ind. 295.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 182.

See, also, 16 Cyc. p. 138.

#### § 64. Equity aids the vigilant, not those who sleep on their rights.

[a] (Sup. 1896)

Equity aids the vigilant, and not those who slumber on their rights.—*Citizens' Nat. Bank v. Judy*, 43 N. E. 259, 146 Ind. 322.

#### FOR CASES FROM OTHER STATES,

See, also, 16 Cyc. p. 140.

**§ 65. He who comes into equity must come with clean hands.**

Application of maximum to mandamus, see **MANDAMUS**, § 15.

In suits for specific performance, see **SPECIFIC PERFORMANCE**, § 88.

Misrepresentation by plaintiff as defense to action for infringement of trade-mark or for unfair competition, see **TRADE-MARKS AND TRADE-NAMES**, § 85.

[a] (**Sup.** 1902)

Plaintiff cannot come into equity to have abatement of its stockpens as a nuisance enjoined, they being shown to be a public nuisance, though defendants have no authority to abate them.—*Pittsburgh, C., C. & St. L. R. Co. v. Town of Crothersville*, 64 N. E. 914, 159 Ind. 330.

[b] (**App.** 1909)

One cannot claim relief against fraud, unless he is himself free from fraud in connection with the subject-matter of the relief sought.—*A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co.*, 43 Ind. App. 213, 86 N. E. 1025.

[c] (**Sup.** 1910)

He who seeks equity, must do equity, and must come into court with clean hands, and hence where plaintiff seeking to enjoin defendant from using devices to increase the natural flow of natural gas and oil from defendant's wells is guilty, though in a lesser degree, of the same acts in connection with the matter in controversy, the court will leave the parties where it found them.—*Ilo Oil Co. v. Indiana Natural Gas & Oil Co.*, 92 N. E. 1.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 185-187.

See, also, 16 Cyc. pp. 144-148; note, 70 C. C. A. 543; note, 7 Am. St. Rep. 587.

**§ 66. He who seeks equity must do equity.**

[a] (**Sup.** 1886)

The maxim that he who asks equity must do equity cannot be successfully invoked to overthrow a plain contract, voluntarily entered into with knowledge of all the facts.—*Keller v. Orr*, 7 N. E. 195, 106 Ind. 406.

[b] (**Sup.** 1886)

He who seeks equitable relief must show that he has done or offered to do all that equity required.—*Jones v. Ewing*, 6 N. E. 819, 107 Ind. 313.

[c] (**Sup.** 1887)

A plaintiff who shows himself otherwise entitled to the aid of a court of equity will not be denied relief under the principle that he seeking equity must do equity, unless the defendant brings forward some corresponding equity, growing out of the subject-matter then in suit, which could at some time subsequent to the transaction, in some form of proceeding, entitle him to a remedy against the other party

in respect to the subject-matter involved.—*Otis v. Gregory*, 13 N. E. 39, 111 Ind. 504.

[d] (**Sup.** 1907)

Assertion of a right of redemption must be tried according to the maxim that he who seeks equity must do equity.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

[e] (**App.** 1910)

One asking an injunction must show that he has done, or offered to do, all that equity requires of him.—*Barth v. Pittsburg, C., C. & St. L. R. Co.*, 90 N. E. 488.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 188-190.

See, also, 16 Cyc. pp. 140-143.

**II. LACHES AND STALE DEMANDS.**

Aid to vigilant in equity, see ante, § 64.

Bill of review, see post, § 452.

Limitation of actions, see **LIMITATION OF ACTIONS**, § 37.

Election under will, see **WILLS**, § 790.

**Particular remedies or proceedings.**

See—

Between shareholders and officers and agents of corporation. **CORPORATIONS**, § 320.

By or against states. **STATES**, § 201.

**CANCELLATION OF INSTRUMENTS**, § 34.

Confirmation or trial of tax title. **TAXATION**, §§ 802-805.

**DOWER**, § 75.

Enforcement of vendor's lien. **VENDOR AND PURCHASER**, § 278.

Establishment and enforcement of trust. **TRUSTS**, § 365.

Foreclosure of mortgage. **MORTGAGES**, § 425.

Forfeiture of charter of railroad company. **RAILROADS**, § 32.

Infringement of trade-mark or trade-name. **TRADE-MARKS AND TRADE-NAMES**, § 86.

**INJUNCTION**, § 113.

Owner of property taken for public use. **EMINENT DOMAIN**, § 288.

**QUIETING TITLE**, § 29.

Redemption from mortgage sale. **MORTGAGES**, §§ 397, 614.

**REFORMATION OF INSTRUMENTS**, § 32.

Relief against judgment. **JUDGMENT**, § 456.

Rescission of contract of sale. **VENDOR AND PURCHASER**, § 119.

Setting aside adoption proceedings. **ADOPTIONS**, § 16.

Election under will. **WILLS**, § 797.

Execution sale. **EXECUTION**, § 256.

**SPECIFIC PERFORMANCE**, § 105.

Stockholders suing or defending on behalf of corporation. **CORPORATIONS**, § 209.

**§ 67. Nature and elements in general.**

[a] (**Sup.** 1905)

Laches, where the delay is short of the period of limitations, is an equitable defense based upon public policy and is not to be con-

fused with the defense of estoppel.—*Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. Equity, §§ 191-196.  
See, also, 16 Cyc. p. 150.

### § 68. Grounds and essentials of bar.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. Equity, §§ 197-226.  
See, also, 16 Cyc. pp. 150-158.

### § 69. — In general.

[a] (App. 1903)

It is a settled doctrine of courts of equity that unexplained delays in the prosecution of a right until it becomes stale constitute such laches as forfeit the interference of the court.—*Matthews v. Wilson*, 67 N. E. 280, 31 Ind. App. 90.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. Equity, §§ 197-199.  
See, also, 16 Cyc. p. 152.

### § 70. — Knowledge of facts.

[a] (Sup. 1853)

A party sued upon his promissory notes, who neglects to examine them, and avail himself of all proper credits, when he has an opportunity to do so, trusting to the plaintiff's assurances that they are credited, is not in a position to seek relief in chancery.—*Jarboe v. Kepler*, 4 Ind. 177.

[b] (Sup. 1865)

Two parties desiring to make a partition of lands, employed a third person to appraise the lands and make the division, agreeing to abide by his determination. Under the partition as made by him, in consequence of an error of computation innocently made, one of the parties got land worth less than his share according to the appraisement. *Held*, that a court of equity would grant no relief to him where he doubted the correctness of the computation at the time.—*Beaver v. Trittippo*, 24 Ind. 41.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. Equity, §§ 200-203.  
See, also, 16 Cyc. pp. 160-172.

### § 71. — Lapse of time.

[a] (Sup. 1859)

In a suit on a note for \$400, judgment was confessed and rendered for \$233, under a power of attorney, authorizing a confession for such sum as should be found due, and no further proceedings were had. Two years afterwards the plaintiff discovered that more than \$233 was then due. Six years after the discovery, he brought his bill for relief, and the court refused it, on the ground of laches.—*State Bank v. Campbell*, 12 Ind. 42.

[b] (Sup. 1883)

In cases of chancery jurisdiction to which the statute of limitations is not a bar, a court of equity will presume that a stale demand has been paid.—*Jones v. Jones*, 91 Ind. 378.

[c] (Sup. 1887)

Where a deed is sought to be reformed on the ground of mistake, and it does not appear when the mistake was first discovered, nor that rights of third parties have intervened, nor that the defendant has in any way changed his situation, the mere fact that the plaintiff remained in possession for 13 years, and made valuable improvements, will not defeat his right to a reformation.—*Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

[d] (Sup. 1896)

A delay of 11 months in asking for reformation of a mortgage for mutual mistake is not such laches as will bar the right, as against a subsequent mortgagee with knowledge of the mistake.—*Citizens' Nat. Bank of Attica v. Judy*, 146 Ind. 322, 43 N. E. 259.

Courts of equity have never fixed any definite or specific period of delay that, like the statute of limitations, will bar the right to equitable relief from fraud or mistake.—*Id.*

[e] (Sup. 1905)

There is no fixed or determined rule for the application of the doctrine of laches. Each case must depend on its own peculiar circumstances, and the question is addressed to the sound discretion of the chancellor.—*Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. Equity, §§ 204-211.  
See, also, 16 Cyc. pp. 152-158.

### § 72. — Prejudice from delay in general.

[a] (Sup. 1866)

A plaintiff was *held* entitled to no equitable relief against a judicial sale of his land when he had allowed 15 years to elapse before applying to the court.—*Stehman v. Crull*, 26 Ind. 436.

[b] (Sup. 1905)

Where a co-tenant delays redemption of common property for speculative reasons, until another has been prejudiced by his action, he will be denied a remedy.—*Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74.

A complainant in equity, who, with knowledge of his rights, has been guilty of long delay without legal excuse, whereby another has altered his position to his prejudice, will be denied relief.—*Id.*

[c] (Sup. 1907)

Failure to enforce a right for such a length of time that valuable evidence might be lost to defendant and the property involved diminish materially in value may wholly defeat plaintiff's

right.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 207, 210-220, 225, 226.

See, also, 16 Cyc. p. 162.

**§ 73. — Loss of evidence.**

[a] (Sup. 1907)

Failure to enforce a right for such a length of time that valuable evidence might be lost to defendant and the property involved diminish materially in value may wholly defeat plaintiff's right.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 222-224.

See, also, 16 Cyc. pp. 163, 164.

**§ 74. Excuses.**

See WILLS, § 707.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 227-241.

See, also, 16 Cyc. pp. 167-176.

**§ 75. — In general.**

[a] (Sup. 1966)

Where the vendee of land in this state, who sought a rescission of his contract on the ground that the land was not located as it was represented to him, and was therefore much less valuable, did not bring suit until six years and some days after the sale, it was *held* that the delay was unreasonable and that the suit must fail, although the plaintiff alleged that he did not discover the fraud "until long after the purchase."—*Matlock v. Todd*, 25 Ind. 128.

[b] (Sup. 1891)

Defendant purchased certain land as a mill site, took possession, and proceeded to erect a mill at the expense of several thousand dollars, before receiving a conveyance of the premises, which, when received, by mistake failed to include the mill site. Plaintiff afterwards purchased the same land from defendant's vendor, with full notice of defendant's purchase and improvements under claim of ownership. Defendant did not know of the mistake until plaintiff sued to restrain the use of the land by defendant, while plaintiff was fully informed, by defendant's acts and improvements, that he claimed title to the omitted land for a number of years before action. *Held*, that plaintiff, and not defendant, was guilty of laches in asserting his alleged rights in the premises.—*Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 606.

[c] (Sup. 1894)

Where a judgment creditor has sued out an execution on a judgment fraudulently procured nearly 10 years before, of which defendant had no knowledge until six years later, defendant is not barred by laches from en-

joining its collection.—*Brake v. Payne*, 137 Ind. 479, 37 N. E. 140.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 227, 228, 230, 233, 234, 239, 240.

See, also, 16 Cyc. p. 167.

**§ 77. — Pecuniary condition, insolvency, or bankruptcy.**

[a] (Sup. 1894)

There is no laches in a delay for 52 days to sue to avoid, for fraud in statements by the buyer's agent, a conveyance of land 1,000 miles distant from the grantor's residence.—*Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 238.

See, also, 16 Cyc. p. 169.

**§ 83. — Recognition of right by adverse party.**

[a] (Sup. 1832)

By mutual mistake, a deed failed to reserve a right of way, which, however, was used for many years with consent of defendant, till he forbade the use, when plaintiffs discovered the mistake in the deed and immediately brought suit to have it reformed. *Held*, that the delay in bringing suit was excused.—*Schautz v. Keener*, 87 Ind. 258.

[b] (Sup. 1891)

In a suit by the wife to reform a deed in which she joined with her husband, in which a provision reserving the rents to her for life was fraudulently omitted, the husband's fraud was admitted by demurrer and answer, and the answer alleged that complainant had discovered the fraud nine years before bringing the suit; that she vacated the land to allow the children's guardian to rent it; that part of the rents had been paid her for the children's support, and part had been expended in valuable improvements; and that for such improvements the guardian had anticipated the rents for some years to come. *Held*, that complainant was not equitably estopped on the ground of laches.—*Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 231.

See, also, 16 Cyc. p. 174.

**§ 87. Following statute of limitations.**

[a] Where the court of equity has exclusive jurisdiction, the statute of limitation does not apply.—(Sup. 1835) *Raymond v. Simonson*, 4 Blackf. 77; (1844) *Smith v. Calloway*, 7 Blackf. 86.

[b] (Sup. 1841)

To a suit in chancery on an unwritten contract, the statute of limitations may be plead-

ed in all cases.—*Judah v. Brandon*, 5 Blackf. 506.

[c] (*Sup.* 1844)

Statutes of limitation apply in equity, as in law, in all cases where courts of law and courts of equity have concurrent jurisdiction.—*Smith v. Calloway*, 7 Blackf. 86.

[d] (*Sup.* 1851)

Rev. Code 1838, relating to the period of limitation in actions on simple contracts, and requiring them to be commenced within five years, applies to suits in chancery as well as actions at law.—*McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470.

[e] (*Sup.* 1859)

Equity will not refuse relief because of lapse of time, unless a period equal to that prescribed by the statute of limitations has expired.—*Murphy v. Blair*, 12 Ind. 184.

In cases of equitable title to land, relief must be sought within the period in which ejectment would lie.—*Id.*

A claim to real estate will not be barred by a lapse of time shorter than that which would bar an action of ejectment.—*Id.*

[f] (*Sup.* 1866)

Equity will not afford relief where the corresponding legal right has been barred by the statute of limitations.—*Dumont v. Dufore*, 27 Ind. 263.

[g] (*Sup.* 1887)

There may be cases of statutory proceedings or cases of purely equitable cognizance where the laches of a party may be of such a character, and under such circumstances as will bar his right to prosecute his action in less time than that fixed by the statute of limitations, but that is only in cases where the laches are of such a character and under such circumstances as to work an equitable estoppel.—*Scherer v. Ingerman*, 11 N. E. 8, 12 N. E. 304, 110 Ind. 428.

[h] (*App.* 1891)

A demand that is barred by the statute of limitations in a suit at law cannot ordinarily be enforced in equity.—*McNagney v. Frazer*, 27 N. E. 431, 1 Ind. App. 98.

[i] (*Sup.* 1892)

The purchaser at sheriff's sale under whom defendants claimed was also assignee of a judgment of foreclosure against the former owner and his wife, at the time of the death of the former, and neither the wife nor plaintiff attempted to assert the right to one-third of the premises until the decree of foreclosure was barred. *Held*, that there was, in equity, as strong reason for applying the statute of limitations to plaintiff's claim as for applying it to the foreclosure decree.—*Barnes v. Born*, 30 N. E. 509, 32 N. E. 833, 133 Ind. 169.

# FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 242-244, 395; 33 CENT. DIG. Lim. of Act. §§ 169, 170.

See, also, 16 Cyc. pp. 177-181; note, 12 Am. Dec. 368.

## III. PARTIES AND PROCESS.

Bill of review, see post, § 457.

Misjoinder of parties, see post, §§ 149, 150.

### In particular proceedings.

See—

CANCELLATION OF INSTRUMENTS, § 35.

CREDITORS' SUIT, §§ 24-28.

Dissolution and accounting by partnership.

PARTNERSHIP, § 322.

DIVORCE, §§ 70-85.

DOWER, § 76.

Enforcement of mechanic's lien. MECHANICS' LIENS, §§ 261-263.

Vendor's lien. VENDOR AND PURCHASER, § 279.

Establishment and enforcement of trust. TRUSTS, § 366.

Foreclosure of mortgage—

CHATTEL MORTGAGES, § 275.

MORTGAGES, §§ 426-441.

INJUNCTION, §§ 114, 115.

INTERPLEADER, §§ 19, 20.

PARTITION, §§ 45-51.

QUIETING TITLE, §§ 30, 31.

Redemption from mortgage sale. MORTGAGES, § 615.

REFORMATION OF INSTRUMENTS, § 33.

Relief against judgment. JUDGMENT, § 457.

Setting aside transfer in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 250-255.

SPECIFIC PERFORMANCE, §§ 106, 107.

### § 89. Parties in general.

Dismissal for nonjoinder, see post, § 362.

# FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 246-251, 265.

See, also, 16 Cyc. pp. 181-183.

### § 90. — Necessity and effect of interest.

[a] (*Sup.* 1842)

All interested in the result should be made parties to a suit in equity.—*Park v. Ballentine*, 6 Blackf. 223.

# FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 246, 247.

See, also, 16 Cyc. p. 181.

### § 91. — Nature and extent of interest.

[a] (*Sup.* 1830)

To a bill by the assignee of a debt to obtain certain securities given by the debtor to the attorney of the assignor, where the attorney had assigned the same against the attorney and

his assignee, the assignor of the complainant is a necessary party.—*Elderkin v. Shultz*, 2 Blackf. 345.

[b] (*Sup.* 1872)

In equity suit can be maintained by the obligees, against the other obligees, in which all the equities arising on the contract can be fully adjusted between the parties.—*Merchants' Nat. Bank v. Randall*, Wils. 163.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 248-251.

See, also, 16 Cyc. pp. 182, 183.

§ 114. **Intervention.**

In creditors' suits, see CREDITORS' SUIT, § 28.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 275-279.

See, also, 16 Cyc. pp. 201-203.

§ 115. **Bringing in new parties.**

[a] (*Sup.* 1881)

If one not named in the original proceedings for partition becomes a party, and files a cross complaint, the original defendants are entitled to notice and to a hearing.—*Smith v. King*, 81 Ind. 217.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 280-283.

See, also, 16 Cyc. p. 200.

§ 117. **Defects and objections as to parties.**

[a] (*Sup.* 1849)

After a decree against one as defendant who has appeared and answered to the bill, it is too late for him to object that he was not made a party to the bill.—*Moyer v. McCulloch*, 1 Ind. 339, *Smith*, 211.

[b] (*Sup.* 1854)

A defendant in chancery cannot object that other parties have been joined as defendants in the bill, who are not shown to have any interest.—*English v. Roche*, 6 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 246, 285-292; 14 CENT. DIG. CRED. SUIT, § 122.

See, also, 16 Cyc. pp. 204-208.

§ 120. **Subpoena.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 293-304.

See, also, 16 Cyc. p. 209.

§ 121. — **Nature and necessity.**

[a] (*Sup.* 1887)

Where the complaint does not disclose knowledge, on the part of the original complainants, of subject-matter of the claim made by the cross complaint, it is necessary to issue and serve process; but, where the original complaint discloses the character of the claim of the cross complainant, it is not necessary that process

should issue upon the cross complaint, as against the parties in court upon the original complaint.—*Bevier v. Kahn*, 111 Ind. 200, 12 N. E. 169.

[b] (*Sup.* 1894)

Where the original complaint in an action for partition alleges that plaintiff and certain of the defendants are owners in fee of an undivided portion of the land, and that one of the other defendants is owner in fee of the remainder, and a cross complaint filed by one of the original defendants alleges that she is owner in fee of all the land, and asks that the title be quieted in her as against others of the original parties, process must issue on the defendants named in the cross complaint, in order to bind them by a decree rendered thereon.—*Shaul v. Rinker*, 139 Ind. 163, 38 N. E. 593.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 294.

See, also, 16 Cyc. pp. 209-211.

§ 123. — **Service.**

[a] (*Sup.* 1844)

Notice in a newspaper to a nonresident defendant in a bill in chancery to appear before the circuit court of the proper county on the first day of its next term is sufficiently certain as to the time and place of appearance.—*Thomas v. Bailey*, 7 Blackf. 149.

[b] (*Sup.* 1845)

When a bill in equity was filed in vacation against a nonresident defendant, it was necessary under the act of 1838 to give notice of the pendency of the suit in a public newspaper for 3 full weeks and 60 days before the next term of the court.—*Shipley v. Mitchell*, 7 Blackf. 472.

[c] (*Sup.* 1881)

In a proceeding in chancery, where defendant seeks relief against a codefendant as to matters not apparent on the face of the original bill, he must file his cross-complaint, making parties thereto such of his codefendants and such others as are necessary to the relief demanded, and process is required to bring such codefendants into court.—*Swift v. Brumfield*, 76 Ind. 472.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 296-302.

See, also, 16 Cyc. pp. 212-214.

§ 127. **Appearance.**

Waiver of objections, see APPEARANCE, §§ 21-25.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 306.

See, also, 16 Cyc. p. 216.

IV. PLEADING.

Pleadings as evidence, see post, §§ 337-345.



**In particular proceedings.***See—*

CANCELLATION OF INSTRUMENTS, §§ 36-39.  
 CREDITORS' SUIT, §§ 37-42.  
 DISCOVERY, §§ 19, 22.  
 Dissolution and accounting by partnership.  
 PARTNERSHIP, § 327.  
 DIVORCE, §§ 89-108.  
 DOWER, § 78.  
 Enforcement of mechanic's lien. MECHANICS' LIENS, §§ 269-277.  
 Of vendor's lien. VENDOR AND PURCHASER, § 280.  
 Establishment and enforcement of trust. TRUSTS, § 371.  
 Foreclosure of mortgage—  
 CHATTEL MORTGAGES, § 277.  
 MORTGAGES, §§ 444-459.  
 Infringement of trade-mark or trade-name. TRADE-MARKS AND TRADE-NAMES, § 92.  
 INJUNCTION, §§ 116-123.  
 INTERPLEADER, §§ 23, 26.  
 PARTITION, §§ 54-62.  
 QUIETING TITLE, §§ 33-43.  
 Redemption from mortgage sale. MORTGAGES, § 616.  
 REFORMATION OF INSTRUMENTS, §§ 35-41.  
 Setting aside transfer in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 258-269.  
 SPECIFIC PERFORMANCE, §§ 112-117.

**(A) ORIGINAL BILL.**

Amendment of bill, see post, §§ 268, 271.  
 Bill to enforce decree, see post, § 441.  
 Cross-bill, see post, §§ 195-202.  
 Demurrer for objections to substance of bill, see post, § 223.  
 Supplemental bill, see post, § 296.

**In particular proceedings.***See—*

CANCELLATION OF INSTRUMENTS, § 37.  
 CREDITORS' SUIT, § 39.  
 DISCOVERY, § 19.  
 Dissolution and accounting of partnership.  
 PARTNERSHIP, § 327.  
 DIVORCE, §§ 89-93.  
 DOWER, § 78.  
 Enforcement of mechanics' liens. MECHANICS' LIENS, §§ 271, 280.  
 Of vendors' liens. VENDOR AND PURCHASER, § 280.  
 Equitable relief against judgments. JUDGMENT, § 460.  
 Establishment and enforcement of trusts. TRUSTS, § 371.  
 Foreclosure of mortgages—  
 CHATTEL MORTGAGES, § 277.  
 MORTGAGES, §§ 444-453.  
 INJUNCTION, § 118.  
 INTERPLEADER, § 23.  
 PARTITION, § 55.  
 QUIETING TITLE, §§ 34-36.  
 Redemption from mortgage sales. MORTGAGES, § 616.

**REFORMATION OF INSTRUMENTS, § 36.**

Setting aside transfers in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 258-265.  
 SPECIFIC PERFORMANCE, § 114.

**§ 128. Nature and office.****[a] (Sup. 1877)**

In an action on a note against the makers, one of defendants filed a complaint against his codefendant to establish the fact that the former was only a surety, and demanded judgment declaring him a surety and giving him proper relief as such. *Held*, that such complaint was not a cross complaint, but a new and original proceeding, which could not be tried on the summons issued by the plaintiff.—*Joyce v. Whitney*, 57 Ind. 530.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, §§ 307, 308.

See, also, 16 Cyc. pp. 216, 217.

**§ 138. Prayer for relief.**

In action to foreclose mortgage, see MORTGAGES, § 453.

In suit to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, § 263.

**[a] (Sup. 1845)**

The obligee of a title bond mortgaged it to A., and the latter afterwards obtained the legal title to the premises from the obligor and gave up the bond to him. *Held*, that a prayer in a bill filed by the mortgagor against the mortgagee and obligor to set aside that transaction between the defendants that the mortgagee be decreed to file a bill of foreclosure against the complainant is mere surplusage.—*Newhouse v. Hill*, 7 Blackf. 584.

**[b] (Sup. 1852)**

A court of equity will not render a decree setting aside a conveyance of real property, made to hinder and delay creditors, where the bill does not pray for such a decree.—*Eastman v. Ramsey*, 3 Ind. 419.

**[c] (Sup. 1859)**

One complaint may ask a rescission of a sale for false representations, or, if the court will not grant that, damages for breach of warranty or noncompliance with the contract.—*Gatling v. Newell*, 12 Ind. 118.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, §§ 319-321.

See, also, 16 Cyc. p. 224.

**§ 141. Form and sufficiency of allegations in general.****[a] (Sup. 1845)**

A second mortgagee, before forfeiture, filed a bill in chancery against the first mortgagee to compel him to surrender his mortgage, alleging that it had been paid. The bill did not show that complainant was injured, or was likely to be injured, by the alleged incumbrance. *Held*,

on demurrer, that the bill could not be sustained.—*Jones v. Myers*, 7 Blackf. 340.

[b] (Sup. 1866)

In a suit to enforce an equitable title to lands, it is not necessary that the complaint should charge defendant with notice of plaintiff's equity. If defendant claims as a purchaser without notice, he should set up, by way of answer, the facts which entitle him to protection as such.—*Makepeace v. Davis*, 27 Ind. 352.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 323-330, 333.

See, also, 16 Cyc. p. 219.

#### § 145. Double aspect.

[a] (Sup. 1865)

Duplicity in pleading is as fatal in equity as at law.—*Driver v. Driver*, 6 Ind. 286.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 339.

See, also, 16 Cyc. p. 238.

#### § 146. Multifariousness.

Of pleading in general, see PLEADING, § 341.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 340-379;

24 CENT. DIG. Fraud. Conv. § 758.

See, also, 16 Cyc. pp. 239-255.

#### § 147. — In general.

[a] (Sup. 1847)

No general rule can be laid down as to what constitutes multifariousness in a bill in equity. The court must exercise a sound discretion in determining, from the circumstances of each case, whether a bill is liable to that objection.—*Carter v. Kerr*, 8 Blackf. 373.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 340.

See, also, 16 Cyc. pp. 239-241.

#### § 148. — Misjoinder of causes of action.

[a] (Sup. 1847)

A bill in chancery for a partition of lands will not be considered multifarious on account of any pertinent statements it may make in setting forth the title of the complainant conformably to the requisitions of the statute.—*Carter v. Kerr*, 8 Blackf. 373.

[b] (Sup. 1860)

A mortgage may be corrected and foreclosed, or a deed may be corrected and the title quieted in the same suit, if the complaint states facts sufficient to justify such relief.—*Hunter v. McCoy*, 14 Ind. 528.

[c] (Sup. 1888)

A complaint charging that a firm was indebted to plaintiff, and, to prevent the collection of the debt, transferred its property to a

third party, who participated in the intent to defraud plaintiffs; that this third party disposed of the property, and has not accounted; and that the firm is insolvent; and praying for judgment against the firm for the amount of the debt, and that the third party be compelled to account,—states a cause of action in equity, and is not demurrable as improperly uniting several causes of action.—*Chamberlin v. Jones*, 114 Ind. 458, 16 N. E. 178.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 341-367.

See, also, 16 Cyc. pp. 241-248.

#### § 149. — Misjoinder of complainants.

[a] (Sup. 1837)

Two persons joined in a bill, each having a separate claim against defendant. One complainant, on account of his infancy, had a right to sue in equity, but the other had no such right. *Held*, that the bill was insufficient.—*Grimes v. Wilson*, 4 Blackf. 331.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 342, 368-

370; 24 CENT. DIG. Fraud. Conv. § 758.

See, also, 16 Cyc. pp. 248-250.

#### § 150. — Misjoinder of defendants.

[a] (Sup. 1836)

A bill uniting claims against defendant as heir, and in his individual capacity, is multifarious.—*Bryan v. Blythe*, 4 Blackf. 249.

[b] (Sup. 1806)

The existence of similar questions of fact in causes of action against several defendants, or the fact that each demand is asserted as a right growing out of the administration of an estate, so that each case involves some common elements of fact, will not warrant the joining of the separate claims growing out of different transactions and involving material inquiries essentially foreign to each other in a bill in equity.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529, 166 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 342, 371-

379; 24 CENT. DIG. Fraud. Conv. § 758.

See, also, 16 Cyc. pp. 250-255.

#### § 153. Construction and operation.

Admissions in answer, see post, § 186.

[a] (Sup. 1860)

A positive charge in the bill is an admission binding on plaintiff.—*Townsend v. McIntosh*, 14 Ind. 57.

The complainant in chancery cannot introduce evidence tending to contradict a positive averment or charge in his bill.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 386-389.

See, also, 16 Cyc. p. 237.

**(B) PLEA, ANSWER, AND DISCLAIMER.**

Amendment of plea or answer, see post, §§ 278-283.

Further or additional answer, see post, § 302.

Plea or answer to bill of review, see post, §§ 308, 461.

**In particular proceedings.**

*See—*

CANCELLATION OF INSTRUMENTS, § 39.

DISCOVERY, § 22.

Dissolution and accounting of partnership. PARTNERSHIP, § 327.

DIVORCE, §§ 96-99.

DOWER, § 78.

Enforcement of mechanics' liens. MECHANICS' LIENS, § 272.

Establishment and enforcement of trusts. TRUSTS, § 371.

Foreclosure of mortgages. MORTGAGES, § 454.

Infringement of trade-marks or trade-names. TRADE-MARKS AND TRADE-NAMES, § 92.

INJUNCTION, § 119.

INTERPLEADER, § 26.

PARTITION, § 56.

QUIETING TITLE, § 37.

REFORMATION OF INSTRUMENTS, § 38.

Setting aside transfers in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, § 266.

SPECIFIC PERFORMANCE, § 116.

**§ 156. Pleas.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 303-412.

See, also, 16 Cyc. pp. 286-297.

**§ 163. — In bar of relief.**

[a] (Sup. 1855)

Two distinct pleas in bar are not allowed in equity.—Driver v. Driver, 6 Ind. 286.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 401.

**§ 169. — Answer in support of plea.**

[a] (Sup. 1856)

The plea in bar to a bill in equity, which specifically charged fraud, not being accompanied by an answer, was adjudged bad.—Spivey v. Frazee, 7 Ind. 661.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 406.

See, also, 16 Cyc. p. 202.

**§ 177. Answer.**

Answer after demurrer overruled, see post, § 244.

Answer after exceptions sustained, see post, § 259.

Answer as evidence, see post, §§ 338-345.

Answer in support of plea, see ante, § 169.

To bill for discovery, see DISCOVERY, § 22.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 413-435.

See, also, 16 Cyc. pp. 297-320.

**§ 186. — Denials and admissions.**

Admissions as evidence in other suit, see EVIDENCE, § 208.

Failure to answer, see post, § 194.

[a] (Sup. 1846)

A charge in a bill that defendant had assented to a certain agreement is sufficiently denied by an allegation in the answer that he never had any knowledge of the agreement.—Coquillard v. Suydam, 8 Blackf. 24.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 426, 427.

See, also, 16 Cyc. pp. 305, 311-313.

**§ 189. — Sufficiency of discovery in general.**

[a] (Sup. 1849)

An answer that defendant cannot say whether the agreement set out in the bill is a copy of one executed by him or not is insufficient, and he will be compelled to answer directly whether it is or not.—Barbee v. Inman, 5 Blackf. 439.

[b] (Sup. 1857)

A defendant may answer an interrogatory demanding whether he has a receipt for money paid without making the receipt an exhibit.—Earnhart v. Robertson, 10 Ind. 8.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 432.

**§ 191. — Impertinence and scandal.**

[a] (Sup. 1840)

Where an answer to a bill for the specific performance of a contract states conversations and parol agreements prior to and after the execution of the contract, and varying its terms, they will be stricken out, on exceptions, as impertinent.—Barbee v. Inman, 5 Blackf. 439.

[b] (Sup. 1846)

Irrelevant matter contained in an answer in chancery should be struck out.—Conwell v. Claypool, 8 Blackf. 124.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 434.

See, also, 16 Cyc. p. 309.

**§ 193. Attachment to compel answer.**

[a] (Sup. 1829)

Where a particular claim in a bill is not explicitly answered, complainant may except to the answer and insist on a full answer.—Pegg v. Davis, 2 Blackf. 281.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 439-442.

See, also, 16 Cyc. p. 314.

**§ 194. Failure to answer.**

Waiver of objection, see post, § 330.

[a] (Sup. 1846)

A fact alleged in a bill in chancery, and not denied in the answer, must be taken to be true.—*Conwell v. Claypool*, 8 Blackf. 124.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 443-445.

See, also, 16 Cyc. p. 313.

**(C) CROSS-BILL AND PLEA AND ANSWER THERETO.**

*In particular proceedings.*

*See—*

CANCELLATION OF INSTRUMENTS, § 38.

Dissolution and accounting of partnership.

PARTNERSHIP, § 327.

DIVORCE, § 101.

Foreclosure of mortgage—

CHattel MORTGAGES, § 277.

MORTGAGES, § 455.

PARTITION, § 57.

QUIETING TITLE, § 30.

REFORMATION OF INSTRUMENTS, § 37.

SPECIFIC PERFORMANCE, § 115.

**§ 195. Nature and office of cross-bill.**

[a] (Sup. 1887)

Plaintiff was induced to make a warranty deed to land which he neither owned, nor claimed to own; on the faith of an agreement by S. to pay a mortgage from plaintiff to M., the owner, and the balance of the purchase price; M. agreeing to convey to plaintiff. S. refused to carry out his agreement, and M., in consequence, refused to convey to plaintiff. Held, that plaintiff, having offered to place the parties as they were before, was himself entitled to a rescission and cancellation of his deed to S., and to be placed in statu quo, unless on a cross bill M. chose to compel the performance of his contract with S., and that the court, sitting as a court of equity, should have ordered the filing of such a cross bill, and determined the rights of all the parties.—*Sims v. Burk*, 109 Ind. 214, 9 N. E. 902.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 446-449.

See, also, 16 Cyc. pp. 324-327; note, 83 Am. Dec. 251.

**§ 196. Necessity for cross-bill.**

[a] (Sup. 1865)

Under the chancery practice, when a defendant sought relief against a codefendant as to matters not apparent upon the face of the original bill, he must file his cross bill, making parties thereto such of his codefendants and others as were necessary to the relief sought; and process was necessary to bring them in.—*Fletcher v. Holmes*, 25 Ind. 458.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 450-454.

See, also, 16 Cyc. pp. 324-327.

**§ 200. Time for filing cross-bill.**

[a] (Sup. 1881)

In a proceeding in chancery, where defendant seeks relief against a codefendant as to matters not apparent on the face of the original bill, he must file his cross-complaint, making parties thereto such of his codefendants and such others as are necessary to the relief demanded, and process is required to bring such codefendants into court.—*Swift v. Brumfield*, 76 Ind. 472.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 465.

See, also, 16 Cyc. p. 328.

**§ 202. Sufficiency of cross-bill.**

[a] (Sup. 1882)

A cross complaint must be good within itself, and not refer to and rely on the original complaint for a part of the facts necessary to be stated.—*Masters v. Beckett*, 83 Ind. 595.

[b] (Sup. 1882)

A description of real estate in a cross complaint to quiet title which omitted county and state, but referred to it as "the real estate in complaint mentioned," is sufficient.—*Cookery v. Duncan*, 87 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 469, 470.

See, also, 16 Cyc. pp. 331-333.

**(D) REPLICATION.**

*In particular proceedings.*

*See—*

DIVORCE, § 102.

Enforcement of mechanics' liens. MECHANICS' LIENS, § 274.

Foreclosure of mortgages. MORTGAGES, § 456.

INJUNCTION, § 119.

INTERPLEADER, § 26.

PARTITION, § 58.

REFORMATION OF INSTRUMENTS, § 33.

**§ 212. Sufficiency.**

[a] (Sup. 1846)

The effect of a replication is to admit the plea to be good, and to confine the inquiry to the truth of the matter in issue.—*Sampson v. Hendricks*, 8 Blackf. 288.

[b] (Sup. 1860)

On an issue to the jury from the probate court, under Rev. St. 1843, p. 666, a reply to the answer admits it to be good in law, and generally the pleadings with reference to the issue are to be construed like chancery pleadings.—*Clem v. Durham*, 14 Ind. 203.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 485.

See, also, 16 Cyc. p. 323.

**§ 213. Failure to reply.**

Waiver of objections, see post, § 330.

[a] (Sup. 1855)

If the affirmative matter in the answer is not denied, either by replication or an answer to it in a cross bill, it will be taken as true.—*Hale v. Plummer*, 6 Ind. 121.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 486.

See, also, 16 Cyc. p. 322.

#### (E) DEMURRER, EXCEPTIONS, AND MOTIONS.

Demurrer to bill of review, see post, § 462.

Demurrer to plea, see ante, § 214.

#### In particular proceedings.

See—

Enforcement of mechanics' liens. MECHANICS' LIENS, § 275.

Foreclosure of mortgages. MORTGAGES, § 457.

INJUNCTION, § 120.

PARTITION, § 59.

QUIETING TITLE, § 41.

SPECIFIC PERFORMANCE, § 116.

#### § 214. Mode of making objections to pleading.

[a] (Sup. 1835)

A demurrer to a plea in chancery is unknown, but, to take advantage of a defect in such plea, the party must have it set down for hearing.—*Raymond v. Simonson*, 4 Blackf. 77.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 487.

See, also, 16 Cyc. p. 315.

#### § 218. Grounds for demurrer to bill.

##### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 496-503.

See, also, 16 Cyc. pp. 265-270.

#### § 223. — Objections to substance of bill.

[a] (Sup. 1906)

Multifariousness is a proper ground of demurrer to a bill in equity.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529, 166 Ind. 427.

##### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 502.

See, also, 16 Cyc. p. 266.

#### § 228. Form and requisites of demurrer.

[a] (Sup. 1881)

In suit to foreclose a mortgage, plaintiff demurred to a cross complaint on the ground that it "does not state facts sufficient to prevent said plaintiff from foreclosing said mortgage for the full amount of the debt due therein." *Held*, that no such cause for demurrer is known to the statute, or should be recognized in practice.—*Martin v. Martin*, 74 Ind. 207.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 504.

See, also, 16 Cyc. pp. 271-275.

#### § 231. Scope and extent of demurrer in general.

[a] (Sup. 1878)

Unless a cross complaint is an answer to the original complaint, a demurrer to a cross-complaint does not reach back to the original complaint.—*Harlen v. Watson*, 63 Ind. 143.

[b] (Sup. 1878)

S., a vendor, agreed that on payment of a certain sum on a certain future day, and execution by H., the purchaser, of a mortgage for the balance of the purchase money, S., by a "good and sufficient deed," would convey to H. certain land, the title to which was in litigation between them, and after the day so fixed H. died. In an action against his widow and heirs for specific performance, the complaint alleged that on such day S. tendered to H. a "good and sufficient deed" for the land, and demanded performance by H., which was refused; that after H.'s death S. tendered the same deed to defendants and demanded performance of H.'s stipulations, which they refused; that the same deed was brought into court for defendants; and that the land had remained in the possession of H. and defendants ever since the contract, etc. *Held*, that a demurrer to the complaint that the tender to defendants of a deed to H. was insufficient should be carried back and sustained.—*Sowle v. Holdridge*, 63 Ind. 213.

##### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 507.

See, also, 16 Cyc. pp. 275-280.

#### § 232. Demurrer to bill good in part.

[a] (Sup. 1842)

A demurrer to a whole bill must be overruled if the bill taken altogether entitles complainant to some kind of relief.—*Fancher v. Ingraham*, 6 Blackf. 139.

##### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, § 508.

See, also, 16 Cyc. p. 274.

#### § 242. Operation and effect of decision on demurrer.

##### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 516-520.

See, also, 16 Cyc. pp. 282-285.

#### § 244. — Answer after demurrer overruled.

[a] Where a demurrer to a bill is overruled, a final decree, without giving defendant an opportunity to deny the allegations in the bill, is erroneous.—(Sup. 1823) *Bottorf v. Conner*, 1 Blackf. 287; (1830) *Kipper v. Glancey*, 2 Blackf. 356; (1840) *Lefavour v. Justice*, 5

Blackf. 366; (1848) *Henderson v. Dennison*, 1 Ind. 152, Smith, 70.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, § 519.  
See, also, 16 Cyc. p. 284.

**§ 247. — Amendment after demurrer sustained.**

[a] (Sup. 1837)

On sustaining a demurrer to a bill for misjoinder of one having no right to sue in equity with an infant having such right, the bill should not be dismissed as to such infant, but should stand over, in order that he might strike the name of the other complainant from the bill.—*Grimes v. Wilson*, 4 Blackf. 331.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, § 520.  
See, also, 16 Cyc. p. 282.

**§ 250. Necessity of exceptions.**

[a] (Sup. 1831)

Objections to an answer should be made by exceptions thereto, and not by demurrer.—*Arnold v. Styles*, 2 Blackf. 391.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, § 522.

**§ 255½. Withdrawal or waiver of exceptions.**

[a] (Sup. 1829)

Though where exceptions be taken to parts of an answer only, defendant cannot be required to answer over generally, but only so far as the exceptions extend, yet if, in such case, the order be for defendant to answer over generally, and no notice be afterwards taken of the order by either party in the subsequent proceedings, complainant will be considered as having abandoned the order, together with the exceptions which it was intended to sustain, and the order will not be error of which the defendant can complain.—*Pegg v. Davis*, 2 Blackf. 281.

**§ 259. Further answer after exceptions sustained**

[a] (Sup. 1829)

Where exceptions are taken to parts of an answer, and the court considers them valid, defendant may be ordered to answer over so far as the exceptions extend, but not to the whole bill.—*Pegg v. Davis*, 2 Blackf. 281.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, § 532.  
See, also, 16 Cyc. p. 320.

**§ 261. Motions relating to pleadings.**

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, §§ 534-540.  
See, also, 16 Cyc. p. 315.

**§ 263. — Striking out pleading.**

[a] (Sup. 1856)

An answer to a bill in equity, which is clearly evasive, may be ordered to be taken from the files.—*Spivey v. Frazee*, 7 Ind. 661.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, §§ 535-540.  
See, also, 16 Cyc. p. 315.

**§ 264. — Striking out part of pleading.**

[a] (Sup. 1846)

If money, alleged in an answer in chancery to have been tendered to complainant, be not brought into court, the allegation of tender should be struck out of the answer.—*Conwell v. Claypool*, 8 Blackf. 124.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, §§ 536-540.  
See, also, 16 Cyc. p. 315.

**(F) AMENDED AND SUPPLEMENTAL PLEADINGS AND REVIVOR.**

In particular proceedings.

See—

DIVORCE, § 104.

DOWER, § 78.

Enforcement of mechanics' liens. MECHANICS' LIENS, § 276.

Foreclosure of mortgages. MORTGAGES, § 458.

INJUNCTION, § 121.

PARTITION, § 60.

QUIETING TITLE, § 42.

**§ 266. Amendment as of course.**

[a] (Sup. 1869)

Complainant may, as of right, amend his bill before answer.—*Cheek v. Tilley*, 31 Ind. 121.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, § 544.

**§ 268. Amendment of bill.**

Amendment after demurrer sustained, see ante, § 247.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, §§ 413, 552-569.  
See, also, 16 Cyc. pp. 335-351.

**§ 271. — Condition of cause.**

[a] (Sup. 1841)

Leave to amend a bill after the dismissal thereof is error.—*Elston v. Drake*, 5 Blackf. 540.

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. EQUITY, §§ 558-560.  
See, also, 16 Cyc. pp. 342-346.

**§ 278. Amendment of plea or answer.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 570-578.

See, also, 16 Cyc. pp. 352-356.

**§ 281. — Condition of cause.**

[a] (Sup. 1867)

After a supplemental complaint had been filed, and defendant, who had been summoned to answer the original complaint, appeared and filed a disclaimer of any interest in the property in controversy at the time he was made a party, or at the time of filing his answer, the cause was dismissed as to him. Subsequently on the call of the cause for trial, he asked leave to amend his disclaimer by striking out so much thereof as disclaimed any interest at the time he was made a party, on the ground that when the disclaimer was prepared his counsel did not know that defendant was a party to the original complaint. *Held*, that the application was properly refused, as being made too late.—*Martin v. Noble*, 29 Ind. 216.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 572.

See, also, 16 Cyc. p. 354.

**§ 283. — Matter making new defense.**

[a] (Sup. 1854)

An answer, not on oath, after depositions had been taken, was found to contain a material admission against defendant, and thereupon defendant asked leave to amend his answer, alleging that it had been hastily prepared, and that the admission was a mistake, and contrary to the fact. *Held*, that leave to amend was properly granted.—*Taylor v. Dodd*, 5 Ind. 246.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 574, 575.

See, also, 16 Cyc. p. 353.

**§ 293. Form and sufficiency of amended pleading.**

[a] (Sup. 1869)

An amendment called a "supplemental complaint," but containing no supplemental matter, was filed by plaintiff, over defendant's objection, before answer, in a suit for an injunction in which a restraining order had been granted. *Held*, that the paper should be treated as an amended bill.—*Cheek v. Tilley*, 31 Ind. 121.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 551, 565, 576.

**§ 294. Supplemental bill or cross-bill.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 581-593, 599.

See, also, 16 Cyc. pp. 357-362.

**§ 296. — Grounds.**

[a] (Sup. 1865)

When a complaint in an equitable action is wholly defective, and without equity, so that no valid decree can be rendered on it, plaintiff cannot, by filing a supplemental complaint founded on matters which have taken place subsequently to the commencement of the suit, sustain the proceedings originally commenced.—*Patten v. Stewart*, 24 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 584-586, 599.

See, also, 16 Cyc. pp. 357, 358.

**§ 302. Further or additional answer.**

[a] (Sup. 1846)

A mistake having been made in an answer in chancery, as shown by affidavit of defendant and the writer of the answer, a supplemental answer was permitted to be filed.—*Coquillard v. Suydam*, 8 Blackf. 24.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 594-598, 600, 601.

**§ 303. Bill of revivor.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 602-611.

See, also, 16 Cyc. pp. 363, 364.

**§ 305. — Grounds.**

[a] (Sup. 1844)

If defendant in chancery die before he has answered, the suit can only be revived by a bill of revivor; but if he die after answer filed, the suit may be revived by virtue of the statute, on motion of complainant, without such bill.—*Aldridge v. Dunn*, 7 Blackf. 249, 41 Am. Dec. 224.

[b] (Sup. 1848)

On a bill in equity to foreclose a mortgage executed by A. to secure payment of a judgment against B. and C., B. appeared, and, pending the cause, died, whereupon the bill was abated as to him, and a decree entered against A. and C., who had made default, and for a sale of the premises. *Held*, that a bill of revivor must be filed, and the representatives of B. made parties, before decree for sale of the premises could be entered.—*Milroy v. Stockwell*, 1 Ind. 35, Smith, 19.

[c] (Sup. 1848)

On a bill of revivor, there must be an order that the bill be revived before final decree.—*Pickering v. Walcott*, 1 Ind. 262, Smith, 128.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 603.

See, also, 16 Cyc. p. 363.

**§ 306. — Form and sufficiency.**

[a] (Sup. 1848)

A bill of revivor filed under the provisions of Rev. St. 1838, p. 443, against an administrator and minor heirs, must state the name of at least one of the heirs.—*Pickering v. Walcott*, 1 Ind. 262, Smith, 128.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 608; 1 CENT. DIG. ABATE. & R. § 475.

See, also, 16 Cyc. p. 364.

**§ 308. — Plea and answer.**

[a] (Sup. 1831)

The answer to a bill of revivor cannot dispute the merits of the decree.—*Arnold v. Styles*, 2 Blackf. 391.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 609.

See, also, 16 Cyc. p. 364.

**(G) SIGNATURE, VERIFICATION, FILING, AND SERVICE.****In particular proceedings.**

See—

DIVORCE, § 105.

INJUNCTION, § 122.

**§ 321. Filing and notice thereof.**

[a] (Sup. 1831)

In suit for an injunction, notice must be given to a co-defendant of the filing of a cross-complaint by a defendant, and a judgment rendered against such co-defendant on a cross-complaint so filed, without service of process and appearance, is erroneous.—*Swift v. Brumfield*, 76 Ind. 472.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 413, 620–632; 27 CENT. DIG. INJ. § 269.

**(H) ISSUES, PROOF, AND VARIANCE.**

Conformity of decree to pleadings and proofs, see post, § 427.

Denials and admissions in answer, see ante, § 186.

**In particular proceedings.**

See—

CREDITORS' SUIT, § 42.

Dissolution and accounting of partnership.

PARTNERSHIP, § 327.

DIVORCE, § 108.

DOWER, § 78.

Enforcement of mechanics' liens. MECHANICS' LIENS, § 277.

Of vendors' liens. VENDOR AND PURCHASER, § 280.

Equitable relief against judgments. JUDGMENT, § 460.

Foreclosure of mortgages. MORTGAGES, § 459.

INJUNCTION, § 123.

PARTITION, § 62.

**QUIETING TITLE, § 43.****REFORMATION OF INSTRUMENTS, § 41.**

Setting aside transfers in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, § 269.

**SPECIFIC PERFORMANCE, § 117.****§ 325. Matters to be proved.**

[a] (Sup. 1835)

Exhibits, which are the foundation of a chancery suit, must be proved by depositions, or viva voce, at the hearing, if not admitted.—*Sandford v. Shelby*, 4 Blackf. 134.

[b] (Sup. 1844)

If a distinct fact in avoidance be set up by an answer in chancery, such fact must be proved.—*Pierce v. Gates*, 7 Blackf. 162.

[c] (Sup. 1846)

If a bill in chancery be founded on an agreement required by the statute of frauds to be in writing, and the agreement be denied by the answer, the agreement, though the statute be not pleaded, must be proved to be in writing.—*Coquillard v. Suydam*, 8 Blackf. 24.

[d] (Sup. 1847)

Where a material allegation in a bill in chancery is denied by the answer, it must be proved.—*Campbell v. Brackenridge*, 8 Blackf. 471.

[e] (Sup. 1860)

The admissions in the answer of a guardian ad litem do not dispense with proof.—*Townsend v. McIntosh*, 14 Ind. 57.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 641–647.

See, also, 16 Cyc. pp. 371, 372.

**§ 326. Evidence admissible under pleadings.**

[a] (Sup. 1853)

Evidence of matter not alleged in the bill or answer will not be considered.—*Peelman v. Peelman*, 4 Ind. 612.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 648–650.

See, also, 16 Cyc. pp. 372–375.

**§ 327. Variance between allegations and proof.**

[a] (Sup. 1835)

A variance between the proof and immaterial allegations in the bill constitutes no objection to the decree.—*Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45.

[b] (Sup. 1844)

A bill alleging a certain contract, which is denied by the answer, is not supported by proof of a different contract.—*Kinsey v. Grimes*, 7 Blackf. 290.

[c] (Sup. 1846)

A defendant in chancery, not charged in the bill as an agent, and with neglect of duty as such, cannot be made liable for negligence



as an agent.—*Coquillard v. Suydam*, 8 Blackf. 24.

[d] (Sup. 1853)

The allegations and proofs in suits in equity must set forth and support the same cause of action. A party cannot state one case in his pleading, and make a different one by his proofs.—*Peelman v. Peelman*, 4 Ind. 612.

[e] (Sup. 1881)

Complainant cannot base his complaint on one definite theory and then claim the right to recover on another.—*Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 651, 652.

See, also, 16 Cyc. pp. 403-406.

#### (I) DEFECTS AND OBJECTIONS, AND WAIVER THEREOF.

#### § 330. Waiver of objections to pleadings in general.

[a] The want of a replication is waived by submission of the cause on pleadings and proofs.—(Sup. 1832) *Demaree v. Driskill*, 3 Blackf. 115; (1844) *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226.

[b] (Sup. 1835)

Where a plea is set down for hearing on a demurrer to it, instead of a motion to have such plea set down for argument, the circumstance cannot be assigned for error.—*Raymond v. Simonson*, 4 Blackf. 77.

[c] (Sup. 1836)

An objection to a bill because of multifariousness, if apparent on the face thereof, must be taken advantage of by demurrer; otherwise, it will be deemed to be waived.—*Bryan v. Blythe*, 4 Blackf. 249.

[d] (Sup. 1843)

Where a demurrer to a bill for multifariousness is overruled, if defendants afterwards answer, they thereby waive the objection.—*Watson v. Clendenin*, 6 Blackf. 477.

[e] (Sup. 1860)

After a replication under the old practice, taking issue on the answer of heirs brought in by a revivor, it is too late to object that they, in pleading, departed from the ancestor's answer.—*Townsend v. McIntosh*, 14 Ind. 57.

[f] (Sup. 1862)

Where a cause by agreement is referred to a commissioner to take accounts, without an answer having been filed to the complaint, the consent cures the error.—*State ex rel. Lipperd v. Carrington*, 19 Ind. 258.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 660-668, 671; 27 CENT. DIG. Inj. § 271.

See, also, 16 Cyc. p. 320.

#### V. EVIDENCE.

Admission of incompetent evidence as ground for new trial, see post, § 392.

Taking and filing proofs, see post, § 349.

Verified answer as documentary evidence, see EVIDENCE, § 370.

#### In particular proceedings.

See—

Accounting by partnership. PARTNERSHIP, § 338.

CANCELLATION OF INSTRUMENTS, §§ 44-47.

Dissolution of partnership. PARTNERSHIP, § 328.

DIVORCE, §§ 109-137.

DOWER, § 79.

Enforcement of mechanics' liens. MECHANICS' LIENS, §§ 278-281.

Of vendors' liens. VENDOR AND PURCHASER, § 281.

Establishment and enforcement of trust. TRUSTS, § 372.

Foreclosure of mortgage—

CHattel MORTGAGES, § 278.

MORTGAGES, §§ 460-464.

INJUNCTION, §§ 124-127.

PARTITION, § 63.

QUIETING TITLE, § 44.

Redemption from mortgage sales. MORTGAGES, § 617.

REFORMATION OF INSTRUMENTS, §§ 42-45.

Relief from judgment. JUDGMENT, § 461.

Setting aside transfers in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 270-300.

SPECIFIC PERFORMANCE, §§ 118-121.

#### § 337. Pleadings as evidence in general.

[a] (Sup. 1857)

A bill was brought setting up a trust in certain land, and a cross bill alleged a purchase of an interest in the land without notice of the trust. The complainants answered that at the time of purchase the other party had full notice of the trust, and no evidence upon the issue was put in. *Held*, that the answer to the cross bill was a direct response to a material charge, and was itself evidence, and, unless disproved, must be taken as true, and the dismissal of the cross bill was not erroneous.—*Pugh v. Pugh*, 9 Ind. 132.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 679-684.

See, also, 16 Cyc. pp. 382, 401; 20 Cyc. p. 772.

#### § 338. Answer as evidence.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 685-724.

See, also, 16 Cyc. pp. 383-401.

#### § 339. — In general.

[a] (Sup. 1844)

If an answer in chancery be put in issue by the replication, no part of the answer can be read by the defendant as evidence in his

favor, except so much as may qualify or explain the meaning of some passage in the answer read in evidence by the complainant.—*Clark v. Spears*, 7 Blackf. 96.

[b] (Sup. 1855)

Where a bill in chancery waives answer under oath, the fact that the answer is sworn to gives it no force as evidence.—*Peter v. Wright*, 6 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 685, 686, 688-696, 703-705, 710, 714.

### § 340. — Responsiveness.

[a] The rule that an answer in chancery must be received as true does not extend to matters of affirmative defense.—(Sup. 1830) *Green v. Vardiman*, 2 Blackf. 324; (1844) *Pierce v. Gates*, 7 Blackf. 162; (1854) *Brown v. Woodbury*, 5 Ind. 254; (1855) *Peck v. Hunter*, 7 Ind. 295.

[b] Only such facts set forth in an answer as are clearly responsive to the allegations of the bill will be considered as evidence in the cause.—(Sup. 1830) *Green v. Vardiman*, 2 Blackf. 324; (1860) *Townsend v. McIntosh*, 14 Ind. 57.

[c] (Sup. 1832)

Where an answer acknowledges an assignment set up in the bill, but alleges that it has been canceled, the answer is not evidence of the cancellation, but it must be proved.—*Wasson v. Gould*, 3 Blackf. 18.

[d] (Sup. 1844)

A bill of foreclosure and for a sale of mortgaged premises averred that the mortgage was given to secure the payment of a certain promissory note. The answer admitted the execution of the note and mortgage, but alleged that judgment had been obtained on the note, and that the defendant had paid the judgment. A general replication was filed. *Held*, that the admission in the answer of the execution of the note and mortgage was evidence against the defendant, but that the subsequent allegation of payment, being a new and distinct fact, was not evidence in his favor.—*Clark v. Spears*, 7 Blackf. 96.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 697-701.  
See, also, 16 Cyc. p. 390.

### § 342. — Answer not under oath.

[a] (Sup. 1855)

An answer in chancery not under oath is not evidence of the matters alleged in it.—*Peck v. Hunter*, 7 Ind. 295.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 706.  
See, also, 16 Cyc. pp. 386-388.

### § 343. — Waiver of answer under oath.

[a] (Sup. 1851)

An answer is not evidence for defendant, where the bill requires one without oath.—*Larsh v. Brown*, 3 Ind. 234.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 702.  
See, also, 16 Cyc. p. 387.

### § 344. — For or against codefendant.

[a] The answer of one defendant is not evidence against a co-defendant.—(Sup. 1828) *Thomasson v. Tucker's Adm'rs*, 2 Blackf. 172; (1839) *McClure v. McCormick*, 5 Blackf. 129.

[b] (Sup. 1846)

In a suit against a father and minor children, the latter answering by guardian ad litem in the usual form, a decree cannot be based on the father's answer, confessing the bill, without other evidence.—*Shirley v. Shields*, 8 Blackf. 273.

[c] (Sup. 1848)

The answer of a complainant to the cross bill of adult defendants is not evidence against infant defendants who appear by guardian ad litem.—*Campbell v. Campbell*, 1 Ind. 220, *Smith*, 137.

An answer by adult defendants, stating the consideration of the contract on which the bill is founded, is not evidence against the infant co-defendants.—*Id.*

[d] (Sup. 1860)

The answer of one defendant is evidence against a co-defendant, who is his privy in estate, or who claims through him.—*Townsend v. McIntosh*, 14 Ind. 57.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 707-709.  
See, also, 16 Cyc. pp. 397, 398.

### § 345. — Evidence to overcome answer.

[a] The answer of defendant, so far as responsive to the bill, must be taken as true unless it be overturned by two witnesses, or one with strong corroborative circumstances.—(Sup. 1830) *Green v. Vardiman*, 2 Blackf. 324; (1840) *Coles v. Raymond*, 5 Blackf. 435; (1844) *Pierce v. Gates*, 7 Blackf. 162; (1857) *Achey v. Stephens*, 8 Ind. 411.

[b] (Sup. 1831)

A bill in chancery, when denied by the answer, must be proved by at least two witnesses, or by one witness and corroborating circumstances, or the complainant cannot succeed.—*Jenison v. Graves*, 2 Blackf. 440.

[c] (Sup. 1841)

Testimony of one witness in chancery supported by strong corroborating circumstances is sufficient to counteract a positive denial in the answer.—*McCormick v. Malin*, 5 Blackf. 500.

**[d] (Sup. 1844)**

An issue of fact having been formed on a bill and answer in equity, a jury was called to try it, and the answer was read in evidence. *Held*, that the jury might find for the complainant on the testimony of a single disinterested witness, if, in their opinion, such testimony was entitled to greater weight and credibility than the answer.—*Kinsey v. Grimes*, 7 Blackf. 290.

**[e] (Sup. 1846)**

If a defendant in chancery do not profess to answer from any knowledge he has of the matter in controversy, evidence equivalent to that of two witnesses is not necessary to overcome his denial.—*State v. Holloway*, 8 Blackf. 45; *Holloway v. State*, 5 Ind. 212.

**[f] (Sup. 1854)**

The answer of the defendant in chancery, under oath, can be overcome only by at least one witness and strong corroborating circumstances.—*Calkins v. Evans*, 5 Ind. 441.

**[g] (Sup. 1855)**

Where the answer was required to be without oath, a preponderance of the testimony in support of the bill was sufficient.—*Peter v. Wright*, 6 Ind. 183.

**[h] (Sup. 1855)**

In chancery, if the complainant waive the defendant's oath to his answer, pursuant to statute, the effect of the denial in the answer is to require the allegations in the bill to be sustained by a preponderance of evidence.—*Moore v. McClintock*, 6 Ind. 209.

**[i] (Sup. 1855)**

Where an answer in proceedings in equity is required to be without oath, two witnesses are not required to prove the matter put in issue by the denial in the answer, but the evidence of one witness is entitled to the same weight it would have in establishing the affirmative of an issue in law.—*Peck v. Hunter*, 7 Ind. 295.

**[j] (Sup. 1857)**

In chancery, an averment in the answer responsive to the bill that the party was sane at the time the act was performed is evidence of that fact, against which proof of general derangement will not avail.—*Achey v. Stephens*, 8 Ind. 411.

**[k] (Sup. 1860)**

An answer meeting the allegations of the bill upon information and belief does not fall within the rule requiring two witnesses to prevail against it.—*Townsend v. McIntosh*, 14 Ind. 57.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 715-724.

### § 346. Presumptions and burden of proof.

**[a] (Sup. 1845)**

Where an answer on a bill to enjoin a judgment alleges that complainant knew the

facts pending the suit at law, and pleaded the same in bar, the burden of establishing it is on defendant.—*Fitch v. Polke*, 7 Blackf. 564.

**[b] (Sup. 1853)**

Where the material facts alleged in a bill are admitted by the answer, but distinct facts are set up in avoidance, the burden of proof is upon the defendant.—*Baker v. Leathers*, 3 Ind. 558.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 725, 726.

## VI. TAKING AND FILING PROOFS.

### § 349. Taking in general.

**[a] (Sup. 1860)**

In a chancery suit, it is error to fail to have placed upon the records oral evidence against infant parties.—*Bennett v. Welch*, 15 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 731, 732.

See, also, 16 Cyc. pp. 375-377.

## VII. DISMISSAL BEFORE HEARING.

### In particular proceedings.

See—

DIVORCE, §§ 137-139½.

INJUNCTION, § 129.

PARTITION, § 64.

Relief against judgment. JUDGMENT, § 462.

### § 359. Voluntary dismissal.

**[a] (Sup. 1829)**

A failure to comply with an interlocutory decree does not place complainant in contempt, so as to prevent him from dismissing his bill.—*Smith v. Smith*, 2 Blackf. 232.

A complainant may at any time dismiss his bill, on payment of costs, if he is not in contempt.—*Id.*

**[b] (Sup. 1850)**

A plaintiff in chancery has a right to dismiss his bill at any time before final hearing upon payment of costs, if he be not in contempt.—*Elderkin v. Fitch*, 2 Ind. 90.

**[c] (Sup. 1874)**

The dismissal of the original petition in a proceeding for partition carries with it a cross petition filed by the defendant, and puts an end to the action.—*Holzner v. Holzner*, 48 Ind. 151.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 749-775.

See, also, 16 Cyc. pp. 460-469.

### § 360. Involuntary dismissal.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 757-774.

See, also, 16 Cyc. pp. 462-467.

**§ 362. — Grounds.**

[a] (Sup. 1865)

A bill in chancery should not be dismissed, for nonjoinder of necessary parties, without opportunity first given to the plaintiff to amend.—*Dart v. McQuilty*, 6 Ind. 391.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 758-761.

See, also, 16 Cyc. pp. 462-465.

**VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.**

On bill of review, see post, § 464.

Trial of equitable action as law action, procedure governing, see TRIAL, § 18.

**In particular proceedings.**

See—

CANCELLATION OF INSTRUMENTS, §§ 48-51.

CREDITORS' SUIT, § 48.

DIVORCE, §§ 140-142, 144, 146, 149, 150.

DOWER, § 80.

Enforcement of mechanics' liens. MECHANICS' LIENS, §§ 286-290.

Of vendors' liens. VENDOR AND PURCHASER, § 284.

Establishment and enforcement of trusts.

TRUSTS, § 373.

Foreclosure of mortgages. MORTGAGES, §§ 476-482.

INJUNCTION, § 130.

PARTITION, §§ 67, 71, 72.

QUIETING TITLE, § 47.

Redemption from mortgage sales. MORTGAGES, § 618.

REFORMATION OF INSTRUMENTS, § 46.

Relief against judgment. JUDGMENT, § 463.

Setting aside transfers in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 308-310.

**§ 369. Condition of cause.**

[a] (Sup. 1845)

A suit in chancery was ready for final hearing, under Act 1838, as soon as the issue was completed, unless depositions were to be taken.—*Ryhn v. Cochran*, 7 Blackf. 417.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 776-780.

**§ 371. Separate hearings in same cause.**

[a] (Sup. 1906)

Where complainant wrongfully joined in the same bill six essentially different causes against distinct defendants, it was an abuse of the trial court's discretion to deny defendant's motion for a separate trial which was timely made.—*Boonville Nat. Bank v. Blakey*, 76 N. E. 529, 166 Ind. 427.

Where a bill in equity is filed against several defendants, a motion for a separate trial may be granted for good cause.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 782.

**§ 375. Continuance.**

[a] Upon an objection to a bill of the want of proper parties who might properly have been made coplaintiffs, where by an amendment making them coplaintiffs the record would have been rendered confused by the necessary variations and additions, the cause was allowed to stand over, with liberty to amend by making them defendants; nothing being requisite but to insert their names in the bill and prayer of process, and the former defendants being allowed time to file a new answer.—(Sup. 1831) *Lindley v. Cravens*, 2 Blackf. 426; (1842) *Park v. Ballentine*, 6 Blackf. 223.

[b] (Sup. 1834)

Under Rev. Code 1831, providing that, when depositions are to be taken, the cause shall stand for hearing at the next term after the issue is completed, a continuance until such next term is not authorized, unless depositions are to be taken.—*Andrews v. Jones*, 3 Blackf. 440.

[c] (Sup. 1841)

The continuance of a cause after the dismissal of the bill is a void proceeding.—*Elston v. Drake*, 5 Blackf. 540.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 785, 786.

See, also, 16 Cyc. p. 409.

**§ 376. Submission of issues to jury.**

Constitutional right to trial by jury, see JURY, § 13.

In suits for divorce, see DIVORCE, § 144.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 788-820.

See, also, 16 Cyc. pp. 413-428.

**§ 377. — In general.**

[a] The awarding of an issue to try a question of fact is within the discretion of a court of equity.—(Sup. 1835) *Ray v. Doughty*, 4 Blackf. 115; (1856) *Lapreese v. Falls*, 7 Ind. 692.

[b] (Sup. 1856)

Rev. St. 1843, did not alter the rule of practice in courts of chancery that the court may in its discretion take the opinion of a jury as to any question of fact in controversy.—*Lapreese v. Falls*, 7 Ind. 692.

[c] (Sup. 1883)

Though Rev. St. 1881, § 409, requires that issues of law and fact which were of exclusive equitable jurisdiction prior to June 18, 1852, shall be tried by the court, yet a court of equity may submit issues to a jury.—*Lake Erie & W. R. Co. v. Griffin*, 92 Ind. 487.

[d] (Sup. 1884)

In a chancery suit the court has the right to submit a question of fact to a jury to decide for the information of the court, and it is entirely within the discretion of the court as to whether it will seek such information by a

jury.—*Miller v. Evansville Nat. Bank*, 99 Ind. 272.

[c] (Sup. 1885)

There was no error in submitting to a jury questions of fact, where it was done only for information, and the court afterwards made a finding for itself.—*Farmers' Bank of Mooresville v. Butterfield*, 100 Ind. 229.

[f] (Sup. 1885)

Where an issue is properly in equity, a party is not entitled as of right to have an issue of fact tried by a jury.—*McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 788-793.

See, also, 16 Cyc. p. 413.

### § 378. — Issues proper for jury.

[a] (Sup. 1888)

Under the rule that, if any essential part of a cause is exclusively of equitable cognizance, the whole is drawn into equity, a suit on a promissory note, and to set aside a conveyance as fraudulent, need not be submitted to a jury generally as an action at law.—*Towns v. Smith*, 115 Ind. 480, 16 N. E. 811.

[b] (App. 1892)

Where the facts stated in a complaint present no ground for a specific decree, and it is sought to recover compensation by way of damages only, it is proper to submit the cause to a jury; the rule being that if the remedy sought be equitable the court cannot be required to call a jury, but if it be legal the trial is by jury, unless the jury is waived.—*Robertson v. McPherson*, 4 Ind. App. 595, 31 N. E. 478.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 794-799.

See, also, 16 Cyc. p. 418.

### § 379. — Proceedings for award and framing of issues.

[a] (Sup. 1883)

Where a court of equity submits issues to a jury, it cannot submit the whole case, but must frame such questions as it desires to be tried by a jury.—*Lake Erie & W. R. Co. v. Griffin*, 92 Ind. 487.

[b] (Sup. 1884)

A suit by a widow to set aside an antenuptial contract for fraud and asking for partition is exclusively equitable, and, even after impaneling a jury, the court may discharge them and itself find on the evidence.—*Israel v. Jackson*, 93 Ind. 543.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 800-808.

See, also, 16 Cyc. pp. 416-420.

### § 380. — Proceedings at trial.

[a] (Sup. 1885)

Instructions to the jury should not be general, as in a suit at law, but should only re-

late to the determination of the questions of fact submitted.—*Farmers' Bank of Mooresville v. Butterfield*, 100 Ind. 229.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 809-812, 820.

See, also, 16 Cyc. pp. 420-422.

### § 381. — Verdict and findings.

[a] The verdict of a jury on an issue directed by a court of chancery is merely advisory.—(Sup. 1882) *Evans v. Nealis*, 87 Ind. 262; (1883) *Lake Erie & W. R. Co. v. Griffin*, 92 Ind. 487; (1884) *Jennings v. Durham*, 101 Ind. 391.

[b] (Sup. 1884)

Where the case is submitted to a jury, the finding is only for the court's information, and a motion for judgment on answers to interrogatories notwithstanding a general verdict is improper.—*Farmers' Bank of Mooresville v. Butterfield*, 100 Ind. 229.

[c] (Sup. 1891)

The trial court in a case of exclusive equity cognizance is not bound by the finding of the jury, as it may adopt the finding, but is not under obligation to do so.—*Whitlock v. Consumers' Gas Trust Co.*, 26 N. E. 570, 127 Ind. 62.

[d] (Sup. 1892)

The right of a court of chancery to submit questions of fact to a jury is not dependent on the legislative sanction given by Rev. St. 1881, § 409, and the right to disregard a verdict in making decree is justified by time-honored precedent.—*Brundage v. Deschler*, 131 Ind. 174, 29 N. E. 921.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 813-817.

See, also, 16 Cyc. pp. 422-426.

### § 382. — New trial.

[a] (Sup. 1885)

In chancery cases the verdict of the jury is merely advisory, and a motion for a venire de novo is not proper.—*Platter v. Elkhart County Com'rs*, 103 Ind. 360, 2 N. E. 544.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 818, 819.

See, also, 16 Cyc. pp. 426-428.

### § 385. Reception of evidence.

On reference, see post, § 404.

[a] (Sup. 1843)

On a hearing upon bill, answer, and exhibits, the exhibits must be proved.—*Ward v. Kelly*, 1 Ind. 101, Smith, 74.

[b] (Sup. 1854)

In chancery, exhibits may be proved at the hearing.—*Morton v. White*, 5 Ind. 338.

[c] (Sup. 1854)

In chancery, exhibits may be proved by parol.—*Gafney v. Reeves*, 6 Ind. 71.

## [d] (Sup. 1855)

An exhibit may be proved in chancery at the hearing, and hence the proof does not necessarily become part of the record.—*Foot v. Le-favour*, 6 Ind. 473.

## [e] (Sup. 1860)

The execution of a promissory note mentioned in the bill, but not made an exhibit, cannot be proved orally.—*Bennett v. Welch*, 15 Ind. 332.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 822-824, 833.

See, also, 16 Cyc. p. 411.

## § 390. Objections and exceptions.

Necessity of motion for new trial for purpose of review, see APPEAL AND ERROR, § 283.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 831.

See, also, 16 Cyc. p. 419.

## § 391. Waiver and correction of irregularities and errors.

## [a] (Sup. 1847)

Immediately before a cause in chancery was set down for hearing, the defendant filed the exhibits referred to in his answer, and gave verbal notice that he would prove their execution viva voce at the hearing. He examined several witnesses at the hearing, without objection, as to the execution of the exhibits. *Held*, that it was too late for the complainant, after such examination, to object to said testimony.—*Chesbro v. Campbell*, 8 Blackf. 401.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 832.

See, also, 16 Cyc. p. 420.

## § 392. Rehearing.

In suits for divorce, see DIVORCE, § 151.

In suits for partition, see PARTITION, § 72.

In suits to foreclose mortgages, see MORTGAGES, § 482.

## [a] (Sup. 1878)

That the judgment in a case in which an answer was filed is broader than the prayer of the complaint is not ground for a rehearing.—*Humphrey v. Thorn*, 63 Ind. 206.

## [b] (Sup. 1884)

Though in a suit for an injunction the court may submit questions to a jury, the ultimate finding must be by the court, and, until made, a motion for a new trial is premature.—*Pence v. Garrison*, 93 Ind. 345.

## [c] (Sup. 1891)

The admission of improper evidence by a master is not ground for a new trial.—*Lewis v. Godman*, 129 Ind. 359, 27 N. E. 503.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 833-851.

See, also, 16 Cyc. pp. 508-512.

## IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

Authority to take acknowledgments, see ACKNOWLEDGMENT, § 16.

In suits to foreclose mortgages, see MORTGAGES, § 479.

Reference in action at law, see REFERENCE.

Reference to take and state account, see ACCOUNT, § 20.

Review of questions of fact, see APPEAL AND ERROR, §§ 1016, 1017.

Taking and filing proofs, see ante, § 349.

## § 393. Appointment, qualification, and tenure.

## [a] (Sup. 1910)

A federal Circuit Court, having appointed a receiver for a railroad, is warranted in making the appointment of a commissioner for the purpose of hearing garnishment and attachment proceedings against employes of a railroad, since such commissioner is viewed as an officer of the court and under its control, and is generally required to report his actions to the court, and relief from his acts is obtained by application to the court.—*Harmon v. Best*, 91 N. E. 19.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 852, 853.

See, also, 16 Cyc. pp. 430, 431.

## § 404. Evidence on reference.

## [a] (Sup. 1854)

The intention of Rev. St. 1843, p. 844, § 76, requiring a master to take down the evidence on an examination before him only when required by one of the parties, is to permit the parties to put the evidence on the record for the purpose of impeaching, and not of supporting, the report.—*McKinney v. Pierce*, 5 Ind. 422.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 886-892.

See, also, 16 Cyc. p. 442.

## § 406. Report.

Presentation of exceptions in bill of exceptions for purpose of review, see APPEAL AND ERROR, § 549.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 893-904, 920-923.

See, also, 16 Cyc. pp. 444-447.

## § 408. — Return of evidence.

## [a] (Sup. 1854)

A master, in his report, under Rev. St. 1843, is not obliged to report the evidence, un-

less he be required so to do by one of the parties.—*McKinney v. Pierce*, 5 Ind. 422.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, §§ 901, 902.

See, also, 16 Cyc. p. 446.

**§ 409. — Operation and effect.**

[a] (Sup. 1854)

A master's report will not be presumed to be correct, but must be supported by evidence, unless such evidence is dispensed with by statute.—*McKinney v. Pierce*, 5 Ind. 422.

A master's report, under Rev. St. 1843, p. 844, § 76, requiring a master to take down the evidence only when required to do so by one of the parties, like the verdict of a jury, until the contrary is shown, will be presumed to be right; and a balance reported will be regarded by the chancellor as a fact established by proof.—*Id.*

[b] (Sup. 1877)

The question of allowing interest on a balance found to be due on an accounting before a commissioner is one of the questions for a finding by the commissioner. If his report does not allow interest, it is error for the court to render judgment for the sum reported due, and an additional sum as interest from the date of the balance. Interest from the date of the commissioner's report may be awarded by the court, but not interest previous to it.—*Reid v. State ex rel. Frybarger*, 58 Ind. 406.

[c] (Sup. 1885)

The court is not concluded by the master commissioner's findings, but may disregard them and act upon the evidence reported.—*Bremmerman v. Jennings*, 101 Ind. 253.

[d] (Sup. 1891)

The court is at liberty to reject the conclusions reached by the master commissioner and from the legitimate evidence of the cause state conclusions of its own.—*Lewis v. Godman*, 27 N. E. 563, 129 Ind. 359.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, §§ 904, 920–923.

**§ 410. Objections and exceptions to report and hearing thereof.**

Presentation in appeal record of grounds of review, see **APPEAL AND ERROR**, § 501.

[a] (Sup. 1883)

A master was ordered to report the evidence, but, instead, found the facts. On motion of plaintiff, the judge stated conclusions of law applicable to such facts, and rendered judgment accordingly. *Held*, that plaintiff waived his right to move for a new trial at the next term, or to question the correctness of the finding of facts.—*Borchus v. Sayler*, 90 Ind. 439.

[b] (Sup. 1885)

Additional exceptions to a master commissioner's report may be allowed to be filed after

it has been returned into court.—*Bremmerman v. Jennings*, 101 Ind. 253.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, §§ 905–919.

See, also, 16 Cyc. pp. 447–455.

**X. DECREE AND ENFORCEMENT THEREOF.**

Decision on demurrer, see ante, §§ 242–247.

Requisites and sufficiency to authorize judicial sales in general, see **JUDICIAL SALES**, § 3.

Reversal of decree on bill of review, see post, § 466.

Validity of decree against persons not parties, see **JUDGMENT**, § 243.

**In particular proceedings.**

See—

**CANCELLATION OF INSTRUMENTS**, § 60.

**CREDITORS' SUIT**, § 51.

Custody of children on divorce of parents.

**DIVORCE**, §§ 302, 303, 305.

Disposition of property on divorce. **DIVORCE**, § 254.

Dissolution and accounting by partnership. **PARTNERSHIP**, § 344.

**DIVORCE**, §§ 159–174.

Enforcement of mechanic's lien. **MECHANICS' LIENS**, § 291.

Of vendor's lien. **VENDOR AND PURCHASER**, § 285.

Establishment and enforcement of trust. **TRUSTS**, § 375.

Foreclosure of mortgage—

**CHATTEL MORTGAGES**, § 283.

**MORTGAGES**, §§ 485–499.

**INJUNCTION**, §§ 207–211.

**INTERPLEADER**, § 33.

**PARTITION**, §§ 73, 95.

Permanent alimony on divorce. **DIVORCE**, §§ 243, 245, 260–276.

**QUIETING TITLE**, § 52.

Redemption from mortgage sale. **MORTGAGES**, § 621.

**REFORMATION OF INSTRUMENTS**, § 48.

Restraining enforcement of taxes. **TAXATION**, § 611.

Setting aside transfers in fraud of creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, §§ 311–316.

**SPECIFIC PERFORMANCE**, § 131.

Support of children on divorce of parents. **DIVORCE**, §§ 308, 309, 311.

**§ 415. Nature and essentials in general.**

[a] (Sup. 1865)

The record stated that the cause was set down for hearing on bill, answers, and depositions. A writing under seal, on which the bill was founded, was copied in the bill, and also made an exhibit. The record also showed that it had been proved. *Held*, that the omission to state that the cause was set down on the exhibit as well as the bill, etc., was a mere omission in

a matter of form.—*Foot v. Lefavour*, 6 Ind. 473.

[b] (Sup. 1890)

A decree in an action to correct an erroneous description in a deed is not void because it misdescribes the premises, where reference is made therein to a conveyance containing a good description.—*Thain v. Rudisill*, 126 Ind. 272, 26 N. E. 46.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 932-944.  
946, 950, 951.

See, also, 16 Cyc. pp. 471-474.

#### § 417. Decree pro confesso.

As subject of bill of review, see post, § 443.  
In suits for divorce, see DIVORCE, §§ 159-161.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 952-985.  
See, also, 16 Cyc. pp. 474, 490-497.

#### § 418. — Requisites and validity.

[a] (Sup. 1829)

The return on a subpoena: "Executed on A. M. 25 March, 1826, J. P. not found. 20 March, 1826. R. J., Sheriff,"—is not sufficient to authorize a decree on a pro confesso.—*Pegg v. Capp*, 2 Blackf. 257.

[b] (Sup. 1829)

Where a particular claim in a bill is not explicitly answered, and complainant excepts to the answer, and insists on a full answer, which is refused, he will be entitled to a decree by confession to the extent of such claim.—*Pegg v. Davis*, 2 Blackf. 281.

[c] Where a bill is taken pro confesso, certain and definite allegations are to be taken as true. Uncertain ones are to be proved before a decree.—(Sup. 1829) *Pegg v. Davis*, 2 Blackf. 281; (1833) *Platt v. Judson*, 3 Blackf. 235; (1838) *Fellows v. Shelmire*, 5 Blackf. 48; (1846) *Close v. Hunt*, 8 Blackf. 254; (1852) *Colerick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505; (1853) *Laney v. Laney*, 4 Ind. 149.

[d] (Sup. 1832)

On a bill against an administrator to account, the matter was referred to a master, and the defendant was to give notice to the complainant of the time and place of the hearing before the master. The defendant took no steps in the case during the succeeding vacation, and at the next term the court rendered a final decree for the complainant. *Held*, that there was no error in the proceeding.—*Murdock v. Holland's Heirs*, 3 Blackf. 114.

[e] (Sup. 1833)

It is no objection to a final decree on a pro confesso against a nonresident that it was entered on the first day of the term after publication made; proof of publication being had.—*Platt v. Judson*, 3 Blackf. 235.

[f] (Sup. 1841)

A bill may be taken as confessed if the defendant, after service of process, does not demur, plead, or answer in time.—*Elston v. Drake*, 5 Blackf. 540.

[g] (Sup. 1843)

A decree pro confesso cannot be rendered against a defendant who has not been served with process.—*Reed v. Glover*, 6 Blackf. 345.

[h] (Sup. 1845)

If a bill in equity be taken as confessed on account of the nonappearance of the defendant, and a final decree be rendered against him, the record should show that the court had jurisdiction of the person of the defendant.—*Shipley v. Mitchell*, 7 Blackf. 472.

[i] (Sup. 1846)

On a bill in chancery against husband and wife, the husband answered alone, and confessed the bill. *Held*, that a decree against both, without other evidence, was erroneous.—*Comley v. Hendricks*, 8 Blackf. 189.

[j] (Sup. 1846)

If an issue be formed in equity, by a plea to the bill and a replication to the plea, a default cannot be entered against the defendant, and the bill be taken as confessed, while the issue is undisposed of.—*Sampson v. Hendricks*, 8 Blackf. 288.

[k] (Sup. 1850)

In a bill in chancery against an executrix to obtain payment of certain accounts against a decedent, where the defendant was nonresident and publication of the pending of the suit was made and afterwards proved, the bill was taken as confessed, and final decree, without proof, rendered for the complainants. *Held*, that the decree was erroneous.—*Trimble v. White*, 2 Ind. 205.

[l] (Sup. 1850)

St. 1843 (Rev. St. p. 836), which permits the court, where a bill is taken as confessed, to proceed to a decree at the same term, and that such decree shall be deemed absolute, etc., does not prescribe the manner of proceeding, and does not preclude the court in all cases from requiring proof of the facts alleged in the bill before the rendition of a final decree for the complainants.—*Bowman v. Hall*, 2 Ind. 206.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 952-971.  
See, also, 16 Cyc. pp. 490, 497.

#### § 419. — Opening or setting aside.

[a] (Sup. 1841)

The statute authorizing decrees against nonresident defendants to be opened within a year after their rendition applies to decrees by the probate court.—*Heistand v. Kuns*, 6 Blackf. 95.

[b] (Sup. 1890)

A decree pro confesso should not be set aside to permit a defendant to file an answer



which fails to show a meritorious defense.—*West v. Miller*, 125 Ind. 70, 25 N. E. 143.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 972-985.

See, also, 16 Cyc. pp. 513-516

**§ 423. Nature and extent of relief in general.**

[a] (App. 1907)

Where, in a suit in equity, the court had jurisdiction of the parties and subject-matter, it had power to determine the rights of the parties on the facts and grant any relief that might be proper within the issues.—*Roberts v. Leutzke*, 89 Ind. App. 577, 78 N. E. 635.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 986-990, 992-998, 1000-1014.

See, also, 16 Cyc. pp. 478-487.

**§ 424. Incidental or alternative relief.**

In suits for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, § 57.

In suits for specific performance, see SPECIFIC PERFORMANCE, §§ 127, 128.

Retention of jurisdiction, once acquired, to give relief, see ante, §§ 37-41.

[a] (Sup. 1886)

Since the adoption of the Code of 1852, in a suit for a breach of a written contract, a mistake in the instrument may be corrected.—*Rhode v. Green*, 26 Ind. 83.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, § 901.

**§ 425. Denial of relief.**

[a] (Sup. 1850)

Where the charges made in the bill and denied by the answers were not sustained by the proof, the bill was rightly dismissed, without reference to the question whether the facts charged would, if fully proved, have constituted sufficient grounds for the relief prayed for.—*Young v. Loree*, 2 Ind. 27.

**§ 426. Relief to defendant.**

In suits for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, § 59.

In suits to foreclose mortgages, see MORTGAGES, § 491.

In suits to quiet title, see QUIETING TITLE, § 51.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 999, 1000.

See, also, 16 Cyc. pp. 481, 482.

**§ 427. Conformity to pleadings, proofs, and findings.**

Ground for new trial, see ante, § 392.

[a] (Sup. 1824)

It is no objection to a decree for relief that it is inconsistent with the specific prayer for relief, where it is consistent with the case made

by the bill, and the bill contains a general prayer for relief.—*Crumbaugh v. Smock*, 1 Blackf. 305.

[b] (Sup. 1856)

If the prayer of a bill in equity is for general, as well as special, relief, the court has power to mold the decree to meet the case made on the record.—*Spivey v. Frazee*, 7 Ind. 661.

[c] (Sup. 1860)

The court will grant any relief called for by the case and the issue made, without regard to the prayer.—*Hunter v. McCoy*, 14 Ind. 528.

[d] (Sup. 1878)

The court in granting relief is confined to the prayer in the complaint only in cases where there is no answer, and in all other cases relief may be granted consistent with the complaint.—*Humphrey v. Thorn*, 63 Ind. 296.

[e] (Sup. 1881)

A prayer for general relief is sufficient to support any decree warranted by the allegations of the bill.—*Shotts v. Boyd*, 77 Ind. 223.

[f] (Sup. 1882)

A suit for an injunction against apprehended injuries to real estate may be treated as a suit to quiet title if the averments are proper and sufficient, and relief decreed accordingly although not specially demanded.—*Stockton v. Lockwood*, 82 Ind. 158.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 1001-1014;

24 CENT. DIG. FRAUD. CONV. § 966.

See, also, 16 Cyc. pp. 483-487.

**§ 429. Amendment or modification.**

In suits to foreclose mortgages, see MORTGAGES, § 495.

[a] (Sup. 1868)

An application to correct a clerical error in a decree will be denied when the correction sought would not, to any extent, or for any purpose, change the effect of the decree.—*Goodwine v. Hedrick*, 29 Ind. 383.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. EQUITY, §§ 1020-1033.

See, also, 16 Cyc. pp. 501-512.

**§ 430. Opening or vacating.**

Bill of review, see post, §§ 443-466.

Opening decree pro confesso, see ante, § 419.

In suits for divorce, see DIVORCE, § 165.

In suits to foreclose mortgages, see MORTGAGES, § 496.

[a] (Sup. 1838)

A decree cannot be set aside, after the term at which it is rendered, except in the case of nonresidents, or as provided by statute.—*Gullett v. Housh*, 5 Blackf. 33.

[b] A decree in equity, pronounced after Code 1852, in a cause commenced before, is to be governed, as to the mode of setting it aside,

by that Code.—(Sup. 1858) *McGregor v. Axe*, 10 Ind. 362; (1859) *Maxwell v. Mullis*, 12 Ind. 99.

[c] (Sup. 1860)

On the return of the verdict in a proceeding in chancery in the probate court, a motion was made to set it aside and grant a new trial. The evidence adduced on the trial was not before the judge. *Held*, that the motion was properly overruled.—*Clem v. Durham*, 14 Ind. 263.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1034-1047.

See, also, 16 Cyc. pp. 501-512.

#### § 431. Construction and operation.

[a] (Sup. 1834)

In an action by an administrator in equity for embezzling the goods of the intestate, the decree was against two defendants for a certain sum, and stated that they should be jointly and severally liable for the same. *Held*, that the words "jointly and severally" are merely surplusage, as a decree in chancery renders defendants jointly and severally liable.—*Thorn v. Tyler*, 3 Blackf. 504.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1048-1051.

See, also, 16 Cyc. p. 498; note, 36 Am. Dec. 37.

#### § 437. Enforcement in general.

Action of debt on decree, see JUDGMENT, § 902.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1053, 1054.

See, also, 16 Cyc. pp. 499, 500; note, 93 Am. St. Rep. 154.

#### § 441. Bill to enforce decree.

[a] (Sup. 1831)

A bill of revivor by heirs to revive a decree in favor of their ancestor must be filed in the court in which the decree was rendered, although the land to which the decree relates has, since the decree was obtained, been set off to another county.—*Arnold v. Styles*, 2 Blackf. 391.

[b] (Sup. 1840)

A bill in equity will lie to carry a former decree into execution, when, from the neglect of the parties or other cause, subsequent events have intervened, making the further aid of the court necessary; and a person not a party to the decree, when his rights are affected by it, may resort to this remedy.—*Linton v. Potts*, 5 Blackf. 396.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1058-1064.

See, also, 16 Cyc. p. 500.

### XI. BILL OF REVIEW.

#### § 443. Decrees reviewable.

[a] (Sup. 1843)

A defendant to a bill in equity, having negligently suffered a decree to go against him by default, cannot allege his own negligence in support of a bill of review.—*Gullett v. Housh*, 7 Blackf. 52.

[b] (Sup. 1892)

A decree entered by consent is not the subject of a bill of review.—*Indianapolis, D. & W. R. Co. v. Sands*, 133 Ind. 433, 32 N. E. 722.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1071-1077;

13 CENT. DIG. COURTS, § 494.

See, also, 16 Cyc. p. 518.

#### § 444. Grounds.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1078-1094.

See, also, 16 Cyc. pp. 526-532.

#### § 446. — Errors and irregularities.

[a] A bill of review will lie for errors appearing on the face of the decree.—(Sup. 1843) *Gullett v. Housh*, 7 Blackf. 52; (1867) *Kemp v. Mitchell*, 29 Ind. 163.

[b] (Sup. 1874)

A bill of review for error of law appearing in the proceedings and judgment cannot be sustained, unless the errors are such that the Supreme Court would reverse the judgment on appeal.—*Richardson v. Howk*, 45 Ind. 451.

[c] (Sup. 1883)

A bill of review will not lie where the only error, if any, is in the provisions of a decree, and the complaint is sufficient, process was duly served, and all the proceedings were strictly regular.—*Hardy v. Miller*, 89 Ind. 440.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. EQUITY, §§ 1079-1090.

See, also, 16 Cyc. p. 526.

#### § 447. — New matter.

Grounds for nonsuit, see DISMISSAL AND NON-SUIT, § 53.

[a] (Sup. 1838)

A., the obligee in a title bond, filed his bill to obtain the legal title against B., the obligor, and C., the subsequent grantee of B., and his wife, and obtained a decree. B. applied for a bill of review on the ground of newly-discovered evidence, which was that B. had at most only a life estate in the land, the fee being in his wife, to which life estate only A.'s bond entitled him. *Held*, that the evidence was material.—*Jenkins v. Prewitt*, 5 Blackf. 7.

[b] (Sup. 1843)

If a defendant in equity know of certain facts necessary to his defense, before the rendition of a decree against him, he cannot sup-

port a bill of review by alleging that he has, since the decree, discovered certain evidence of those facts, without showing that he could not have proved them by other testimony.—*Gullett v. Housh*, 7 Blackf. 52.

[c] A bill of review lies for newly-discovered evidence, not known, and which by the use of due diligence could not have been known to the party in time for trial.—(Sup. 1843) *Gullett v. Housh*, 7 Blackf. 52; (1867) *Kemp v. Mitchell*, 29 Ind. 163.

[d] (Sup. 1845)

In order to maintain a bill of review on the discovery of new matter, the matter must not only be new, but such as the party, by reasonable diligence, could not have known.—*Jenkins v. Prewitt*, 7 Blackf. 329.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 1091-1094.  
See, also, 16 Cyc. pp. 530-532; note, 4 L. R. A. (N. S.) 865.

#### § 452. Limitations and laches.

[a] (Sup. 1838)

In this state, the statute of limitations of writs of error applies to bills of review.—*Jenkins v. Prewitt*, 5 Blackf. 7.

Where a bill of review is founded on newly-discovered evidence, the statute of limitations of writs of error, which applies to bills of review, does not begin to run, except from the time of the discovery of the new evidence.—Id.

The question of diligence is examined on an application for a bill of review for newly-discovered evidence, but this does not preclude inquiry respecting it on the hearing.—Id.

[b] (Sup. 1842)

A bill of review founded on newly-discovered evidence was filed October 2, 1832, and the discovery of the new matter was averred to have been made in the summer of 1828. *Held*, that the bill appeared to be filed in time, as being within five years from the discovery of new matter.—*Jenkins v. Prewitt*, 6 Blackf. 237.

[c] (Sup. 1843)

The statute of limitations may be relied on in bar of a bill of review.—*Gullett v. Housh*, 7 Blackf. 52.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 1101-1109.  
See, also, 16 Cyc. p. 521.

#### § 457. Parties.

[a] (Sup. 1855)

As a general rule, a bill of review ought to have the same parties that were to the proceeding sought to be reversed; but they may be made complainants or defendants in accordance with their respective interests in the matter to be reviewed.—*Sloan v. Whiteman*, 6 Ind. 434.

[b] (Sup. 1884)

All parties to the original action must be joined in a bill to review.—*Concannon v. Noble*, 96 Ind. 326.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 1090.  
See, also, 16 Cyc. pp. 520, 521.

#### § 460. Form and sufficiency.

[a] (Sup. 1838)

A bill of review for newly discovered evidence must show where the new evidence was discovered, and, if it does not, it will be bad on demurrer.—*Jenkins v. Prewitt*, 5 Blackf. 7.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 1117-1123.  
See, also, 16 Cyc. p. 525.

#### § 461. Plea and answer.

[a] (Sup. 1838)

Where to a bill of review on newly discovered matter it is pleaded that such matter was known to the complainant in time to have been used in the original cause, or that the newly discovered matter might, by the use of reasonable diligence, have been known to the complainant in time to have been used in the first cause, it is no objection to the plea in either case that the facts pleaded had been previously examined on the motion for leave to file the bill of review.—*Jenkins v. Prewitt*, 5 Blackf. 7.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, § 1124.  
See, also, 16 Cyc. p. 533.

#### § 462. Demurrer to bill.

[a] (Sup. 1874)

If a demurrer be filed to a bill to review a judgment on the ground of new facts, or facts newly discovered, and the demurrer is overruled, it does not dispose of the case, and the defendant must answer.—*Richardson v. Howk*, 45 Ind. 451.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Equity, §§ 1125, 1126.  
See, also, 16 Cyc. p. 533.

#### § 464. Hearing and determination.

[a] (Sup. 1843)

A bill of review containing no equity on its face must on final hearing be dismissed.—*Gullett v. Housh*, 7 Blackf. 52.

[b] (Sup. 1874)

An exception to a ruling of law must have been taken at the trial, and cannot first be raised by means of a bill of review.—*Richardson v. Howk*, 45 Ind. 451.

[c] (Sup. 1874)

Objection may first be raised on a bill of review that the complaint is insufficient, though

no exception thereto was taken at the trial.—  
Berkshire v. Young, 45 Ind. 461.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, §§ 1129-1140.

See, also, 16 Cyc. p. 533.

**§ 466. Operation and effect of reversal  
of former decree.**

[a] (Smp. 1881)

An action for review, when successful,  
merely reverses the original judgment and leaves  
the cause to proceed again.—Leech v. Perry, 77  
Ind. 422.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Equity, § 1144.

**EQUITY OF REDEMPTION.**

See—

CHATTEL MORTGAGES, §§ 293-296.

Judicial sale of. JUDICIAL SALES, § 50.

MORTGAGES, §§ 591-624.

**ERASURE.**

See—

ALTERATION OF INSTRUMENTS.

WILLS, §§ 172, 173, 176.

**ERROR.**

In transmission of telegraph or telephone mes-  
sage, see TELEGRAPHS AND TELEPHONES, §  
39.

**ERROR OF JUDGMENT.**

Liability of city for error of judgment in de-  
vising plan for sewer, see MUNICIPAL COR-  
PORATIONS, § 831.

**ERROR, WRIT OF.**

See—

APPEAL AND ERROR.

Coram nobis. CRIMINAL LAW, § 997.

CRIMINAL LAW, §§ 1004-1190.

JUSTICES OF THE PEACE, §§ 139-191.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# ESCAPE.

## *Scope-Note.*

[INCLUDES voluntary departure and attempts of prisoners to depart from lawful custody of officers or other persons, or from any place where they are lawfully confined, with or without force or fraud, and voluntary or negligent allowance by officers of such departure, aiding such escape, and concealing or harboring escaped prisoners, as offenses against public justice and authority; nature and elements of the crimes of escape, jail breaking, prison breach, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES civil liabilities of officers for permitting escape (see *Officers; Sheriffs and Constables*; and other specific heads); resisting or obstructing arrest (see *Obstructing Justice*); and delivery of prisoners from custody by others (see *Rescue*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

- § 1. Nature and elements of offenses in general.
- § 5. Aiding escape.
- § 6. Defenses.
- § 7. Persons liable.
- § 9. Indictment or information.

## *Cross-References.*

### *See—*

Accused, or attempts to escape, as evidence of guilt. CRIMINAL LAW, § 351.  
Animal from inclosure as contributory negligence of owner. RAILROADS, § 423.  
Fire from right of way to adjoining lands, liability of railroad company for permitting. RAILROADS, § 457.  
To adjoining land. NEGLIGENCE, § 21.  
OBSTRUCTING JUSTICE.

Prisoners arrested in civil proceedings, civil liability of prison officers for permitting. PRISONS, § 16.  
Civil liability of sheriffs and constables for permitting. SHERIFFS AND CONSTABLES, §§ 104, 139, 170.  
RESCUE.  
Resentence after escape and capture. CRIMINAL LAW, § 977.

### § 1. Nature and elements of offenses in general.

[a] (Sup. 1908)

An escape is where one who is under arrest gains his liberty before he is delivered by due course of law, and where an escape from confinement is effected by the prisoner with force, it is called a "prison breaking," and where it is effected by others with force, it is known as a "rescue."—*State v. Sutton*, 84 N. E. 824, 170 Ind. 473.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escape, § 1.

See, also, 16 Cyc. pp. 538-542; note, 44 C. C. A. 4.

### § 5. Aiding escape.

[a] (Sup. 1842)

The refusal, without a sufficient excuse, to assist a constable in preventing the escape of a person in his custody, is an indictable offense.—*State v. Deniston*, 6 Blackf. 277.

[b] (Sup. 1867)

When the accused is on bail, the return of a verdict of guilty does not, of itself, terminate his right to his liberty, or place him in the custody of the sheriff, nor does it give to the sheriff any right to arrest or imprison him; hence a prosecution cannot be maintained, under such circumstances, against one who aids in the escape of the accused.—*Redman v. State*, 28 Ind. 205.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escape, § 6.

See, also, 16 Cyc. p. 542.

### § 6. Defenses.

[a] (Sup. 1875)

It is no defense to an action for a negligent escape that the sheriff used care in keeping the prisoner.—*State ex rel. Shirk v. Mullen*, 50 Ind. 598.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escape, § 7.

See, also, note, 15 L. R. A. 190.

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### § 7. Persons liable.

[a] (Sup. 1867)

Under 2 Gav. & H. St. §§ 55, 56, providing that, where a convict escapes, he shall, on conviction, be imprisoned, not exceeding double the length of the time of his original sentence, to commence from the expiration of the original term of his imprisonment, and that, if any prisoner escapes, he may be retaken, notwithstanding that the term of his sentence has expired, and he shall remain so imprisoned until tried for the escape.—*Ex parte Clifford*, 29 Ind. 106.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escape, § 8.

### § 9. Indictment or information.

[a] (Sup. 1842)

Where one is indicted for refusing, without sufficient excuse, to assist a constable in preventing the escape of a person in his custody, the indictment must aver that the defendant was informed of the official character of the constable.—*State v. Deniston*, 6 Blackf. 277.

[b] (Sup. 1879)

An indictment for aiding in the escape of a prisoner in custody on a charge of felony set forth the indictment against the prisoner, and also the substance of the charge against him. *Held* that, as it was not necessary to set forth said indictment, the question whether it was good or bad was immaterial.—*Gunyon v. State*, 68 Ind. 79.

[c] (Sup. 1881)

It is no ground for quashing an indictment charging a constable with permitting a prisoner charged with riot to escape that the indictment failed to allege that the prisoner was in defendant's custody by virtue of a warrant, or that the warrant was not set out in the indictment.—*State v. Sparks*, 78 Ind. 166.

[d] (Sup. 1887)

An indictment charging the defendants with unlawfully and feloniously aiding and assisting the escape of a prisoner in the custody of the sheriff in the Indiana reformatory for women, and describing the mode of effecting the escape "from the custody of said sheriff and from said jail," charges the felony of aiding a prisoner to escape, defined in Rev. St. 1881, § 2029, and is not bad for duplicity because it also charges the misdemeanor defined in section 2031, of "aiding prisoner to escape from jail."—*Stewart v. State*, 111 Ind. 554, 13 N. E. 59.

[e] (Sup. 1895)

An information and affidavit on a prosecution under Rev. St. 1881, § 2029 (Rev. St. 1894, § 2116), making it a felony to assist a prisoner in escaping, is sufficient as against a motion in arrest of judgment, although the manner in which defendant aided the escape is not averred.—*Campton v. State*, 39 N. E. 916, 140 Ind. 442.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escape, §§ 9, 11-16.

See, also, 16 Cyc. pp. 543-546.

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# ESCHEAT.

## Scope-Note.

[INCLUDES reversion of property, real or personal, to the state, for want of persons legally competent to hold or take it; and conveyance, release, and enforcement of the rights of the state.

[EXCLUDES disabilities to inherit, etc., of particular classes of persons (see *Aliens; Bastards*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 6. Enforcement.
- § 7. Operation and effect.
- § 8. Disposition of property escheated.

## Cross-References.

See—

Disabilities of aliens. **ALIENS**, §§ 5-14.

Laws giving right to hold property as violation of vested right to escheat. **CONSTITUTIONAL LAW**, § 93.

Payment of proceeds of estate to public officers on failure to prove heirship. **DESCENT AND DISTRIBUTION**, § 71.

Property of bastard. **BASTARDS**, § 104.

Quo warranto to recover escheated property. **QUO WARRANTO**, §§ 1, 30.

Taxation of escheated land. **TAXATION**, § 176.  
Sale of. **TAXATION**, §§ 631, 821.

### § 6. Enforcement.

Ry action on bond of administrator, see **EXECUTORS AND ADMINISTRATORS**, § 537 (6).  
Duties of attorney general, see **ATTORNEY GENERAL**, § 7.

[a] (**Sup.** 1876)

2 Rev. St. p. 545, §§ 143, 145, provide that where, from the final settlement report of the administrator of a decedent's estate, it appears that there is a surplus in his hands for distribution, upon the expiration of two years from the filing and approval of such report, without the appearance of any heirs to claim such surplus, it escheats to the state; and it is the duty of the court having jurisdiction of such estate to order such administrator to pay such surplus to the proper county treasurer, for the use of the state, and, on his failure to obey the order, the court shall remove him and appoint his successor, who shall sue him on his bond. *Held*, that the failure of the court to make such order, or direct such removal, warrants a suit by the attorney general on behalf of the state, under 1 Rev. St. 1876, p. 152, § 9, providing that in cases where officers whose duty it is to collect money unclaimed in estates, or that escheats to the state for want of heirs, fail or refuse to do so, the attorney general shall bring proceedings to compel the payment of the money.—*Fuhrer v. State ex rel. Attorney General*, 55 Ind. 150.

[b] (**Sup.** 1878)

In an action in the name of the state, on the relation of the attorney general, to recover possession of real estate alleged to have escheated to the state, all defenses are admissible in evidence under the general denial.—*State ex rel. Attorney General v. Meyer*, 63 Ind. 33.

On information by the attorney general to recover lands alleged to be escheated for want of heirs, it is a sufficient answer to aver title through one adopted under the laws of another state and filing record of such adoption.—*Id.*

[c] (**Sup.** 1881)

Where, in action to recover land, the prosecuting attorney intervenes and files an information to recover the land in question in behalf of the state, on the ground that it has escheated, under Code, § 761, providing for the recovery of escheated lands, in the event of the original plaintiff dismissing his cause of action, the issues between the defendant and the state may still be determined in the same action.—*Reid v. State ex rel. Thompson*, 74 Ind. 252.

Where an alien dies owning real estate, and leaving known devisees claiming the same, the state must first establish her title thereto by information found, before she is entitled to possession.—*Id.*

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Where a counterclaim for escheated lands was filed by the state within two years after Act Dec. 21, 1872, was passed, it was not barred by section 250 of that act, since said law was not in force when the lands became liable to forfeiture, and two years was a reasonable time within which to bring the action for forfeiture.—Id.

In an action to recover lands, an information may be filed as a counterclaim by the prosecuting attorney, under Code, § 761, providing that, when any property shall escheat, an information may be filed by the prosecuting attorney in the circuit court for the recovery of such property in behalf of the state.—Id.

[d] (Sup. 1882)

In an action to recover land as escheated, alleging that there were no resident heirs, the complaint must further allege that the nonresident alien heirs did not convey the land during eight years immediately preceding Act March 9, 1861, as by that act they might, and give good title.—State ex rel. Attorney General v. Witz, 87 Ind. 190.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escheat, §§ 7-17, 24.  
See, also, 16 Cyc. pp. 552-556; note, 2 L. R. A. (N. S.) 643.

#### § 7. Operation and effect.

Merger of lien for taxes, see TAXATION, § 513.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escheat, §§ 18, 19, 23.  
See, also, 16 Cyc. pp. 556-558.

#### § 8. Disposition of property escheated.

[a] (Sup. 1849)

To entitle the heirs of an alien to land of his ancestor, and which has escheated to the state, under the act of 1839, it must appear that the ancestor died in possession of the land.—Doe ex dem. Huddleston v. Lazenby, 1 Ind. 234, Smith, 203.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escheat, §§ 20-22.  
See, also, 16 Cyc. pp. 558, 559.

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# ESCROWS.

## Scope-Note.

[INCLUDES deeds, bonds, and other obligatory writings delivered to a person not a party thereto, to be held by him until the performance of a specified condition or the happening of a certain contingency, and then to be delivered to the grantee or obligee; and rights, duties, and liabilities of parties to such instruments and of the depositaries, as affected by the delivery thereof as escrows and the final delivery.

[EXCLUDES delivery as escrow as a compliance with the statute of frauds (see *Frauds, Statute of*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 1. Nature and requisites in general.
- § 2. Instruments deliverable in escrow.
- § 3. Depositaries.
- § 6. Conditions or contingencies.
- § 8. Operation and effect of delivery in escrow.
- § 14. Unauthorized or wrongful delivery by depositary.

## Cross-References.

See—

Filing to be delivered in escrow with pleading  
in action to enforce contract for sale of land.  
PLEADING, § 308.

Sufficiency of delivery of deed to third person  
in general. DEEDS, § 58.

### § 1. Nature and requisites in general.

[a] (Sup. 1844)

Whether a bond was delivered as an escrow, is a question for the jury.—*State ex rel. Lowry v. Bodly*, 7 Blackf. 355.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escrows, §§ 1-3, 5.

See, also, 16 Cyc. pp. 561-567.

### § 2. Instruments deliverable in escrow.

[a] (Sup. 1877)

A note cannot be delivered to the payee or his agent as an escrow.—*Stewart v. Anderson*, 59 Ind. 375.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escrows, § 4.

See, also, 16 Cyc. p. 563.

### § 3. Depositaries.

[a] (Sup. 1838)

A deed can never be delivered as an escrow to the grantee himself.—*Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49.

Delivery of a deed to the grantee, though purporting to be in escrow, is an absolute delivery thereof, and the condition is void.—*Id.*

[b] (Sup. 1850)

A bond cannot be delivered as an escrow to the obligee.—*State ex rel. Barrell v. Chrisman*, 2 Ind. 126.

[c] (Sup. 1857)

One co-obligor may, it seems, deliver a bond to another co-obligor as an escrow, but delivery of an instrument to an obligee or payee, or the agent of either, is absolute in law.—*Madison & I. Plank-Road Co. v. Stevens*, 10 Ind. 1.

[d] (Sup. 1865)

A surety cannot sign and deliver as an escrow to his principal a bond or note perfect on its face.—*Deardorff v. Foresman*, 24 Ind. 481.

[e] (Sup. 1866)

Where one executes a bond as security for another, and delivers it to the latter on his promise to procure the signature of other persons named, and the bond is delivered to the obligee without such signatures, it is valid, if there be nothing on the face of the bond to indicate that others were to sign it.—*Webb v. Baird*, 27 Ind. 368, 89 Am. Dec. 507.

[f] (Sup. 1877)

A note cannot be held by a payee as an escrow.—*Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Stump v. Same*, 56 Ind. 598.

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[g] (*Sup.* 1877)

A note cannot be delivered to the payee or his agent as an escrow.—*Stewart v. Anderson*, 59 Ind. 375.

[h] (*Sup.* 1889)

A note may be delivered as an escrow to a third person, but it cannot be so delivered to the payee.—*Clanin v. Esterly Harvesting Mach. Co.*, 21 N. E. 35, 118 Ind. 372, 3 L. R. A. 863.

[i] (*App.* 1894)

A note cannot be delivered in escrow to one acting at the time as attorney for the payee, and such delivery is delivered to the payee.—*Murray v. W. W. Kimball Co.*, 10 Ind. App. 141, 37 N. E. 736.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escrows, § 6.

See, also, 16 Cyc. pp. 571-575.

### § 6. Conditions or contingencies.

Application of statute of frauds, see FRAUDS, STATUTE OF, § 99.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escrows, § 8.

See, also, 16 Cyc. pp. 564-567.

### § 8. Operation and effect of delivery in escrow.

[a] (*Sup.* 1884)

A deed held as an escrow conveys no title.—*Burkham v. Burk*, 96 Ind. 270.

[b] (*App.* 1906)

A deed in escrow conveys no title before delivery.—*Corr v. Martin*, 37 Ind. App. 655, 77 N. E. 870.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escrows, §§ 9, 10.

See, also, 16 Cyc. p. 568.

### § 14. Unauthorized or wrongful delivery by depositary.

Estoppel to take advantage of, see ESTOPPEL, § 90.

[a] (*Sup.* 1855)

Where a deed is deposited as an escrow to be delivered on grantee's performance of a particular act, and is passed to him before performance, his possession does not import a delivery.—*Peter v. Wright*, 6 Ind. 183.

Where a deed from M. to W. was delivered by M. to O. as an escrow, to be delivered to W. on his paying a certain sum in cash, and O. afterwards delivered the deed to W. on receiving the promissory note of one B., it was held that, without M.'s consent, the delivery by O. was ineffectual, and the estate remained in M.—*Id.*

[b] An escrow delivered by the depositary before compliance with the conditions on which

it was to be delivered is inoperative.—(*Sup.* 1864) *Berry v. Anderson*, 22 Ind. 36; (1881) *Robbins v. Magee*, 76 Ind. 381; (1884) *Stringer v. Adams*, 98 Ind. 539.

[c] (*Sup.* 1881)

Where the depositary of an escrow delivers it before compliance with the condition upon which he received it, the grantor, by acting on the belief that the condition had been complied with before such delivery, does not estop himself from setting up its invalidity.—*Robbins v. Magee*, 76 Ind. 381.

[d] (*Sup.* 1884)

C. contracted to sell land to M., a deed to be delivered on payment of an installment of the price. The deed was left with C.'s attorney to be delivered on payment. No payment was ever made and the deed was not delivered, M. abandoning the purchase. The deed was improperly obtained and recorded, and there was then a regular chain of conveyances to defendant. C. was absent and knew nothing of the transaction. Held, on demurrer, that the complaint by C. against defendant to quiet title, averring these facts, was good.—*Henry v. Carson*, 96 Ind. 412.

[e] (*Sup.* 1886)

Where a deed is placed in the hands of a third person, to be delivered to the grantee upon the performance of a stated condition, and the grantee is put in possession of the land, and the deed delivered to him in violation of the condition, and the deed recorded, a purchaser who buys in good faith, pays full value, and has no notice, will hold the land, for the reason that the grantor is estopped to claim title as against such a purchaser.—*Quick v. Milligan*, 108 Ind. 419, 9 N. E. 302, 58 Am. Rep. 49.

[f] (*Sup.* 1889)

One in whose hands a promissory note is placed in escrow, and who, by delivering it contrary to the terms of the escrow, compels the maker to pay the note to an innocent indorsee, is liable therefor in damage to the maker.—*Riggs v. Trees*, 120 Ind. 402, 22 N. E. 254, 5 L. R. A. 696.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Escrows, §§ 17-20.

See, also, 16 Cyc. pp. 579-582; note, 17 L. R. A. 511.

## ESTABLISHMENT.

See—

Boards of health. HEALTH, § 3.

BOUNDARIES, §§ 27-56.

BRIDGES, §§ 2-26.

CANALS, §§ 3-24.

CEMETERIES, § 4.

COUNTIES, §§ 1-16.

COURTS, §§ 42-58.

CUSTOMS AND USAGES, § 4.

**Drains—****DRAINS, §§ 1-64.****MUNICIPAL CORPORATIONS, § 708.****FERRIES, §§ 5-20.****Heirship or right to share in distribution of intestate's estate. DESCENT AND DISTRIBUTION, § 71.****HIGHWAYS, §§ 1-68.****HOSPITALS, § 3.****LEVEES.****LOST INSTRUMENTS, §§ 2-8.****Polling places. ELECTIONS, § 201.****Poor farm. PAUPERS, § 9.****Pounds. ANIMALS, § 104.****PRISONS, § 1.****PRIVATE ROADS, § 2.****REFORMATORIES, § 2.****Right of exemption—****EXEMPTIONS, §§ 107-150.****HOMESTEAD, §§ 197-213.****Schools. SCHOOLS AND SCHOOL DISTRICTS, §§ 9-20.****STREET RAILROADS, §§ 2-61.****Streets. MUNICIPAL CORPORATIONS, §§ 646, 648, 649, 654.****TELEGRAPHS AND TELEPHONES, §§ 1-20.****Title before partition. PARTITION, § 17.****TOWNS, §§ 1-11.****TRUSTS, §§ 336-375.****TURNPIKES AND TOLL ROADS, §§ 3-32.****Waterworks by public authorities. WATERS AND WATER COURSES, § 183.****WILLS, §§ 204-433.**

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# ESTATES.

## Scope-Note.

[INCLUDES nature and incidents of interests in real or personal property in general, and of estates in fee or absolute ownership; and union or merger of estates.

[EXCLUDES creation and transfer of estates (see *Decds; Wills; Descent and Distribution*; and other specific heads); particular estates or estates less than the fee (see *Estates Tail; Life Estates; Dower; Curtesy; Landlord and Tenant; Reversions; Remainders*); estates held jointly or in common (see *Joint Tenancy; Tenancy in Common*); and estates of decedents (see *Executors and Administrators*), insolvents (see *Insolvency*), and bankrupts (see *Bankruptcy*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

- § 4. Estates of freehold.
- § 6. Base or qualified fee.
- § 9. Rent charges.
- § 10. Merger.

## Cross-References.

### See—

Bankrupts' estates. **BANKRUPTCY.**  
Canal lands. **CANALS, § 13.**  
Conveyances to husband and wife. **HUSBAND AND WIFE, § 14.**  
Created by deed. **DEEDS, §§ 120-136.**  
By exercise of eminent domain. **EMINENT DOMAIN, § 317.**  
By marriage settlement. **HUSBAND AND WIFE, § 31.**  
By will. **WILLS, §§ 590-627.**  
Decedents' estates—  
    **DESCENT AND DISTRIBUTION.**  
    **EXECUTORS AND ADMINISTRATORS.**  
    **WILLS.**  
Insolvents' estates. **INSOLVENCY.**  
Parties in property mortgaged—  
    **CHATTEL MORTGAGES, §§ 128, 129.**  
    **MORTGAGES, §§ 136-139.**  
Pleading estate claimed in ejectment. **EJECTMENT, § 65.**

Remaining in owner of land taken for public use. **EMINENT DOMAIN, § 319.**  
Restrictions on creation of future estates. **PERPETUITIES, § 4.**  
Subject of curtesy. **CURTESY, § 9.**  
To dower. **DOWER, §§ 11-17.**  
Transfer of future or contingent. **ASSIGNMENTS, §§ 6-8.**

### Particular estates.

#### See—

**CURTESY.**  
**DOWER.**  
Estates for years. **LANDLORD AND TENANT.**  
**ESTATES TAIL.**  
**HOMESTEAD.**  
**JOINT TENANCY.**  
**LIFE ESTATES.**  
**REMAINDERS.**  
**REVERSIONS.**  
**TENANCY IN COMMON.**  
**TRUSTS, §§ 130-151.**

## § 4. Estates of freehold.

[a] (**Sup. 1872**)

1 Gav. & H. Rev. St. p. 266, § 37, allows a freehold to be created to commence at a future date.—**Rush v. Rush, 40 Ind. 83.**

[b] (**Sup. 1887**)

A written agreement by the owner of real estate, providing that the other party to the agreement may hold and use such real estate so long as the latter shall keep and maintain a mill thereon in running order, and recognizing the right of the latter to remove such mill, but containing no words of grant or conveyance, creates no freehold interest; and one to whom such agreement is assigned by memorandum on the back is chargeable with constructive notice of a chattel mortgage executed on

the mill by the assignor, and duly recorded in the chattel mortgage records.—**Malott v. Price, 109 Ind. 22, 9 N. E. 718.**

[c] (**Sup. 1910**)

At common law a freehold estate could not be in abeyance.—**Beatson v. Bowers, 91 N. E. 922.**

FOR CASES FROM OTHER STATES,  
SEE 19 CENT. DIG. **Estates, § 4.**  
See, also, 16 Cyc. pp. 601-605.

## § 6. Base or qualified fee.

[a] (**App. 1909**)

The laws of descent in Indiana do not recognize such an estate as a base fee.—**Rozell v.**

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Cranfill, 43 Ind. App. 298, 85 N. E. 792, 86 N. E. 864.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estates, § 6.

See, also, 16 Cyc. p. 602.

§ 9. Rent charges.

[a] (Sup. 1886)

At common law, the right to receive rents not yet due at the death of the life tenant, who took his estate subject to a prior lease, passes to the owner of the reversion; and Rev. St. 1881, § 5223, which provides that, when a life tenant who has demised any lands dies before the rent becomes due, his executor may recover the proportion of rent which accrued before his death, applies only where the rent is payable under a lease made by the life tenant, and not under a pre-existing lease, subject to which the life estate was taken.—*Watson v. Penn*, 108 Ind. 21, 8 N. E. 636, 58 Am. Rep. 26.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estates, § 8.

§ 10. Merger.

By assignment of mortgage of debt to mortgagor or owner of property, see MORTGAGES, § 268.

By conveyance of mortgaged property by mortgagor to mortgagee, see MORTGAGES, § 295.

Of lease in fee, on conveyance by landlord to tenant, as termination of tenancy, see LANDLORD AND TENANT, § 96.

Of life estate and remainder, see REMAINDERS, § 9.

[a] (Sup. 1843)

A vendor claiming a lien on land for a part of the purchase money due, and purchasing the same land sold on execution subject to such lien, thereby extinguishes the debt so claimed as a lien, to the extent of the value of the land purchased, after deducting the sum paid on such sale.—*Murphy v. Elliott*, 6 Blackf. 482.

[b] (Sup. 1873)

The life estate of one in lands of which he receives a conveyance in fee is merged in the fee.—*Allen v. Anderson*, 44 Ind. 395.

[c] (Sup. 1885)

Where one purchases land subject to a mortgage, and the land is bought in by him at

sheriff's sale to satisfy a judgment constituting a lien thereon prior to the mortgage, but of which he had no knowledge when he bought the land in the first instance, he does not thus gain a title paramount to the mortgage.—*Hancock v. Fleming*, 103 Ind. 533, 3 N. E. 254.

[d] (Sup. 1886)

A person may have several equitable claims on a piece of land, in fact as many as he can obtain, and they will all subsist without merger, but when the holder of any one or all of these claims is invested with the legal title, there being no reason for keeping them alive, they are deemed merged in the greater title.—*Chase v. Van Meter*, 39 N. E. 455, 140 Ind. 321.

The true test as to whether there has been a merger of estates is the intention of the parties, either express or implied. If the intention has not been expressed, it will be sought for and ascertained in all the circumstances of the transaction. If it appears from all the circumstances to be for the benefit of the party who acquires both legal and equitable title that merger shall not take place, but that the equitable or lesser estate shall remain alive, then his intention that such a result will follow will be presumed, and equity will carry it into execution by preventing a merger. If from all the circumstances a merger would be disadvantageous to the party, then his intention that it should not result will be presumed.—*Id.*

[e] (Sup. 1886)

A merger of legal and equitable estates will not take place where it would work an injury or wrong, or aid in effecting a fraud, and any extraordinary circumstances which would indicate that the prevention of the merger would have such an evil effect can be established as a defense against the interference of equity.—*Swatts v. Bowen*, 40 N. E. 1037, 141 Ind. 322.

[f] (Sup. 1910)

Merger of one estate into a larger one arises through the intervention of some other estate, which, through being different or a greater estate, swallows the lesser.—*Beatson v. Bowens*, 91 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estates, §§ 9-13.

See, also, 16 Cyc. pp. 665-669; note, 99 Am. St. Rep. 153, 156, 160.

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# ESTATES TAIL.

## *Scope-Note.*

[INCLUDES nature and incidents of estates of inheritance limited to issue, general or special; abolition of such estates, and its effect; rights, powers, and liabilities of tenants in tail; and barring entails.

[EXCLUDES construction of grants and devises in tail (see *Deeds; Wills*). For complete list of matters excluded, see cross-references, post.]

## *Cross-References.*

*See—*

Construction of deeds. *DEEDS*, § 127.

Of wills. *WILLS*, §§ 604-607.

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### **§ 2. Statutory modification or abolition.**

Effect on remainders, see *REMAINDERS*, § 4.

[a] Estates tail are abolished by statute, and what would have been an estate tail at common law is an estate in fee simple under Rev. St. 1881, § 2958.—(1887) *Allen v. Craft*, 100 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; (1895) *Waters v. Lyon*, 40 N. E. 662, 141 Ind. 170.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. *Estates Tail*, § 2.

See, also, 16 Cyc. p. 610.

## **ESTIMATES.**

*See—*

Amount of assessments for public improvements. *MUNICIPAL CORPORATIONS*, § 461.

Cost of public improvement. *MUNICIPAL CORPORATIONS*, §§ 296, 315.

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# ESTOPPEL.

## *Scope-Note.*

[INCLUDES preclusion of persons from asserting or denying matters of fact, rights, or claims contrary to or inconsistent with previous allegations, admissions, denials, acts, or conduct of the same persons or those under whom they claim; nature and grounds of such preclusion; operation and effect of estoppel as to rights and titles subsequently acquired as well as those previously existing; pleading estoppel; and evidence relating thereto.

[EXCLUDES liability of particular classes of persons to be estopped (see *Infants*, and other specific heads); estoppel of tenant to dispute landlord's title (see *Landlord and Tenant*); and conclusiveness and effect of judgments (see *Judgment*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

### I. By Record.

- § 2. Judicial records in general.
- § 3. Pleadings.
- § 4. Petitions and affidavits.
- § 5. Stipulations and admissions.
- § 9. Persons estopped.
- § 11. Pleading estoppel.

### II. By Deed.

#### (A) CREATION AND OPERATION IN GENERAL.

- § 13. Instruments operating as estoppel.
- § 15. — Deeds.
- § 18. — Bonds and other obligations.
- § 19. — Defective, inoperative, or invalid instruments and transactions.
- § 20. Grounds of estoppel.
- § 21. — In general.
- § 22. — Recitals.
- § 23. — Covenants.
- § 25. Persons to whom estoppel is available.
- § 27. Grantors or mortgagors and privies.
- § 28. Effect, as against heir, of covenant of ancestor.
- § 29. Grantees or mortgagees.
- § 30. Remote grantees.
- § 31. Persons acting in particular character or capacity.
- § 32. Matters precluded.

#### (B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

- § 35. Estoppel as to title subsequently acquired in general.
- § 36. Instruments operating on title subsequently acquired.
- § 38. — Conveyances with covenants.
- § 39. — Conveyances without covenants.
- § 40. Grounds of estoppel.
- § 42. — Liability on covenants.
- § 46. Estates or rights affected.
- § 48. — Title acquired from or adversely to grantee.

### III. Equitable Estoppel.

#### (A) NATURE AND ESSENTIALS IN GENERAL.

- § 52. Nature and elements of estoppel in pais.
- § 53. Intent.
- § 54. Knowledge of facts.
- § 55. Reliance on adverse party.
- § 56. Acts done or omitted, and change of position.

### III. Equitable Estoppel—Continued.

#### (A) NATURE AND ESSENTIALS IN GENERAL—Continued.

- § 58. Prejudice to person setting up estoppel.
- § 60. Certainty as to grounds.
- § 62. Estoppel against public, government, or public officers.

#### (B) GROUNDS OF ESTOPPEL,

- § 64. Assumption of capacity or authority.
- § 65. Assertion of title or right in general.
- § 66. Possession or acts of ownership under title or claim.
- § 67. Claim under written instrument.
- § 68. Claim or position in judicial proceedings.
- § 70. Failure to assert title or right.
- § 71. Disclaimer.
- § 72. Acts making injury possible as between actor and another equally blameless.
- § 73. Clothing another with apparent title or authority.
- § 74. — Real property.
- § 75. — Personal property.
- § 76. — Relying and acting on apparent title or authority.
- § 77. Dealing with person asserting title or exercising authority.
- § 78. Contracts.
- § 79. Stipulations and consents in judicial proceedings.
- § 80. Official certificates or acts.
- § 81. Requests.
- § 82. Representations.
- § 83. — In general.
- § 85. — Future events.
- § 86. — Validity of bills or notes.
- § 87. — Relying and acting on representations.
- § 88. Admissions and receipts.
- § 89. Acquiescence.
- § 90. — Assent to or ratification of acts of others in general.
- § 91. — Assent to or participation in judicial proceedings.
- § 92. — Acceptance of benefits.
- § 93. — Permitting improvements or expenditures.
- § 94. — Permitting sale or mortgage of property.
- § 95. Silence.

#### (C) PERSONS AFFECTED.

- § 97. Persons to whom estoppel is available.
- § 98. Persons estopped.

#### (D) MATTERS PRECLUDED.

- § 99. Extent of estoppel in general.
- § 101. Title or claim to property.
- § 106. Availability at law.

#### (E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

- § 107. Pleading as element of cause of action.
- § 108. Demurrer raising defense.
- § 109. Pleading as defense.
- § 110. — Necessity.
- § 112. — Sufficiency of allegations.
- § 113. — Reply or demurrer to plea or answer.
- § 114. Pleading in avoidance of defense.
- § 116. Presumptions and burden of proof.
- § 117. Admissibility of evidence.
- § 118. Weight and sufficiency of evidence.
- § 120. Instructions.



### Cross-References.

See ELECTION OF REMEDIES.

#### I. BY RECORD.

By judgment, see JUDGMENT, §§ 540-749.

Married women in general, see HUSBAND AND WIFE, § 62.

#### § 2. Judicial records in general.

[a] (Sup. 1896)

The act of a sheriff in setting off exemptions is a ministerial act, and the record thereof not a judicial record. Hence there arises no estoppel by record to deny the right to such exemption.—*Ross v. Banta*, 34 N. E. 865, 39 N. E. 732, 140 Ind. 120.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 1.

See, also, 16 Cyc. pp. 684, 685.

#### § 3. Pleadings.

As judicial admissions, see EVIDENCE, § 208.

[a] (Sup. 1860)

A defendant who pleads an award against himself as a defense to an action is estopped, in a subsequent suit upon the award, from denying its validity.—*Ogden v. Rowley*, 15 Ind. 56.

[b] (Sup. 1882)

An admission in pleadings, that a certain claim had been sold and assigned does not preclude proof in a subsequent suit that the assignment in fact was never delivered.—*Fowler v. Hobbs*, 86 Ind. 131.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 2-5, 7.

#### § 4. Petitions and affidavits.

As judicial admissions, see EVIDENCE, § 210.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 6.

#### § 5. Stipulations and admissions.

Stipulations as estoppel in pais, see post, § 79. Stipulations as judicial admissions, see EVIDENCE, § 209.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 8.

#### § 9. Persons estopped.

[a] (Sup. 1858)

Under 2 Rev. St. p. 167, § 600, allowing plaintiffs in real actions to have separate judgments, matter of estoppel to some does not affect others.—*Lagow v. Neilson*, 10 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 15.

#### § 11. Pleading estoppel.

[a] (Sup. 1868)

Quære, whether an answer, averring facts which the party, by reason of something in the record, is estopped to plead, may not contain facts sufficient to bar the action, if the plaintiff joins issue thereon, without taking advantage of the estoppel.—*City of Aurora v. Cobb*, 21 Ind. 492.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 17.

#### II. BY DEED.

Estoppel of sureties on bond of deputy officer to deny that deputy subscribed the oath of office, see OFFICERS, § 36.

Estoppel of tenant to dispute title of landlord, see LANDLORD AND TENANT, §§ 61-66.

Married women in general, see HUSBAND AND WIFE, § 62.

#### (A) CREATION AND OPERATION IN GENERAL.

#### § 13. Instruments operating as estoppel.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 18-25.

See, also, 16 Cyc. pp. 688, 689.

#### § 15. — Deeds.

[a] (Sup. 1868)

Where partners having property in which a third person was interested by their joint deed conveyed the entire property with the assent of such third person, in a suit by the latter against the surviving partner to recover the value of such interest, such survivor was estopped from asserting that he did not acquiesce in the sale.—*Pence v. McPherson*, 30 Ind. 66.

[b] (Sup. 1907)

Warranty, as applied to deeds, is regarded with favor, and estoppel with disfavor.—*McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

[c] (App. 1910)

Where a daughter executed a deed to the property inherited by her from her father, and also that inherited by his second wife, to which she would be heir on the death of the wife, if she survived her, conveying the lands to H., which recited that the grantor, being unable to care for her land, desired to place it in the hands of a trustee to care for during her life for her benefit, with remainder to her children, and

named as the consideration therefor "\$1.00 and other sufficient consideration," the deed did not come within the provision of Act Feb. 24, 1899 (Laws 1899, p. 132) § 3, providing that where, during the life of the second wife, the children by a first wife execute a conveyance in fee to the lands inherited by the second wife, and receive payment therefor, this conveys their interest therein, and they or their heirs are estopped from thereafter claiming it, since it does not appear that the lands were conveyed for a valuable consideration, nor that the grantor received payment therefor.—*Dodd v. Shanton*, 90 N. E. 1041.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 19-21.

See, also, 16 Cyc. pp. 688, 689, 706-710.

**§ 18. — Bonds and other obligations.**

[a] (Sup. 1881)

The obligors on a bond which has accomplished the purpose for which it was given are estopped to claim that the same is void for the reason that the penalty thereof was less in amount than was required by statute.—*Carver v. Carver*, 77 Ind. 498.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. § 24.

**§ 19. — Defective, inoperative, or invalid instruments and transactions.**

[a] (Sup. 1854)

A person who has executed a mortgage which is void as being contrary to a public statute may set up its nullity against a purchaser under it.—*State v. State Bank*, 5 Ind. 353.

[b] (Sup. 1872)

If a bond is void in its inception, and possess no force nor validity, it cannot work an estoppel.—*Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. § 25.

**§ 20. Grounds of estoppel.**

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 26-60.

See, also, 16 Cyc. pp. 699-705.

**§ 21. — In general.**

Venire de novo, see TRIAL, § 363.

[a] Where a party makes admissions in the condition of a writing obligatory, he is estopped to deny, in a suit on the obligation, the facts thus admitted.—(Sup. 1837) *Trimble v. State*, 4 Blackf. 435; (1838) *Love v. Kidwell*, Id. 553.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. § 26.

**§ 22. — Recitals.**

[a] (Sup. 1849)

Defendant in an action on a bond executed by him cannot plead matter contradictory to the bond.—*Miller v. Elliott*, 1 Ind. 484, Smith, 267, 50 Am. Dec. 475.

[b] (Sup. 1852)

A party who has executed to a constable a delivery bond, for property levied upon under an execution, will be estopped, in trespass against the officer, for the seizure of the property, from controverting the existence of the judgment, and execution against himself, if there was no fraud in the procurement of the delivery bond.—*May v. Johnson*, 3 Ind. 449.

[c] (Sup. 1855)

Obligors in an appeal bond, on an appeal from justice court reciting that the appeal was taken, are estopped to deny that fact in an action on the bond.—*Reeves v. Andrews*, 7 Ind. 207.

[d] (Sup. 1856)

The obligor, in an instrument under seal, which specifies a consideration, is estopped to deny the existence of a consideration.—*Guard v. Bradley*, 7 Ind. 600.

[e] (Sup. 1856)

Recitals in a mortgage, made under the direction of the owner of the mortgaged premises, operate as an estoppel on him, unless this fact be modified by other circumstances.—*Mallett v. Page*, 8 Ind. 364.

[f] (Sup. 1859)

An acknowledgment in an agreement for the conveyance of land of a receipt for the purchase money does not estop him from showing that the money has not been paid.—*Thompson v. Allen*, 12 Ind. 539.

[g] (Sup. 1863)

Where an instrument is executed as a contract between private parties, no recitals in such instrument will estop the party interested to plead the want or failure of consideration.—*City of Aurora v. Cobb*, 21 Ind. 492.

[h] (Sup. 1869)

An owner of land, intending to convey it to his daughter as a gift, by a mistake of the draftsman improperly described the premises, and conveyed the same to her husband by a deed purporting on its face to be made for value, and thereupon he put her in possession of the premises, and placed the deed on record. Afterwards her husband executed a mortgage thereon with the same erroneous description to a bona fide mortgagee for value, who, without notice of the mistakes, foreclosed and purchased the land at the sheriff's sale, and received a deed also containing the same improper description. *Held*, in a suit by the mortgagee to correct the description in the deeds and mortgage, that the original grantor was estopped to deny that the original deed was made for a valuable consideration as appeared on its face.—*German*

*Mut. Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249, 2 Am. Rep. 341.

An owner of land, intending to convey it to his daughter as a gift, by a mistake of the draftsman improperly described the premises, and conveyed the same to her husband by a deed purporting on its face to be made for value, and thereupon he put her in possession of the premises and placed the deed on record. Afterwards her husband executed a mortgage thereon with the same erroneous description to a bona fide mortgagee for value, who, without notice of the mistakes, foreclosed and purchased the land at the sheriff's sale, and received a deed also containing the same improper description. *Held*, that the original grantor's estoppel as against the mortgagee to deny that his deed was made for a valuable consideration as appeared on its face, or that the proper grantee was named therein, was not avoided by the fact that the mortgagee was compelled to appeal to equity to correct the mistake in the description of the land.—*Id.*

[l] (*Sup.* 1872)

The recital in a replevin bond of the value of the property estops the principal and his sureties from denying such value.—*Wiseman v. Lynn*, 39 Ind. 250.

[j] (*Sup.* 1881)

The obligors in a replevin bond are estopped from asserting that the property which was the subject of the replevin action was of greater value than as stated in the bond.—*Carver v. Carver*, 77 Ind. 498.

[k] (*Sup.* 1882)

The surety in a suit on a guardian's bond is estopped to deny the appointment of the guardian as recited in the bond.—*State ex rel. Metsker v. Mills*, 82 Ind. 126.

[l] (*Sup.* 1895)

A recital in a mortgage executed by a husband and wife that they conveyed the property that "we" have purchased from the mortgagee and "we" acknowledge that we own the real estate in equal shares did not estop the wife from denying that she signed the notes and mortgage as surety for her husband.—*Cole v. Temple*, 41 N. E. 942, 142 Ind. 498.

[m] (*App.* 1903)

The sureties on the bond of an administrator of an absentee were estopped to assert, against the recitals of the bond, that the absentee was not deceased, that their principal was not the administrator, that his appointment was invalid, or that he was not subject to all the liabilities of an administrator of a decedent's estate in relation to the property which came into his possession.—*Romy v. State ex rel. Brannan*, 67 N. E. 998, 32 Ind. App. 146.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 27-51; 25 CENT. DIG. Guard. & W. § 628.

See, also, 16 Cyc. pp. 699-705.

## § 23. — Covenants.

[a] (*Sup.* 1848)

Conveyances of land held under Act Cong. May 29, 1830, granting pre-emption rights, are utterly void; and the covenants therein do not act by way of estoppel.—*Doe ex dem. Stevens v. Hays*, 1 Ind. 247, Smith, 177, 48 Am. Dec. 359.

[b] (*Sup.* 1881)

One making a mortgage with covenants of title is estopped to plead, in a suit to foreclose the mortgage, that he had no title at the time of making it.—*Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172.

[c] (*Sup.* 1882)

Covenants of warranty in a mortgage estop the mortgagor from denying the title the mortgage purports to incur.—*Boone v. Armstrong*, 87 Ind. 168.

[d] (*Sup.* 1884)

A defendant can neither plead nor take advantage in the evidence of anything contradictory to or in conflict with his own warranty.—*Hannah v. Collins*, 94 Ind. 201.

[e] (*Sup.* 1885)

A., the owner of a lot, built a house on the south half thereof, but suffered it to "lap over" 20 inches on the north half, and afterwards conveyed the entire lot to one who thereafter, having sold the south half, conveyed the "north half, or 21 feet off the north side," of said lot, back to A. *Held*, that A. could not maintain an action against his vendor for breach of covenant, the purchaser of the south half having recovered the 20-inch strip from A.—*Allen v. Kersey*, 104 Ind. 1, 3 N. E. 557.

[f] (*Sup.* 1890)

A mortgagor who executed a mortgage with covenants of warranty is estopped from alleging that the mortgaged premises were, at the time of the execution of the mortgage, the separate property of his wife.—*Stanford v. Broadway Savings & Loan Ass'n*, 122 Ind. 422, 24 N. E. 154.

[g] (*Sup.* 1893)

Where a mortgagor of land conveys it to the mortgagee, and the latter at the same time and as part of the transaction conveys it by full warranty deed to the mortgagor's wife, and such conveyances are without consideration and for the sole purpose of transferring the title to the wife, the mortgagee is not estopped from asserting his rights under the mortgage.—*McCrary v. Little*, 35 N. E. 836, 136 Ind. 86.

[h] (*App.* 1898)

A grantor is estopped by her warranty deed, which asserts title and covenants to defend it, to show that she did not have title, and that she agreed with the grantee, before executing the deed, that, in the event of adverse title being asserted, he would pay the grantor such sum as would be necessary to purchase the out-

standing title.—*Beasley v. Phillips*, 50 N. E. 488, 20 Ind. App. 182.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 52-60.

### § 25. Persons to whom estoppel is available.

[a] (Sup. 1881)

An auditor's deed to land sold for taxes does not preclude the state from asserting any claim of right to the land sold.—*Reid v. State ex rel. Thompson*, 74 Ind. 252.

[b] (App. 1910)

A daughter executed a deed to property inherited by her from her father, and also that inherited by his second wife, to which she would be heir on the death of the wife, if she survived her, conveying the lands to H., the deed reciting that the grantor, being unable to care for her land, desired to place it in the hands of a trustee to care for during her life for her benefit with remainder to her children, and named as the consideration therefor "\$1.00 and other sufficient consideration." *Held*, that the husband as heir of a daughter living at the time of the execution of the trust deed, but, who together with her child, subsequently died prior to the death of the second wife, cannot claim that the other children of the grantor in the deed are estopped thereby under the statute to deny his title to a share in the land as heir of his wife, since neither he nor his wife is shown to have parted with any value as a part of the transaction; and one who seeks the benefit of statutory estoppel must bring himself within its provisions.—*Dodd v. Shanton*, 90 N. E. 1041.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 61, 62.

See, also, 16 Cyc. pp. 710-718.

### § 26. Persons estopped in general.

[a] Estoppels by deed bind only parties and privies.—(Sup. 1848) *Goodwin v. Doe ex dem. Kensett*, 1 Ind. 302, Smith, 126; (1858) *Laglow v. Neilson*, 10 Ind. 183; (1869) *Simpson v. Pearson*, 31 Ind. 1, 90 Am. Dec. 577.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 61, 62.

See, also, 16 Cyc. pp. 710-718.

### § 27. Grantors or mortgagors and privies.

[a] (Sup. 1861)

In suit to foreclose a mortgage, the mortgagor answered that the notes and mortgage, though running to plaintiff, were, in fact, the property of a mercantile firm, of which plaintiff was a partner, they having been given for goods purchased of the firm; and that the copartners had made no assignment to plaintiff of their interests. *Held*, that the mortgage operated as an estoppel to this plea by the mortgagor.—*French v. Blanchard*, 16 Ind. 143.

[b] (Sup. 1866)

A., guardian of B., sued C., a former guardian, to foreclose a mortgage given by the latter to secure the amount of the trust funds in his hands, and unaccounted for at the time of his removal. The mortgage recited that certain notes had been transferred by C. to A., and contained an express covenant by C. to pay the money within two years if the same should not sooner be made out of the notes referred to. C. answered that the notes described in the mortgage were taken by him for money belonging to said trust, and loaned by him as guardian, etc., and that, at the time of the giving of said notes, the parties were solvent, etc. *Held*, that as C. had, by the mortgage, acknowledged his liability and promised to pay the money, he could not go behind the mortgage for the purpose of testing his liability.—*O'Haver v. Shidler*, 26 Ind. 278.

[c] (Sup. 1869)

An owner of land, intending to convey it to his daughter as a gift, by a mistake of the draftsman, improperly described the premises, and conveyed the same to her husband by a deed purporting on its face to be made for value, and thereupon he put her in possession of the premises, and placed the deed on record. Afterwards her husband executed a mortgage, with the same erroneous description, to a bona fide mortgagee for value, who, without notice of the mistakes, foreclosed and purchased the land at the sheriff's sale, and received a deed also containing the same improper description. *Held*, that a subsequent deed by the original grantor to his daughter, correctly describing the land, could not, by relation back to the date of the original deed, vest her with the legal title as of that date, to the prejudice of the title acquired by the mortgagee by estoppel against the original grantor.—*German Mut. Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249, 2 Am. Rep. 341.

[d] (Sup. 1835)

A purchaser at a sheriff's sale on a judgment against the husband occupies substantially the position of a tenant in common with the wife, and cannot, as against the wife, assail the common source of title.—*Wright v. Tichenor*, 104 Ind. 185, 3 N. E. 853.

[e] (Sup. 1886)

A married woman, who by will was given an inchoate interest in certain real estate dependent upon her survivorship of her husband, before his death joined him in a warranty deed thereto "for the purpose only" of conveying his interest therein. *Held*, that, the deed being absolute on its face, no mistake being shown, and no reformation being asked, she was estopped from claiming such interest as against the grantee.—*Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645.

[f] (Sup. 1891)

A will devised property to the testator's widow "for and during the term of her natural

life." It further provided that at the widow's death all his estate should be divided between their children, share and share alike. Some of the children, after coming of age, conveyed their interest to the widow by warranty deed, and she in the same way conveyed it to another child. The latter mortgaged the premises to a stranger for value, and then reconveyed them to the widow, who, as part of the consideration, assumed the mortgage. The mortgagee was unaware of any fraud or invalidity in the deeds. *Held*, that the grantors were estopped from setting up any title against him.—*Neely v. Boyce*, 128 Ind. 1, 27 N. E. 169.

## [g] (Sup. 1891)

A privy in blood, such as an heir of the grantor, is estopped by the deed.—*Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. 560.

## [h] (Sup. 1907)

Rev. St. 1881, § 2487, provides that if a man marry a second or subsequent wife, and has by her no children, but has children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children. *Burns' Ann. St. 1901*, § 3349, provides that any mortgage of lands dated, signed, and acknowledged by the grantor, worded, "A. B. mortgages and warrants to C. D.," etc., shall be deemed a good and sufficient mortgage to the grantee with warranty from the grantor and his legal representatives of perfect title in the grantor. *Held*, that where a childless widow deeded to her stepsons all her interest in the land inherited from her deceased husband, and the stepsons executed a mortgage thereon in statutory form, they were estopped from thereafter claiming as against the mortgagee and those having a just claim founded on the mortgage that their title was imperfect.—*Griffis v. First Nat. Bank of Connersville*, 168 Ind. 546, 81 N. E. 490.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 63-67.  
See, also, 16 Cyc. pp. 686, 715, 716.

## § 28. Effect, as against heir, of covenant of ancestor.

## [a] (Sup. 1857)

On June 13, 1820, A. gave a deed to B., and covenanted that the premises now are, and forever hereafter shall be and remain, clear of all right of dower and all other incumbrances, and that A. and his heirs shall warrant the said parcel against every person lawfully claiming the same. B. took possession, and afterwards conveyed all his title to C. in fee, who also took possession, and afterwards, and before the commencement of this suit, died intestate, and the lessors of plaintiff were his heirs. On September 3, 1832, A. died intestate, leaving D. his only child and heir. He died insolvent, and D. took nothing from him by descent or distribution, and he was not at any time during his life seised of any estate in said land. Before the date of said deed from A. to B., E. was

seised of said lands in fee simple, and continued so seised until he died intestate, September 1, 1835. Said E. left F. and three other children, and said D., his granddaughter, his heirs, each inheriting one undivided fifth part of the land, the granddaughter representing her father, A., son of said E. *Held*, that D. inherited directly from her grandfather, and hence was not affected by the covenants of her father.—*Dean v. Doe ex dem. Sease's Heirs*, 8 Ind. 475.

## [b] (Sup. 1868)

Where a tenant by curtesy conveys with warranty realty in which he has such estate, his heirs, to whom such realty descended in fee from the wife, are entitled to the possession, though they are heirs of the husband, and received from him by descent an estate of greater value than the land so conveyed, since the statute (1 Gav. & H. St. p. 259) concerning realty and alienation thereof abolishes lineal and collateral warranties with all their incidents.—*Hartman v. Lee*, 30 Ind. 281.

## [c] (Sup. 1890)

The warranty deed of an heir apparent to the land of his ancestor, who outlives him, does not bind the heirs of such heir, who receive no assets from his estate, since they take the land, not as his heirs, but directly, as the heirs of his ancestor.—*Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; *Jerauld v. Same*, 127 Ind. 600, 25 N. E. 186.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 68.  
See, also, 16 Cyc. p. 718.

## § 29. Grantees or mortgagees.

## [a] (Sup. 1881)

The doctrine that grantees are estopped to deny the title of their grantors does not apply where the only title derived by the grantee from the grantor is a real or pretended claim to the premises set up by the grantor and bought in by the grantee to quiet his title. The purchase of the grantor's adversary title, if it does not strengthen the grantee's title, does not impair it.—*Brandenburg v. Seigfried*, 75 Ind. 568.

## [b] (Sup. 1885)

A purchaser of real estate by accepting the deed and taking possession is estopped from denying the title under which he holds.—*Marsh v. Thompson*, 1 N. E. 630, 102 Ind. 272.

## [c] (Sup. 1887)

A mortgagee by taking the mortgage impliedly concedes the title of the mortgagor, and is estopped to himself claim the title.—*Voss v. Eller*, 10 N. E. 74, 109 Ind. 260.

## [d] (Sup. 1899)

A grantee, in possession of the property bought, claiming to own it, making improvements thereon, and in all respects treating it as his own, without objection from the grantor, a party to the action, or any one else, cannot escape the payment of the debts of the grantor.

a corporation, which was a part of the consideration for the deed, on the ground that the deed passed no title, because not authorized by the directors or stockholders.—*Allen v. Studebaker Bros. Mfg. Co.*, 53 N. E. 422, 152 Ind. 406.

[e] (*App.* 1907)

Where a deed contained two conflicting descriptions intended to apply to property conveyed, a deed by the grantor to a third person of the tract included in the valid description, and not in the invalid description, did not estop such third person from asserting the validity of the correct description, and the invalidity of the other where he did not claim title under the second deed.—*Hornet v. Dumbeck*, 30 Ind. App. 482, 78 N. E. 691.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 69-73; 46 CENT. DIG. Tresp. to T. T. § 14.

See, also, 16 Cyc. pp. 686, 716.

#### § 30. Remote grantees.

[a] (*Sup.* 1880)

One who asserts title through proceedings in bankruptcy cannot be heard to say, for the purpose of defeating another's title, that the bankrupt was without title when the adjudication against him was made.—*Ketchum v. Schicketanz*, 73 Ind. 137.

[b] (*Sup.* 1901)

A railway company had possession of certain realty under legislative grant, and operated its road thereon, claiming title, but had no record title. Plaintiffs executed their quitclaim deed of such realty to W., taking a mortgage to secure the purchase money, and W. conveyed to the company. Pursuant to agreement between W. and plaintiffs, the former represented to the company that there was no incumbrance on the realty, and by such representations induced acceptance of the deed; and, to aid such conspiracy, plaintiffs withheld their mortgage from record until after the acceptance. Plaintiffs had purchased the land with knowledge that their grantors had been defeated in a suit against the railway company for its possession. *Held*, that the company was not estopped, in an action to foreclose such mortgage, to dispute the plaintiffs' claim of title to the land described therein.—*Shedd v. Webb*, 61 N. E. 233, 157 Ind. 585.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 74.

See, also, 16 Cyc. pp. 716, 717.

#### § 31. Persons acting in particular character or capacity.

[a] (*Sup.* 1887)

Where testator's will authorized his widow to appoint an assistant to aid her in the discharge of the duties of the trust of executing the will, and she appointed such an assistant, who applied for an order to sell land for the payment of debts, and she joined him both in

the deed and in reporting the same for confirmation, she was estopped from asserting as against her grantees that all the land was not sold.—*Sims v. Gay*, 9 N. E. 120, 109 Ind. 501.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 75-80.

See, also, 16 Cyc. p. 712.

#### § 32. Matters precluded.

[a] (*Sup.* 1887)

Where a widow conveys land, describing and warranting her interest as a life estate, she is not estopped from claiming a different interest in the land vested in her as the heir of one of her children.—*Holman v. Dukes*, 110 Ind. 195, 10 N. E. 629.

[b] (*Sup.* 1898)

A mortgage was executed upon land by the husband alone, under which it was sold. *Held*, that the purchaser could not claim title under the husband, and, as to the wife, deny that he had title at the time of the execution of the mortgage.—*Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55.

[c] (*Sup.* 1898)

From a judgment sustaining an attachment in part only, and discharging it as to the remainder of the property, plaintiff appealed. The appeal did not stay the discharge of that part of the property as to which the attachment was vacated, but such part was not in fact actually released by plaintiff, pending the appeal. *Held*, in an action on the attachment bond for an oppressive appeal, plaintiff in the appeal was not estopped to contend that the appeal bond was insufficient to hold the property discharged.—*Waring v. Fletcher*, 52 N. E. 203, 152 Ind. 620.

[d] (*Sup.* 1907)

Extent of estoppel created by warranty in a deed is measured by the language of the warranty, not by the description or recitals in the deed; whether such description or recitals are true or not being immaterial.—*McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

[e] (*App.* 1907)

Where defendant in replevin gave a delivery bond and retained possession until before trial, it was estopped to deny that it had possession of the property when it was seized under the writ.—*Indiana Union Traction Co. v. Bick*, 40 Ind. App. 451, 81 N. E. 617.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 81.

See, also, 16 Cyc. pp. 695-697.

#### (B) ESTATES AND RIGHTS SUBSEQUENTLY ACQUIRED.

By sale under order of court in administration of decedent's estate, see EXECUTORS AND ADMINISTRATORS, § 386.

**§ 35. Estoppel as to title subsequently acquired in general.**

Married women in general, see HUSBAND AND WIFE, § 62.

**[a] (Sup. 1904)**

At sale on foreclosure of a mortgage on lands, oil wells, and other oil-producing structures thereon, plaintiff became the purchaser, and received a certificate of purchase. Before receiving a deed of the property, plaintiff, who was in full and absolute possession, sold to defendant, with the participation and approval of the mortgagor, all the right, title, and interest of plaintiff in and to the oil under the land, together with the wells and other oil-producing structures, and put defendant in unqualified possession. *Held* that, if plaintiff's title was not complete at the time of the sale, it was nevertheless sufficient to estop him, having received and retained the purchase price, to reclaim the property after obtaining a sheriff's deed.—*Glendenning v. Superior Oil Co.*, 70 N. E. 976, 162 Ind. 642.

**[b] (Sup. 1907)**

Irrespective of the jurisdiction of courts of equity, it has always been possible to convey subsequently acquired interests by the operation of the principle of estoppel.—*McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 84.

See, also, 16 Cyc. pp. 689-692; note, 23 L. R. A. 561.

**§ 36. Instruments operating on title subsequently acquired.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 91-109.

See, also, 16 Cyc. pp. 692-694.

**§ 38. — Conveyances with covenants.**

**[a] (Sup. 1881)**

Where the mortgagor in a mortgage containing full covenants of warranty afterwards acquires another and different title to the property, such new title is considered as vested in the mortgagor in the same manner as if he had held it when the mortgage was executed.—*Haggerty v. Byrne*, 75 Ind. 499.

**[b] (Sup. 1883)**

The effect, as an estoppel against the vendor to set up an after-acquired title, of a deed containing a general covenant of warranty, and the granting clause of which purports to convey the tract itself, is not limited to a conveyance of the grantor's present interest by a subsequent clause, stating that it is the express intention hereby "to convey the entire interest" of the grantor in the tract embraced in the deed.—*Locke v. White*, 89 Ind. 492

**[c] (Sup. 1884)**

A. and B., representing that they were the sole owners of land and that it was unin-

cumbered, conveyed by warranty deed to C., who believed the representation; B. all the time knowing that there was an outstanding title in his sister, which he afterwards acquired. *Held*, that B. was estopped from asserting this after-acquired title against C.—*Karnes v. Wingate*, 94 Ind. 594.

**[d] (Sup. 1884)**

Covenants in a purchase-money mortgage operate only on the estate acquired from the mortgagee, and do not operate on an after-acquired title.—*Randall v. Lower*, 98 Ind. 255.

**[e] (Sup. 1890)**

Where land owned by a husband is conveyed by him and his wife by a warranty deed, he is liable on the covenants of warranty, and, if he afterwards acquires a title to such real estate, it will inure to the benefit of his grantee.—*De Haven v. Musselman*, 24 N. E. 171, 123 Ind. 62.

**[f] (Sup. 1894)**

A mortgage containing covenants of general warranty will, as between the mortgagor and mortgagee, pass an after-acquired title.—*Thalls v. Smith*, 139 Ind. 496, 39 N. E. 154.

**[g] (Sup. 1896)**

Where a conveyance, although made with warranty, does not purport to carry an indefeasible estate, but only the present interest of the grantor, the doctrine of estoppel does not apply and pass an after-acquired title.—*Miller v. Miller*, 39 N. E. 547, 140 Ind. 174.

**[h] (App. 1896)**

A conveyance to the grantor of land subsequent to his deed to another with warranty inures to the benefit of his grantee.—*Johnson v. Bedwell*, 15 Ind. App. 236, 43 N. E. 246; *Same v. Williams*, 14 Ind. App. 698, 43 N. E. 253; *Id.* 699, 43 N. E. 275.

**[i] (Sup. 1898)**

A grantor conveyed land, giving only a certificate of purchase. The land was conveyed by successive warranty deeds. The last grantee, without his wife joining, mortgaged the land, which was foreclosed and the land sold. After the sale the first grantor executed a deed in fee simple to the grantor of the last grantee. *Held*, that the last grantor's after-acquired title inured to the benefit of his grantee, giving him a fee-simple title, as of the date of his original deed.—*Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55.

**[j] (App. 1906)**

The execution of a valid warranty deed estops grantor from asserting an after-acquired title.—*Pence v. Long*, 38 Ind. App. 63, 77 N. E. 961.

**[k] (Sup. 1907)**

Although an ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, yet a distinct recital in such a deed, showing that the parties proceeded on the theory that a particular interest was there-

by conveyed, may be as effectual to create an estoppel as a warranty.—*McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

The general rule as to ordinary recitals, that there can be no estoppel where the truth appears in the instrument, does not apply to a distinct undertaking for the transfer of after-acquired property, since, in such an undertaking, an estoppel exists because of the covenant of warranty.—*Id.*

Where the grantor, his mother and step-father, join in the execution of a deed, purporting to convey, not alone all of the interest by right of inheritance, which the grantor and his mother acquired from his father, but specifically stating that the interest conveyed by the grantor is, in addition to the inherited interest, the particular interest which might accrue to him after the death of his mother in consequence of her second marriage, the grantor is estopped from saying that the title to such particular interest did not pass, since the rule that there is no estoppel where an interest passes has no application to conveyances intended to pass the whole title, although the grantor has a limited interest which is carried by the conveyance.—*Id.*

A warranty in a deed concludes the grantor from asserting an after-acquired title to the land conveyed.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 90-107.

See, also, 16 Cyc. pp. 692-695.

### § 39. — Conveyances without covenants.

[a] (Sup. 1857)

That any conveyance operating as to a part or the whole under the statute of uses is within the scope of the doctrine that a warranty is necessary to convey an estate by estoppel; for in such cases there is no seisin to give effect to the statute.—*Matlock v. Lee*, 9 Ind. 298.

[b] (Sup. 1871)

A deed purporting to convey nothing but the interest of the grantor in the premises, whatever that interest may be, without defining the character of the interest, or affirming that he has an interest in the premises, will not estop him from setting up an after-acquired title to the premises.—*Shumaker v. Johnson*, 35 Ind. 33.

[c] (Sup. 1874)

A deed of bargain and sale, or by way of release or quitclaim, conveys all the present estate of the grantor, but binds no after-acquired estate. There being no covenants of title, there is no estoppel.—*Nicholson v. Caress*, 45 Ind. 479.

[d] A quitclaim deed does not estop the person executing it from asserting an after-acquired interest in the land therein described.—(Sup. 1876) *Graham v. Graham*, 55 Ind. 23; (1881)

*Avery v. Akins*, 74 Ind. 283; (1885) *Bryan v. Uland*, 101 Ind. 477, 1 N. E. 52; (1886) *Thorp v. Hanes*, 107 Ind. 324, 6 N. E. 920; (1893) *Haskett v. Maxey*, 33 N. E. 358, 134 Ind. 182, 19 L. R. A. 379; (App. 1906) *Pence v. Long*, 77 N. E. 961, 38 Ind. App. 63.

[e] A quitclaim deed of the grantor's expectant interest in the estate of his ancestor, who was then in possession, does not pass such grantor's after-acquired estate of inheritance, though the deed was made in good faith, and in consideration of the full value of the property conveyed, where it does not appear that the ancestor knew of the sale, and acquiesced in it.—(Sup. 1890) *McClure v. Raben*, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477; (1893) *Id.*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558.

[f] (Sup. 1894)

A deed without covenants or one with covenants, but purporting to convey only the right, title, and interest of the grantor in the premises described in it, does not operate as a conveyance by estoppel of an after-acquired title.—*Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331.

[g] (Sup. 1897)

One is not estopped by a quitclaim deed from asserting an after-acquired title to land, where he has obtained a subsequent decree of court quieting his title to said land.—*Graham v. Lunsford*, 48 N. E. 627, 149 Ind. 83.

[h] (Sup. 1900)

Acts 1889, p. 430, § 2, providing that where children by a former wife, or their guardians, have executed a conveyance in fee, for full consideration, of the lands descending from the husband and father, in which they have an expectancy of inheritance from the widow, during the widow's life, such conveyance shall bind their interest when acquired by inheritance from the widow, operates on a quitclaim deed made prior to its passage, so as to estop the grantors from setting up their after-inherited title against their grantee.—*Burget v. Merritt*, 57 N. E. 714, 155 Ind. 143.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 108, 109.

See, also, 16 Cyc. p. 692.

### § 40. Grounds of estoppel.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 85-88.

### § 42. — Liability on covenants.

[a] (Sup. 1881)

One who bought land and received a warranty deed was afterwards dispossessed by the foreclosure of a prior mortgage in connection with bankruptcy proceedings of his grantor, and the title came by a mesne conveyance to his grantor again, there being, as he claimed, a fraudulent scheme to defraud him of the land, but he nevertheless proved his claim for dispos-



session against his grantor's estate in bankruptcy. *Held*, that the new title obtained by his grantor would not inure to his benefit.—*Bradford v. Russell*, 79 Ind. 64.

[b] (*Sup.* 1884)

Where a former owner of land sold it subject to taxes of 1876 and 1877, and made a warranty deed therefor he was estopped from claiming the land by purchase at a sale for the taxes of 1876 and 1877 which he was bound by his covenant to pay, and he was equally estopped where the land was sold for any taxes of which the taxes against which he covenanted were a part.—*Hannah v. Collins*, 94 Ind. 201.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 86-88.

See, also, 16 Cyc. pp. 692-695.

§ 46. Estates or rights affected.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 114-119.

See, also, 16 Cyc. pp. 695-697.

§ 48. — Title acquired from or adversely to grantee.

[a] (*Sup.* 1884)

A grantor of lands with general warranty is estopped from claiming title under a tax sale, if any part of the taxes for which it was sold were on it at the time of his conveyance.—*Hannah v. Collins*, 94 Ind. 201.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 116-118.

See, also, 16 Cyc. p. 697.

### III. EQUITABLE ESTOPPEL.

Admissions by demurrer of allegations in complaint of facts which plaintiff is estopped to aver, see PLEADING, § 214.

As defense in ejectment, see EJECTMENT, § 27. Attempt to prove cause of injury as estoppel to rely on presumption of negligence, see NEGLIGENCE, § 121.

By acceptance of devise or legacy, see WILLS, § 718.

Implied ratification by principal of acts of agent, see PRINCIPAL AND AGENT, §§ 168-171.

To introduce particular evidence at trial, see TRIAL, § 37.

Of particular classes of persons, or persons in particular relations.

See—

Bank to resist liability to payee of check.

BANKS AND BANKING, § 140.

CORPORATIONS, §§ 104, 388, 659.

Co-tenant. TENANCY IN COMMON, §§ 34, 54.

Devisee or legatee. WILLS, § 718.

EXECUTORS AND ADMINISTRATORS, § 114.

Foreign corporation. CORPORATIONS, § 659.

GUARDIAN AND WARD, § 61.

Heir to attack administrator's sale. EXECUTORS AND ADMINISTRATORS, § 377.

INFANTS, §§ 29, 35.

Maker of note. BILLS AND NOTES, § 51.

Married women. HUSBAND AND WIFE, §§ 62, 120, 198.

Mortgagee of property. CHATTEL MORTGAGES, § 219.

Mortgagor, to redeem from sale on foreclosure. MORTGAGES, § 597.

PARTNERSHIP, § 156.

PRINCIPAL AND AGENT, §§ 76, 137.

Purchaser, to deny title of vendor. VENDOR AND PURCHASER, § 189.

Sureties on bond given by contractor to indemnify against mechanics' liens. MECHANICS' LIENS, § 314.

Of officer to deny appointment. OFFICERS, § 16.

Tenant as to defects in or objections to lease.

LANDLORD AND TENANT, § 31.

To dispute title of landlord. LANDLORD AND TENANT, §§ 61-66.

UNITED STATES MARSHALS, § 3.

Vendor, to claim lien of purchase money. VENDOR AND PURCHASER, § 206.

To assert or deny particular facts, rights, claims, or liabilities.

See—

Acquisition of title to land by railroad company. RAILROADS, § 62.

Agency. PRINCIPAL AND AGENT, § 25.

Of husband for wife. HUSBAND AND WIFE, § 138.

Appointment of officer. OFFICERS, § 16.

Authority of city agent to negotiate bonds. MUNICIPAL CORPORATIONS, § 217.

Of officers and agents of banks. BANKS AND BANKING, § 113.

Of officers and agents of corporations in general. CORPORATIONS, § 425.

Of United States marshal to deny to appoint deputy. UNITED STATES, § 3.

Claims against bank directors on behalf of creditors. BANKS AND BANKING, § 82.

For compensation for property taken for public use. EMINENT DOMAIN, §§ 79, 80.

To attached property. ATTACHMENT, § 302.

Under assignment for benefit of creditors. ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 297.

Competency or rights of payee of note. BILLS AND NOTES, § 51.

Conclusiveness of account stated. ACCOUNT STATED, § 8.

Consolidation of railroad companies. RAILROADS, § 142.

Constitutionality of statute. CONSTITUTIONAL LAW, § 43.

Corporate existence. CORPORATIONS, § 34.

Powers. CORPORATIONS, § 388.

Custody of child. PARENT AND CHILD, § 2.

Damages from public improvements. MUNICIPAL CORPORATIONS, § 399.

DEDICATION, §§ 16, 39.

Defects in adjustment or arbitration of loss under insurance policy. INSURANCE, § 576.

Defects in or objections to assessment for expenses of public improvement—  
**DRAINS**, § 74.  
**HIGHWAYS**, § 137.  
 To assignments. **ASSIGNMENTS**, § 68.  
 To contracts of guaranty. **GUARANTY**, § 21.  
 To contracts of suretyship. **PRINCIPAL AND SURETY**, § 46.  
 To leases. **LANDLORD AND TENANT**, § 31.  
 To notice and proof of loss under insurance policy. **INSURANCE**, §§ 554-561, 780.  
 Discharge of surety. **PRINCIPAL AND SURETY**, § 129.  
**DOWER**, §§ 50, 62.  
 Exemptions from taxation. **TAXATION**, § 249.  
 Failure to file objections to will in time. **WILLS**, § 336.  
 Forfeiture of insurance. **INSURANCE**, § 641.  
 Fraud as to creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, § 225.  
 Grounds for avoidance or forfeiture of insurance policy. **INSURANCE**, §§ 371-400, 724, 755.  
 Guardianship. **GUARDIAN AND WARD**, § 7.  
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 Insurable interest. **INSURANCE**, § 117.  
 Liability as surety. **PRINCIPAL AND SURETY**, § 83.  
 Of bank to payee of check. **BANKS AND BANKING**, § 140.  
 To municipal taxation. **MUNICIPAL CORPORATIONS**, § 967.  
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**MARRIAGE**, § 36.  
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**PARTNERSHIP**, §§ 33-37.  
 Payment, in action on judgment. **JUDGMENT**, § 906.  
 Priorities of mortgages. **MORTGAGES**, §§ 182, 183.  
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 Right to adjustment or arbitration of loss under insurance policy. **INSURANCE**, § 576.  
 To require notice and proof of loss under insurance policy. **INSURANCE**, §§ 554-561, 780.  
 Sufficiency of notice of drainage proceedings. **DRAINS**, § 30.  
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Validity, etc.—(Cont'd).

Of contract of county. **COUNTIES**, § 124.  
 Of contract of infant. **INFANTS**, § 55.  
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**VENDOR AND PURCHASER**, §§ 41-43.  
 Of contract of suretyship. **PRINCIPAL AND SURETY**, § 46.  
 Of contracts and conveyances relating to married woman's separate property. **HUSBAND AND WIFE**, § 198.  
 Of conveyance of land inherited from husband by widow under subsequent coverture. **DESCENT AND DISTRIBUTION**, § 85.  
 Of election under will. **WILLS**, §§ 796, 797.  
 Of execution sale. **EXECUTION**, § 245.  
 Of guaranty. **GUARANTY**, § 21.  
 Of insurance policy. **INSURANCE**, §§ 141, 371-400, 724.  
 Of issue of corporate stock. **CORPORATIONS**, § 104.  
 Of lease. **LANDLORD AND TENANT**, § 31.  
 Of mortgage. **CHATTEL MORTGAGES**, § 75.  
 Of preliminary proceedings for public improvements. **MUNICIPAL CORPORATIONS**, § 319.  
 Of proceedings for annexation of territory to city. **MUNICIPAL CORPORATIONS**, § 33.  
 Of trust. **TRUSTS**, § 53.  
 Vendor's lien. **VENDOR AND PURCHASER**, § 266.  
 Want of consent to sale of mortgaged property. **CHATTEL MORTGAGES**, § 219.  
 Of consideration in bill or note. **BILLS AND NOTES**, § 98.

To maintain or oppose particular remedies or defenses.

See—

Administrator's sale. **EXECUTORS AND ADMINISTRATORS**, § 377.

Appeal—

**APPEAL AND ERROR**, §§ 154-163, 881-884.  
**CRIMINAL LAW**, § 1137.

By election of remedy. **ELECTION OF REMEDIES**, §§ 13-15.

**CANCELLATION OF INSTRUMENTS**, § 18.

Contest of will or probate. **WILLS**, § 230.

**DISMISSAL AND NONSUIT**, §§ 13, 50.

**MECHANICS' LIENS**, §§ 70, 216, 314.

Motion to quash attachment. **ATTACHMENT**, § 277.

**NEW TRIAL**, § 10.

Objections to arbitration proceedings. **ARBITRATION AND AWARD**, § 46.

To change of venue. **VENUE**, § 84.

To evidence—

**CRIMINAL LAW**, § 692.

**TRIAL**, § 75.

To instructions. **TRIAL**, § 272.

To jurisdiction of courts. **COURTS**, § 37.

To venue. **VENUE**, §§ 17, 32.

Probate of will. **WILLS**, § 427.

Rescission of assignment of patent rights. **PATENTS**, § 211.

Of contract. **CONTRACTS**, § 262.

Rescission, etc.—(Cont'd).

Of contract of sale—

SALES, § 101.

VENDOR AND PURCHASER, § 114.

Redemption from mortgage sale. MORTGAGES, § 597.

REFORMATION OF INSTRUMENTS, § 23.

Review, correction, or setting aside of assessment for taxation. TAXATION, § 463.

SET-OFF AND COUNTERCLAIM, § 21.

SPECIFIC PERFORMANCE, § 101.

Statute of limitations. LIMITATION OF ACTIONS, § 13.

#### (A) NATURE AND ESSENTIALS IN GENERAL.

#### § 52. Nature and elements of estoppel in pais.

[a] (Sup. 1862)

Estoppels arise upon matters of fact, and not upon matter of law.—*Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415.

[b] (Sup. 1869)

A person will be concluded from denying the truth of his own admissions, which were intended to influence the conduct of another, and did so influence it, when such denial would operate to the injury of such other person.—*McCabe v. Raney*, 32 Ind. 309.

[c] (Sup. 1871)

The doctrine of estoppel in pais rests on principles of equity and justice, in the prevention of fraud. A party is concluded from denying the truth of his own acts or admissions which are intended to influence the conduct of another, and do so influence it, when such denial will operate to the injury of, or as a fraud upon, the latter, for, in such case, good conscience and honest dealing require that he should be estopped from making the denial; but the doctrine can have no application where all the facts are equally known to both parties, or where the party setting up the estoppel was not influenced or deceived by the acts or admissions set up.—*Schipper v. St. Palais*, 37 Ind. 505.

[d] The necessary elements of an estoppel by conduct are: (1) There must have been a misrepresentation or concealment of material facts. (2) The misrepresentation must have been made with knowledge of the facts. (3) The party to whom it was made must have been ignorant of the truth of the matter. (4) It must have been made with the intention that the other party should act on it. (5) The other party must have been induced to act on it.—(Sup. 1881) *Hosford v. Johnson*, 74 Ind. 479; (App. 1905) *Pierce v. Vansell*, 74 N. E. 554, 35 Ind. App. 525.

[e] (Sup. 1881)

An answer setting up an estoppel by conduct must show that defendant relied on plaintiff's representations or conduct, and was in-

fluenced thereby, and was ignorant of the truth.—*Robbins v. Magee*, 76 Ind. 381.

[f] (App. 1894)

The principles of equitable estoppel will not permit a party to throw another off his guard and thus obtain an unfair advantage. The controlling principle of equitable estoppel is to prevent fraud and promote justice. A waiver works by way of estoppel rather than by way of contract, and an estoppel requires no consideration to support it.—*Jaqua v. Shewalter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

[g] (App. 1898)

The doctrine of estoppel has no application where no fraud, concealment, or attempt to mislead is charged.—*Tinsley v. Fruits*, 51 N. E. 111, 20 Ind. App. 534.

[h] (App. 1910)

Estoppels are raised to prevent fraud.—*Klitzke v. Smith*, 91 N. E. 748.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 121–125, 127.

See, also, 16 Cyc. pp. 719–726.

#### § 53. Intent.

[a] (Sup. 1881)

It is essential to an estoppel based on a representation as to a particular fact that it should have been made with the intention that the party to whom it was made should act thereon.—*Patterson v. Nixon*, 79 Ind. 251.

[b] (Sup. 1884)

Acts and declarations, or silence, to create an estoppel in pais, need not be willfully intended to lead the party setting up the estoppel to act upon them.—*Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 126, 127.

See, also, 16 Cyc. pp. 726–728.

#### § 54. Knowledge of facts.

[a] (Sup. 1878)

A party is not estopped by reason of statements in regard to the title to property, where he was not fully apprised of his legal rights to such property.—*Long v. Anderson*, 62 Ind. 537.

[b] (Sup. 1878)

One is not estopped to assert a claim to land which he has conveyed by absolute deed, intended as a mortgage, against a purchaser who, before purchasing from the grantee, inquired of the grantor as to his interest in the land, and was told he had none, where he did not inform the grantor that he intended to purchase.—*Cravens v. Kitts*, 64 Ind. 581.

[c] (Sup. 1881)

One who, claiming an interest in lands as a devisee, has joined in a suit for partition thereof, and has been defeated, is not thereby

estopped from afterwards contesting the validity of the will on the ground that the testator was of unsound mind, if, at the time the partition suit was brought, he had no notice of such mental unsoundness of the testator.—*Lee v. Templeton*, 73 Ind. 315.

[d] (Sup. 1881)

In the absence of misrepresentation or fraud, it is of the essence of an estoppel in pais that the party claiming the benefit of the estoppel shall have acted in ignorance of material and relevant facts within the knowledge of the other party, or which the other party ought, under the circumstances, to have known and communicated.—*Reid v. State ex rel. Thompson*, 74 Ind. 252.

[e] (Sup. 1881)

A party acting in excusable ignorance of a material fact is not thereby estopped.—*Robbins v. Magee*, 76 Ind. 381.

[f] When the facts are known or accessible to both parties, there can be no estoppel in pais.—(Sup. 1878) *Long v. Anderson*, 62 Ind. 537; (1880) *Lash v. Rendell*, 72 Ind. 475; (1881) *Stoddard v. Johnson*, 75 Ind. 20; (Sup. 1881) *Budd v. Kraus*, 79 Ind. 137; (App. 1892) *Glass v. Murphy*, 30 N. E. 1097, 31 N. E. 545, 4 Ind. App. 530; (Sup. 1893) *Wolfe v. Town of Sullivan*, 32 N. E. 1017, 133 Ind. 331; (App. 1904) *Silver, Burdett & Co. v. Indiana State Board of Education*, 72 N. E. 829, 35 Ind. App. 438; (1907) *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37; (Sup. 1909) *Russell v. State ex rel. Crowder*, 87 N. E. 13, 171 Ind. 623; (App. 1909) *Fuelling v. Fuesse*, 43 Ind. App. 441, 87 N. E. 700.

[g] In order to create an estoppel in pais through a false representation or concealment, the party pleading the estoppel must have been ignorant of the facts.—(Sup. 1881) *Patterson v. Nixon*, 79 Ind. 251; (App. 1904) *Underwood v. Deckard*, 70 N. E. 383, 34 Ind. App. 198.

[h] (Sup. 1881)

The statement on which an estoppel is based must have been made with knowledge of the facts.—*Patterson v. Nixon*, 79 Ind. 251.

[i] (Sup. 1883)

In order to constitute an equitable estoppel by silence or acquiescence, it must appear that the facts were known to the party against whom the estoppel is urged.—*Buck v. Milford*, 90 Ind. 291.

[j] (Sup. 1895)

The doctrine of estoppel by conduct has no application where everything is equally known to both parties, or where the party sought to be estopped was ignorant of the fact out of which his rights sprung, or where the other party was not influenced by the facts pleaded as an estoppel.—*Ross v. Banta*, 34 N. E. 865, 39 N. E. 732, 140 Ind. 120.

[k] (App. 1895)

Where a married woman executed an instrument with her husband, and all the parties were fully conversant with all the facts relating to her rights, there was no ground for estoppel.—*Goff v. Hankins*, 30 N. E. 294, 11 Ind. App. 456.

[l] (App. 1895)

The doctrine of estoppel in pais has no application where everything is equally known to all the parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was not influenced by the acts asserted in estoppel.—*Cleveland, C. & St. L. R. Co. v. Moline Plow Co.*, 41 N. E. 480, 13 Ind. App. 225.

[m] (Sup. 1898)

In order to constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and a want of knowledge on the part of the party relying on the estoppel.—*Franklin Nat. Bank v. Whitehead*, 49 N. E. 592, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302.

[n] (App. 1904)

In order to constitute an estoppel by conduct, there must be knowledge on the part of the one sought to be estopped, and want of knowledge on the part of the other, or some concealment or misrepresentation on the part of the former. Judgment, 71 N. E. 667, affirmed on rehearing.—*Silver, Burdett & Co. v. Indiana State Board of Education*, 72 N. E. 829, 35 Ind. App. 438.

[o] (Sup. 1907)

A member of a building and loan association is not estopped to question its act in depositing securities, including his bond and mortgage, for the benefit of members residing in a certain state, thereby giving them preference over all other members; he not having known or had notice thereof till after the insolvency of the association.—*Clarke v. Darr*, 168 Ind. 101, 80 N. E. 19, 9 L. R. A. (N. S.) 460.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 128-135.

See, also, 16 Cyc. pp. 730-734; note, 38 Am. Rep. 315.

§ 55. Reliance on adverse party.

Relying on representations, see post, § 87.

[a] (Sup. 1853)

A corporation mortgaged to A. in trust. A. became director, and as director, the mortgage being on record, made a lease of the mortgaged property. Held, that this did not estop him, as against the lessees, from foreclosing, where the lessees had notice of the mortgage.—*Wright v. Bundy*, 11 Ind. 398, 409.

[b] (Sup. 1865)

In a suit to enforce a judgment lien, the answer alleged that the defendant purchased

the land in controversy by the advice of the plaintiff, who gave him no notice that he had any claim thereon, and that the plaintiff stood by and permitted the defendant to make valuable improvements upon the said land without notifying him of his lien. *Held*, that the answer did not establish an estoppel in pais, because it failed to aver that the defendant was influenced by the plaintiff's conduct, or that the defendant had no knowledge of the facts as they really existed.—*Fletcher v. Holmes*, 25 Ind. 458.

[c] (Sup. 1871)

A church building was erected upon a lot conveyed to one for the use of a congregation, and after the use of the building for years for worship the building was removed, and the use of the lot for church purposes was abandoned. While a suit by the grantor was pending to have the deed of conveyance corrected on the ground of mistake in drafting, so as to limit its exclusive use to church purposes, and demanding a forfeiture of the lot to the grantor on account of such abandonment, the grantor took a contract to grade the street in front of said lot, under an ordinance of the city, and made an affidavit to secure the issuing of a precept for the collection of an assessment against the owner of the lot, and in said affidavit alleged that the original grantee was the owner thereof, whereupon he paid the assessment. *Held*, that the grantor was not estopped by such affidavit from prosecuting his suit for the recovery of the lot from the grantee, since the facts were equally well known to both parties.—*Schipper v. St. Palais*, 37 Ind. 505.

[d] (Sup. 1873)

The widow and administrator of A. sold to B. certain real estate, of which A. was seised in fee at his death, over which ran a public street of a town. C., who owned and had erected buildings upon certain other real estate adjoining said street, was present and bid at the sale, and gave no notice of the existence of the street. B., claiming to own the land over which the street ran, obstructed the street, to the damage of C. and the public. *Held*, that C. was not estopped by these facts to sue for the damage so sustained by him. The existence of the public highway was or might have been as open to the knowledge of B. as to that of C.—*Foster v. Albert*, 42 Ind. 40.

[e, f] (Sup. 1879)

The rule that one who stands by and makes no claim to land conveyed by the apparent owner is estopped to set up a claim thereto, and that such estoppel will also affect a purchaser from her with notice of the facts, does not apply where all the facts concerning her claim were equally well known to the grantee in such conveyance.—*Suman v. Springate*, 67 Ind. 115.

[g] In order for one to be estopped by his conduct, the other party must have relied thereon.

—(Sup. 1881) *Budd v. Kraus*, 79 Ind. 137; (1890) *Chaplin v. Baker*, 24 N. E. 233, 124 Ind. 385.

[h] (Sup. 1881)

Plaintiff, without objection from the city occupied and improved for 20 years a lot, supposing it to be his own, which was in fact part of a public street. *Held*, that the city was not estopped to set up its claim thereto, there being equal opportunities for knowledge for both parties.—*Sims v. City of Frankfort*, 79 Ind. 446.

[i] (Sup. 1885)

Where a county officer sells property at public auction on a notice of sale insufficient under the statute, the purchaser cannot set up an estoppel against the county, where he had full knowledge of the facts, and was warned at the time of the sale that its validity would be attacked.—*Platter v. Elkhart County Com'rs*, 103 Ind. 360, 2 N. E. 544.

[j] (Sup. 1893)

In an action to quiet title the issue was whether a married man, through whom plaintiff claimed, took a tract of land, of which the land in issue was a part, by survivorship, or whether it went to his wife's heirs. It appeared that the husband permitted his wife's heirs to occupy a part of the tract; that he bought out the alleged interest of one of the heirs, and partitioned a portion of the tract among others; that one of defendants, relying on the construction placed on the deed by plaintiff's grantor, bought a portion of the tract, but not the land in issue. *Held*, that an equitable estoppel did not arise, since there was no fraud or misrepresentation, and defendants knew the facts as well as plaintiff's grantor.—*Barden v. Overmeyer*, 134 Ind. 660, 34 N. E. 430.

[k] (Sup. 1894)

Where the payee of a note executed by a married woman knew that the money was borrowed for the benefit of her husband, she is not estopped by a recital therein that it was for her sole use and benefit.—*Bowles v. Trapp*, 139 Ind. 55, 38 N. E. 406.

[l] (Sup. 1894)

One not a party to a conveyance cannot insist that the grantee therein is estopped to deny the operation of a stipulation in the instrument, when such third party has not himself been misled or deceived by the stipulation.—*McKinney v. Lanning*, 130 Ind. 170, 38 N. E. 601.

[m] (Sup. 1901)

Facts pleaded in a return to effect an estoppel against the state in mandamus to compel a building association to permit the county assessor to examine its books to determine whether any of its stock has been omitted from taxation must have been relied on by all its shareholders.—*Co-Operative Building & Loan Ass'n v. State ex rel. Daniels*, 60 N. E. 146, 156 Ind. 463.

## [a] (Sup. 1901)

Where a person with a full knowledge of his rights and the facts willfully by words or conduct causes another to believe in the existence of a certain state of things, and thereby induces the other to act on that belief and spend money or assume obligations which he would not otherwise have done, the former will not be permitted against the latter to show that a different state of facts existed at that time.—Shedd v. Webb, 61 N. E. 233, 157 Ind. 585.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 136-141.

See, also, 16 Cyc. pp. 734-741.

**§ 56. Acts done or omitted, and change of position.**

Acting on representations, see post, § 87.

## [a] (Sup. 1882)

There must be some act done or omitted, or a change of position made by the person claiming the estoppel.—Stringer v. Northwestern Mut. Life Ins. Co., 82 Ind. 100.

## [b] (Sup. 1885)

In an action by an assignee of a mortgage to foreclose it, and cut off the rights of certain purchasers of water-power rights in the premises, subsequent to the mortgage, a counterclaim setting up a contract interpreting such rights does not sustain a claim of estoppel against the plaintiffs, although the assignors of the mortgage were principal stockholders of the company which contracted for the water power, unless it be shown that such assignors in some way induced the defendants to enter into such contract.—Maxon v. Lane, 102 Ind. 364, 1 N. E. 796.

## [c] (Sup. 1885)

Where the holder of a note gratuitously permits it to run some time after maturity, without attempting to collect it, and then agrees with the maker "to wait" until the maker can collect money to satisfy it, but does not receive any consideration therefor, and does not change his position in any way, the maker is not thereby estopped from setting up any defense then existing or thereafter arising.—Henry v. Gilliland, 103 Ind. 177, 2 N. E. 360.

## [d] (Sup. 1896)

The fact that the sheriff, after levying on a judgment debtor's property, on demand set off a portion to the debtor as exempt, does not estop the sheriff and purchaser to deny his right to the exemption, it not appearing that the debtor was in any way influenced by such act.—Ross v. Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 142.

See, also, 16 Cyc. p. 742.

**§ 58. Prejudice to person setting up estoppel.**

## [a] (Sup. 1867)

An estoppel in pais is rendered conclusive because others, ignorant of the facts, have acted upon the admissions of a party, expressed or implied from his conduct, in derogation of his own rights.—Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638.

## [b] (Sup. 1865)

Statements made by a garnishee to plaintiff before suit brought, to the effect that he owed defendant a certain sum, which he would pay to plaintiff on the latter's garnisheeing him, do not estop him from denying that he owed defendant said sum; the only injury being the liability for costs for which the garnishee offered to confess judgment.—Lewis v. Prenatt, 24 Ind. 98, 87 Am. Dec. 321.

## [c] (Sup. 1869)

Where an act is done or a statement made by person which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence; the estoppel being limited within such bounds as are sufficient to put those who have dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true.—State ex rel. McCarty v. Pepper, 31 Ind. 76.

## [d] (Sup. 1870)

To constitute estoppel, it must appear that the party insisting on it parted with some right or invested money on the faith of the acts of the other party.—Cox v. Vickers, 35 Ind. 27.

## [e] (Sup. 1890)

What one induces another to regard as true is to be treated as the truth between them if the party who acts has been misled to his damage by the statements of the other.—Chaplin v. Baker, 24 N. E. 233, 124 Ind. 385.

## [f] (Sup. 1897)

In order to create an estoppel in pais, the party pleading it must have been misled to his injury in some substantial particular.—Dudley v. Pigg, 48 N. E. 642, 149 Ind. 363.

## FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 144, 145.

See, also, 16 Cyc. p. 744.

**§ 60. Certainty as to grounds.**

## [a] (Sup. 1887)

Estoppels must be certain; and the mere fact that the execution defendant demanded and received shares of stock in a corporation withheld by it as security for a debt which was satisfied by sale of his property, after such sale, will not, where it does not appear that such stock may not have been wrongfully with-

held, operate as an affirmation of the sale, so as to estop him from having it set aside.—Fletcher v. McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. § 148.

See, also, 16 Cyc. p. 748.

**§ 62. Estoppel against public, government, or public officers.**

Estoppel to claim land as street, see MUNICIPAL CORPORATIONS, § 657.

To procure dismissal of appeal from special assessment, see MUNICIPAL CORPORATIONS, § 532.

**[a] (Sup. 1876)**

Where special agents of the state, with power to sell and convey particular property, in the exercise of their power to point out to the purchasers and let them know precisely and specifically what was to be sold, pointed out and designated property as included in or being a part of the property to be sold, which was really not to be sold, and not included in the statutory designation of what was to be sold, the state is not estopped to show the facts by proof that the property pointed out or designated was not part of what was to be sold, as such acts were entirely beyond the scope of their authority, and the state would not be bound thereby.—Indiana Cent. Canal Co. v. State, 53 Ind. 575.

**[b] (Sup. 1877)**

The action of a city council, on a petition by resident freeholders, in adopting a resolution declaring that a donation to aid the construction of a railroad should be made, does not estop the city, in an action against it for a mandate compelling the issue of bonds to the railroad company for the donation, from denying that the petition has been signed by a majority of the resident freeholders.—City of Kokomo v. State ex rel. Adams, 57 Ind. 152.

**[c] (Sup. 1878)**

The report of a city treasurer to the common council, as to the condition of the fund resulting from the sale of city bonds for a specified purpose, in which report he had charged himself with funds remaining in the hands of the purchaser, does not estop him to deny his liability for such funds.—State ex rel. City of Columbus v. Hauser, 63 Ind. 155.

**[d] (Sup. 1880)**

The county is not estopped to set up a defense to the payment of county warrants by the fact that the county treasurer indorsed on the warrant that it was not paid for want of funds.—State ex rel. Zable v. Benson, 70 Ind. 481.

**[e] (Sup. 1883)**

Where a trustee of a school township issues a certificate of indebtedness in the name of the township, without any consideration, such cer-

tificate being invalid, the township is not estopped from pleading the want of consideration as a defense to any suit against it on the certificate.—Axt v. Jackson School Tp., 90 Ind. 101.

**[f] (Sup. 1885)**

A governmental corporation is not estopped by the act of an officer, where such act is beyond the scope of his authority.—Union School Tp. v. First Nat. Bank, 102 Ind. 464, 2 N. E. 194.

**[g] (App. 1892)**

Where a county treasurer accepts in payment for lands sold for taxes a ditch certificate, and is afterwards sued under Rev. St. § 6465, which makes him liable to the holder of the certificate of sale when he sells lands for taxes which were previously paid, he is not estopped to show that he had no authority to receive the ditch certificate, and that it was not a cash payment; the adversary being bound to know the statutory limitations on the treasurer's authority.—Baldwin v. Shill, 3 Ind. App. 291, 29 N. E. 619.

**[h] (App. 1892)**

A public corporation cannot be estopped by the conduct of an officer whose duties are defined by law, except to the extent that such officer is authorized to act for the corporation.—Abell v. Prairie Civil Tp. of Henry County, 31 N. E. 477, 4 Ind. App. 599.

**[i] (Sup. 1894)**

Persons dealing with public officers having statutory powers must, at their peril, ascertain the scope of their authority, and cannot claim an estoppel against a city by reason of unauthorized acts or statements of its treasurer.—Rissing v. City of Fort Wayne, 137 Ind. 427, 37 N. E. 328.

**[j] (App. 1906)**

The act of county commissioners in accepting a sum of money in settlement of an action against an auditor for money illegally detained by him, and in dismissing the action, does not estop the county from maintaining a subsequent action against the auditor to recover the money with which he was wrongfully credited in such settlement, in the absence of any fraud practiced upon the auditor, or of any payment by him of anything which he was not bound to pay, or of any ignorance on his part of all the facts involved in the transaction.—Zuelly v. Casper, 76 N. E. 646, 37 Ind. App. 186.

**[k] (App. 1908)**

A county is not estopped to recover of the county assessor for money allowed and paid him in excess of his legal compensation, \$3 per day for 180 days, though before he had been engaged in his duties for 180 days the commissioners, through the county attorney, for the purpose of inducing him to act, represented that the law limiting 180 days as the time for which he could be compensated had been repealed, the county attorney in advising the assessor being his attorney and not the county's.—Caldwell v.

Board of Com'rs of Boone County, 41 Ind. App. 40, 83 N. E. 355; *Campbell v. Same*, 41 Ind. App. 710, 83 N. E. 357.

[1] (Sup. 1909)

Since no estoppel can grow out of dealings of public officers of limited authority, a county is not estopped to deny relator's claim to compensation under an invalid tax ferret contract executed in advance of an appropriation by fact that the county had received and retained funds by virtue of relator's services performed thereunder.—*State ex rel. Workman v. Goldthait*, 172 Ind. 210, 87 N. E. 133.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 151-153; 12 CENT. DIG. Corp. § 82; 36 CENT. DIG. Mun. Corp. §§ 379, 433, 525-529, 682, 918.

See, also, 16 Cyc. pp. 780, 781; note, 16 C. C. A. 353; note, 16 L. R. A. 178.

(B) GROUNDS OF ESTOPPEL.

§ 64. Assumption of capacity or authority.

[a] (App. 1902)

A guardian of an insane ward will not be heard to urge, in an action against him as guardian, that the ward is not insane, and therefore not rendered incompetent as a witness by *Burns' Rev. St. 1901, § 505*, providing that insane persons shall not be competent as witnesses, as the only right of the guardian to act at all is based on the insanity of the ward.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 154.

§ 65. Assertion of title or right in general.

[a] (Sup. 1891)

The fact that an heir, after learning that her ancestor has disinherited her, sues him for services rendered to him, and for property converted by him, and, after his death, prosecutes such suit to judgment and satisfaction thereof against his administrator with the will annexed, does not estop her from contesting the validity of the will; no person having changed his position in consequence.—*Roberts v. Abbott*, 127 Ind. 83, 26 N. E. 505.

[b] (Sup. 1896)

Collection of taxes and assessments for public improvements against property dedicated to a city for a park, by the recording of a plat on which the land was designated as a park, and sale of lots with reference thereto, does not estop the city from claiming the land as a park.—*Rhodes v. Town of Brightwood*, 145 Ind. 21, 43 N. E. 942.

[c] (App. 1898)

A provision, in notes given for the price of a chattel sold, that the title to such property

should remain in the payees until such notes were fully paid, does not estop payees to deny their ownership of the property sold, in an action on such notes, as there can be no estoppel by mere inference.—*Tinsley v. Fruits*, 51 N. E. 111, 20 Ind. App. 534.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 155-158.

§ 66. Possession or acts of ownership under title or claim.

[a] (App. 1894)

One who has taken the deed of a farm from his brother, who afterwards makes improvements on it, cannot convey the farm without his brother's consent, and then assert, against assignees of his brother's claim for said improvements, that the latter's deed was only a mortgage, and that he made the improvements for his own benefit.—*Tyler v. Johnson*, 8 Ind. App. 536, 36 N. E. 203.

[b] (App. 1900)

Where defendant's mother, being indebted to plaintiffs, placed her son in charge of her store on agreement that on her death it should be his, on express condition that he should pay plaintiffs a certain debt due them, defendant, being in possession of the store and exercising ownership by virtue of the agreement, was estopped from asserting that such agreement was an attempt on the part of his mother to make a testamentary devise, contrary to *Burns' Rev. St. 1894, §§ 2741-2759*, declaring a will invalid unless in writing, duly witnessed, etc.—*Oldenburg v. Baird*, 58 N. E. 1073, 26 Ind. App. 379.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 159-162.

§ 67. Claim under written instrument.

[a] (Sup. 1865)

A guardian who had sold, under order of court, real estate of his wards, waived his vendor's lien by giving up the original notes for the purchase money and taking new notes secured by a mortgage of a portion of the premises. *Held*, in a suit by the wards to enforce the mortgage, that they could not deny the guardian's authority to waive the lien while they claimed under the mortgage.—*Hadley v. Pickett*, 25 Ind. 450.

[b] (App. 1904)

All persons claiming title through or under a deed imposing a burden on the land are bound thereby.—*Chicago & S. E. R. Co. v. McEwen*, 71 N. E. 926, 35 Ind. App. 251.

[c] (App. 1910)

A railroad asserting rights under a release by an employé of his claim for a personal injury cannot refuse to pay the price for which the release was given.—*Illinois Cent. R. Co. v. Fairchild*, 91 N. E. 836.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 163, 164.

See, also, 16 Cyc. pp. 719-721.



**§ 68. Claim or position in judicial proceedings.**

Assent to or participation in judicial proceedings, see post, § 91.

Stipulations and consents in judicial proceedings, see post, § 79.

[a] (Sup. 1873)

A party cannot appeal and have all the benefit to be derived from the appeal, and then be heard to say that because of some informality in his proceedings to obtain an appeal he did not, in fact, appeal.—*Wachstetter v. State*, 42 Ind. 166.

[b] (Sup. 1875)

Where the payee of a promissory note brought suit upon it in his own name, and the note on its face showed that it was for the use and benefit of another, and it was objected that the plaintiff was not the real party in interest, and he failed to amend his complaint by showing that he was the real owner of the note, and on appeal to the Supreme Court it was held that he was the trustee of an express trust, and in that capacity had a right to maintain the action, he could not afterward, in a proceeding to set off against the judgment on the note a judgment held by the maker of the note against the person for whose use and benefit the note was given to said payee, be allowed to plead that the note was really his own and free from any trust.—*Heavenridge v. Mondy*, 49 Ind. 434.

[c] (Sup. 1880)

Where plaintiff is sued upon an instrument as a mortgage, he is precluded from afterwards asserting that it was a contract of conditional sale.—*Love v. Blair*, 72 Ind. 281.

[d] (Sup. 1881)

Where, in partition by a purchaser of land under a foreclosure decree against the mortgagor, the latter claimed that the property mortgaged was personality, and that he, at the time the mortgage was given, had no title thereto, a transcript of the record of proceedings in another action by plaintiff against such mortgagor, in which he relied on the foreclosure sale as a defense to that action, and made the same available to such an extent as to reduce plaintiff's claim by a considerable amount, was admissible to estop defendant from contesting the validity of the sale in the partition suit.—*Marshall v. Stewart*, 80 Ind. 189.

[e] (Sup. 1883)

Where plaintiff pleads, in bar of an appeal from an order allowing it to dismiss its condemnation proceedings, that defendant had in another action recovered judgment for the value of the condemned land, it is not thereby estopped to appeal from the judgment which was pleaded as a bar.—*Pittsburg, Ft. W. & C. R. Co. v. Swinney*, 91 Ind. 399.

One who has recovered judgment in one character or capacity cannot afterwards assert that the character or capacity in which he succeeded was not the true one.—*Id.*

[f] (Sup. 1885)

The bringing of an action for the possession of real estate upon a claim of title in fee simple is not an election that will estop one from afterwards claiming a leasehold interest therein.—*Campbell v. Hunt*, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879.

[g] (Sup. 1889)

That persons have acquired land through an execution sale on a judgment will not estop them from denying that the judgment debtor had title to the land at the time of the levy and sale, and tracing title through a former owner, in the absence of any showing that possession had been taken under and by virtue of the execution sale.—*Shockley v. Starr*, 119 Ind. 172, 21 N. E. 473.

[h] (Sup. 1903)

Where plaintiffs in an action to quiet title offered to account for the amount due defendants, claiming under tax deeds based on ditch certificates, they are not in a position to claim that the ditch proceedings were so irregular as wholly to defeat all claims for liens on account of such certificates.—*Skelton v. Sharp*, 67 N. E. 535, 161 Ind. 383.

[i] (Sup. 1906)

Where a party submits to a judgment, he elects to consider it binding and cannot afterwards object to it, especially where he has been instrumental in securing its rendition.—*State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County*, 166 Ind. 162, 76 N. E. 986.

Parties are bound by the record under which they claim, and whatever is apparent or arises by necessary implication therefrom need not be alleged.—*Id.*

[j] (Sup. 1907)

Where a co-tenant instituted a suit to obtain a sale of the land held in common, and after the sale judgment creditors sought to have the proceeds applied to the payment of their judgment, and the wife of the co-tenant filed cross-complaints asking that her right to the proceeds be decreed superior to that of the creditors, she could not assert that her title to the real estate did not pass.—*Staser v. Gaar, Scott & Co.*, 168 Ind. 131, 79 N. E. 404.

[k] (Sup. 1907)

Defendant in an action on a fire policy having pleaded the provision thereof for arbitration, and that it had not waived the same, in abatement of the action, and having procured a trial thereon, cannot thereafter change its position, and have a trial of the same matter in bar of the action.—*Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 165-169.

See, also, 16 Cyc. pp. 796-801; note. 130 Am. St. Rep. 758.

**§ 70. Failure to assert title or right.**

Permitting sale or mortgage of property by another, see post, § 94.

**[a] (Sup. 1853)**

As a general proposition, a party who has expressly or by his acts waived his title to property will be estopped from asserting it against a party who has invested money on the faith of such waiver.—*Laney v. Laney*, 4 Ind. 149.

**[b] (Sup. 1865)**

A mere failure to give notice of a right where another, without knowledge of the fact, is investing his money, and where it might be fairly concluded that he would not do so if informed of the fact, will generally preclude a subsequent setting up of the right thus concealed.—*Fletcher v. Holmes*, 25 Ind. 458.

**[c] (Sup. 1871)**

A. procured his father to become his surety on a debt to B., and after the death of his father, and the allowance of the debt against his estate, executed to the administrator of his father's estate an assignment of his entire interest, real and personal, in the estate, to secure the amount of the debt to the estate. Proceedings were afterwards instituted to obtain a partition of the real property among the heirs of the estate, to which proceedings the administrator, as an heir, was a party; and the land, not being divisible, was sold, and two notes given by the purchaser payable to A., for his interest. Judgment was obtained by C. as a creditor against A. and a proceeding supplementary to execution was prosecuted by C. to reach the proceeds of these notes, and this suit was brought by the administrator to secure the proceeds of the notes to indemnify the estate. *Held*, that the administrator was estopped from asserting his claim in favor of the estate against either the purchaser or the judgment creditor of A., who had taken the proceedings supplementary to execution to reach the proceeds of the note.—*Routh v. Spencer*, 38 Ind. 393.

**[d] (Sup. 1879)**

One having an interest in land, and standing by without objection when the land is conveyed by another to a third person, is not thereafter estopped from claiming the land as against such third person who at the time of the conveyance had knowledge of all the facts.—*Suman v. Springate*, 67 Ind. 115.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 183-187.

See, also, 16 Cyc. pp. 761-770.

**§ 71. Disclaimer.****[a] (Sup. 1880)**

Where parents made an express agreement with their son that he should be paid for providing and taking care of them, *held*, that he was not estopped from enforcing his claim against their estate by the fact that he had said,

after their death, that he would make no charge for his services.—*Botts v. Fultz*, 70 Ind. 396.

**[b] (Sup. 1884)**

Where a widow renounced all claims to real estate of her husband sold to pay his debts, and urged and induced the purchaser to buy and pay for the whole estate, she was estopped to thereafter assert as against him her one-third interest.—*Wire v. Wyman*, 93 Ind. 392.

**[c] (Sup. 1893)**

An heir for whose benefit a contract is made by a coheir with the testator is not estopped by a refusal to accept the amount due thereunder, when tendered by such coheir, from afterwards suing upon such contract; and this notwithstanding the fact that the realty devised in consideration of the contract may be liable for debts.—*Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971.

**[d] (App. 1900)**

Where defendant's decedent bound himself and his heirs to convey land to plaintiff, and, on his death without conveying, his heirs sued to quiet title to the land, in which plaintiff appeared and disclaimed interest, she is not prevented thereby from maintaining an action for breach of the contract; such disclaimer being a mere election not to ask for a specific performance, and not an abandonment of her claim for damages.—*Doddridge v. Doddridge*, 56 N. E. 112, 24 Ind. App. 60.

**[e] (App. 1902)**

Where one claiming to have been the equitable owner of a judgment at the time it was settled between the original parties stated that the judgment debtors owed him nothing, to a partner of one of them, before such settlement, such assignee is estopped from claiming under such judgment.—*Little v. Koerner*, 63 N. E. 766, 28 Ind. App. 625.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 173-182.

See, also, 16 Cyc. p. 757.

**§ 72. Acts making injury possible as between actor and another equally blameless.****[a] (Sup. 1888)**

Where one of two innocent persons must suffer through the act of a third, the loss must fall on him who puts it in the power of the third person to commit the act causing the loss.—*Lucas v. Owens*, 16 N. E. 196, 113 Ind. 521.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. § 188.

See, also, 16 Cyc. p. 773.

**§ 73. Clothing another with apparent title or authority.**

By married women, see HUSBAND AND WIFE, § 129.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 189-197.

See, also, 16 Cyc. pp. 773-777.

#### § 74. — Real property.

[a] (Sup. 1864)

Where a deed of land was delivered to a company for examination, and the company conveyed the land to a third person, but the original owner remained in possession, and afterwards brought suit to have the deeds set aside, it was *held* that there was no estoppel.—Berry v. Anderson, 22 Ind. 36.

A man may be estopped by his acts from asserting title to land which he has not conveyed as against bona fide purchaser of such land.—Id.

[b] (Sup. 1865)

Where a deed is executed on Sunday, but by the procurement of the grantor is dated as of the preceding day, he cannot assert the invalidity of the deed against a subsequent bona fide purchaser.—Love v. Wells, 25 Ind. 503, 87 Am. Dec. 375.

[c] (Sup. 1885)

The fact that goods were sold to the buyer on the faith of his naked legal title to certain land in the possession of another did not estop the person beneficially interested in such land to say that it in equity belonged to her, and not to the person holding the title.—Hays v. Reger, 1 N. E. 386, 102 Ind. 524.

[d] (Sup. 1889)

Rev. St. 1881, § 5119, declares that a married woman shall not enter into any contract of suretyship, and that all such contracts shall, as to her, be void. A married woman, to enable her husband to obtain a loan for his own benefit, conveyed her land to him through a third person, who knew of the intent. After six months plaintiff made the loan on a mortgage on the land executed by husband and wife, but one-half the amount was furnished to plaintiff by the third person, who took plaintiff's note therefor. There was evidence that plaintiff had no knowledge of the purpose of the conveyances. Title remained in the husband for seven years, and, so far as appeared, with the wife's approbation, and it did not appear that she was in any way misled. *Held*, that the wife was estopped to allege that the conveyances and mortgage were void, as an evasion of the statute.—Long v. Crosson, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783.

[e] (Sup. 1895)

A married woman holding an equitable title to real estate, the legal title to which is in her husband, who knowingly allows the latter to contract for improvements with a third party, who in good faith relies upon the husband's ownership as shown of record, is estopped to set up her equitable interest as against the creditor.—Le Coil v. Armstrong-Landon-Hunt Co., 140 Ind. 256, 39 N. E. 922.

[f] (Sup. 1906)

Where complainant after the execution of a deed conveying certain property to her caused it to be altered so as to convey the property to

defendant, a minor, for the purpose of giving her a life estate in the property only, the fact that complainant voluntarily caused such alteration did not estop her from subsequently giving parol evidence of the contents of the deed before it was altered, in a suit to reform the deed by replacing complainant's name therein as grantee.—Gibbs v. Potter, 77 N. E. 942, 160 Ind. 471.

[g] (App. 1906)

Where a mortgagee, who loaned money on the security of a mortgage of real property, the deed to which the mortgagor had forged, was, through her attorney, aware the day before the loan was made that the owner had not conveyed his land to the mortgagor, she and her attorney could not have relied on a previous statement of the owner that he had sold his land to the mortgagor, and the owner was not estopped by his statement from asserting his right to have the mortgage declared void as a cloud on his title.—Williams v. Ketcham, 77 N. E. 285, 37 Ind. App. 506.

#### FOR CASES FROM OTHER STATES.

SEE 19 CENT. DIG. Estop. §§ 190, 191.

See, also, 16 Cyc. pp. 774, 775; note, 22 L. R. A. 256.

#### § 75. — Personal property.

[a] (Sup. 1877)

In an action against an officer for an alleged conversion of barrels of whisky, defendant answered that he had seized them under an execution under a valid judgment against M., a retailer, who had contracted the judgment debt on the faith that the whisky was his own; that when seized they were at the place of business of M.; that plaintiff had procured M. to obtain a license in his own name, and had furnished him means to purchase the stock of liquors, under a secret agreement that they should remain the property of plaintiff until sold by M., who was to have the retail profits. *Held*, that there was no estoppel; otherwise, if plaintiff had authorized M. to sell the whisky at wholesale.—McGirr v. Sell, 60 Ind. 249.

[b] (Sup. 1887)

Where owners and dealers in wheat place it with an elevator company, and knowingly permit such company to mingle it with other wheat purchased by the company, and to sell from the common mass, thus clothing it with apparent ownership and authority to sell the wheat, they are estopped to assert title thereto, as against an innocent purchaser for value, who bought in good faith, in the usual course of business, believing such company to be the owner of the wheat; and a private understanding between the dealers and the company cannot affect the rights of such innocent purchaser.—Preston v. Witherspoon, 109 Ind. 457, 9 N. E. 585, 58 Am. Rep. 417.

[c] (Sup. 1888)

One who has made an actual transfer of stock, thus enabling the assignee to secure cred-

it on the faith of his ownership, cannot avail himself, as against the assignee's creditors, of a secret agreement, whereby the assignor was to remain the owner and receive the dividends; Rev. St. 1881, § 4924, making all transfers of goods or things in action, made in trust for the use of the person making the same, void against creditors, antecedent or subsequent.—Hirsch v. Norton, 115 Ind. 341, 17 N. E. 612.

[d] (Sup. 1889)

Plaintiffs, believing that they were selling certain property to defendant, and that M. was its agent, as he had falsely represented, were not estopped from recovering the property from defendant, when sold to it by M., because they had allowed the bills of lading to be made out in the name of M.—Peters Box & Lumber Co. v. Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367.

[e] (Sup. 1895)

Where a wife purchases a retail drug store with her separate property, and permits her husband to carry on the business in his own name, she is not estopped, there being no allegation of her insolvency, as against a person selling goods to the husband on the faith of his ownership of the store, to deny the authority of the husband to subsequently mortgage the goods to secure the price, though, after the goods were bought, she may have stated to the sellers that they belonged to her husband. McGirr v. Sell (1877) 60 Ind. 249, approved.—Kiefer v. Klinsick, 42 N. E. 417, 144 Ind. 46.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 192-195.

See, also, 16 Cyc. pp. 775-777.

§ 76. — Relying and acting on apparent title or authority.

[a] (Sup. 1895)

Where land is purchased by a wife with her own money, the deed being taken in the husband's name, and so remaining, in the records, for nearly 18 years, the wife meanwhile joining her husband in mortgages on the land as his property, she will be estopped from asserting her title as against innocent persons, who have become creditors of the husband on the faith of his ownership.—Pierce v. Hower, 42 N. E. 223, 142 Ind. 626.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 196, 197.

See, also, 16 Cyc. pp. 773, 775, 777; note, 3 L. R. A. (N. S.) 879.

§ 77. Dealing with person asserting title or exercising authority.

[a] (Sup. 1855)

A purchaser at sheriff's sale did not pay or tender the purchase money, nor was a deed executed to him. He afterwards lent money to the execution debtor, and took a mortgage on the land bid off at sheriff's sale. Held that, by

taking such mortgage, he was estopped from setting up any title anterior thereto.—Conklin v. Smith, 7 Ind. 107, 63 Am. Dec. 416.

[b] (Sup. 1868)

Suit for breach of duty by defendants as trustees in surrendering and allowing to be canceled certain bonds executed by a railroad company and held by defendants in trust to secure the repayment of certain sums advanced to the company by a town, the plaintiff's assignor. Held that, the contract by the town with the company not being prohibited by any statute, the mere lack of power in the town to loan money could not be taken advantage of by the borrower or by the defendants.—Ridenour v. Whertritt, 30 Ind. 485.

[c] (Sup. 1869)

A signer of the petition to the county commissioners for the organization of a turnpike corporation which has attempted to organize to construct a lesser amount of road than is permitted by statute, who has not become a member of it, is not estopped from denying the legality of the organization in a suit to enjoin the collection of taxes therefor.—Green v. Beeson, 31 Ind. 7.

[d] (Sup. 1879)

In an action by the state for the use of a city against the treasurer of the city's school trustees, to recover for interest received by him on the funds in his hands, the court found that the interest received by him was interest accrued upon warrants issued in his favor by the county auditor on the county treasurer for the funds themselves, and paid by the latter out of those funds. Held, that defendant was liable, being estopped to deny the authority of the county treasurer to pay him such interest.—Hadley v. State ex rel. City of Richmond, 66 Ind. 271.

[e] (Sup. 1881)

Where a tenant in common, while indebted to his cotenant, transfers his undivided interest to a third person without consideration and for the purpose of defrauding his creditors, the cotenant does not, by afterwards conveying a portion of the land to such fraudulent grantee in pursuance of an agreement of partition, estop himself from maintaining an action to subject the interest of his debtor in the hands of the fraudulent grantee to the payment of the debt, since the parties to the fraudulent transfer were not misled into changing their situations by the execution of the partition deed.—Stout v. Stout, 77 Ind. 537.

[f] (Sup. 1883)

One who has borrowed from the county clerk, auditor, and recorder, as trustees of the county library, the surplus fund of such library, and has executed his note and mortgage therefor, cannot deny the corporate existence of the library, or that the officers with whom he had dealt were trustees of an express trust.—Traylor v. Dykins, 91 Ind. 229.

## [g] (Sup. 1835)

Where, in a suit to set aside a note and mortgage executed by a married woman, the mortgagee had recognized her title to the property by accepting the mortgage, he was estopped to impeach the same for fraud for a purpose.—*Warey v. Forst*, 26 N. E. 87, 102 Ind. 205.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 198-203.

## § 78. Contracts.

## [a] (Sup. 1874)

One of several heirs of A. owning an estate in common, in which the widow of A. held a dower interest only, represented to the other heirs that, if they and the widow would unite with himself in the sale and conveyance of said estate, he would invest the proceeds of the sale in certain real estate in the name of the widow. The sale and conveyance were made accordingly, and the proceeds were invested by said heir in said real estate, the deed of which was taken by him generally "to the heirs of A." Held, in an action by a grantee of the widow against said heir, that the latter was not estopped by said promise to other heirs, not made to the widow, to claim partition of said real estate as one of the heirs of A.—*Adkins v. Adkins*, 48 Ind. 12.

## [b] (Sup. 1878)

Although county commissioners are required to advertise for bids for county contracts, yet they are estopped from setting up their failure to do so in an action by the contractor to recover on the contract.—*Board of Com'rs of Jennings County v. Verbar*, 63 Ind. 107.

## [c] (Sup. 1882)

Where a purchaser at foreclosure sale agrees to give the mortgagor time to pay the lien created by the sale, he is estopped, after having received full consideration, to repudiate the agreement and take out a sheriff's deed.—*Felton v. Smith*, 84 Ind. 485.

## [d] (Sup. 1883)

A party, cannot contradict his own note; and a stipulation that he signs it as a principal precludes him from afterwards asserting that he was a surety, and from claiming a right of set-off under the statute applicable to sureties.—*Menaugh v. Chandler*, 89 Ind. 94.

## [e] (Sup. 1892)

One who was vouched to defend an action in ejectment employed an attorney to conduct the defense, and told him to do the best he could, and to have the defendant pay what was necessary, and that she would repay it. Held, in an action against the vouchee to recover money paid by the attorney on settlement of the suit, she is estopped to maintain that the agreement to repay the same is without consideration because of the invalidity of the outstanding title.—*Freeman v. Brehm* (App.) 31 N. E. 545.

## [f] (App. 1895)

Where a railroad company in consideration of a grant of land for a right of way agreed that the landowner should have the undercrossing at a point where the railroad crossed a highway on the landowner's lands, the railroad was not in a position to say as against the landowner that it could close up such way under the railroad to the landowner's damage without incurring liability to him on account of such act.—*Lake Erie & W. R. Co. v. Lee*, 41 N. E. 1058, 14 Ind. App. 328.

## [g] (Sup. 1906)

Where a town purchased a water plant incumbered by a mortgage, the contract of purchase containing a provision that it is bought subject to the mortgage, the town is estopped to deny the validity of the mortgage.—*Eddy Valve Co. v. Town of Crown Point*, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 204-210.

See, also, 16 Cyc. pp. 719-721.

## § 79. Stipulations and consents in judicial proceedings.

## [a] (Sup. 1867)

An action for the recovery of real estate was tried on July 29, 1865, and the judge to whom the cause was submitted was then ready to pronounce judgment for plaintiff; but at the request of defendant, and for his sole accommodation, it was agreed that the judge should hold the case under advisement, and that the judgment, when entered, should be entered as of the date of July 29th. In pursuance of this agreement the record was signed by the judge, leaving a sufficient space to insert the judgment; and on January 17, 1866, without objection on the part of defendant, the judgment was entered up as of July 29, 1865. Held, that the defendant was estopped to deny that the judgment was rendered on July 29th.—*Ridgway v. Morrison*, 28 Ind. 201.

## [b] (App. 1896)

An employé, after consenting that his employer shall pay into court the amount of a claim and costs for which his wages in the employer's hands have been garnished, and agreeing to accept the balance due him, cannot recover from the employer the full amount of his wages, on the ground that the garnishment proceedings were irregular, and that the employer was not bound to pay the money into court.—*Baltimore & O. S. W. R. Co. v. Manning*, 16 Ind. App. 408, 45 N. E. 526.

## [c] (Sup. 1897)

A creditor who, after appointment of a receiver in a suit brought by him for foreclosure of a mortgage and winding up of the affairs of the mortgagor corporation, agrees with another creditor, attacking the mortgage as fraudulent, to release it, and allow the other creditor, on extending its claim, to have a mortgage stipulating for release of the property from the re-

ceivership, all of which was done, cannot claim that at the time the mortgage was given the property of the corporation was held for his benefit by the receiver, and that, therefore, the mortgage was ineffectual.—*Smith v. Wells Mfg. Co.*, 148 Ind. 333, 40 N. E. 1000.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 211-213.

See, also, 16 Cyc. p. 798.

#### § 80. Official certificates or acts.

[a] (*Sup.* 1867)

In a suit to enjoin the collection of certain taxes assessed upon a return made upon oath in these words: "Money on hand or on deposit within the state, \$2,500,"—the allegations were that this sum was in United States treasury notes, which are not liable to taxation by authority of a state; that the return was made "by reason of a mistake of facts, of which plaintiff was not cognizant at the time"; and that he filed an affidavit with the auditor of the county for an order on the treasurer releasing the tax. The affidavit was made an exhibit, and disclosed the fact that the appellant was "informed and" believed that United States treasury notes were "not taxable." *Held*, that the complainant, having made the return, was estopped from denying its correctness.—*Telle v. Green*, 28 Ind. 184.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 214, 215.

#### § 81. Requests.

[a] (*Sup.* 1882)

Where a contract provides that a certificate of sale of mortgaged premises shall be assigned to defendant, and the complaint alleges that at his request it was assigned to him and another person jointly, a contention that no performance was shown was without merit, as a party who procures performance in a given manner cannot complain of the other for having complied with his request.—*Searce v. Gall*, 82 Ind. 255.

#### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 216, 217.

#### § 82. Representations.

##### FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 218-234.

See, also, 16 Cyc. pp. 749-757; note, 38 Am. Dec. 631.

#### § 83. — In general.

[a] (*Sup.* 1874)

An estoppel does not arise on a false representation as to facts which are matters of official record, so that their truth could be tested by inquiry at the proper office.—*Adkins v. Adkins*, 48 Ind. 12.

[b] (*Sup.* 1881)

In a suit to foreclose a mortgage alleged to have been executed by a husband and wife,

a cross-complaint by a codefendant setting up that the wife and the plaintiff by their authorized agent for the purpose fully informed defendant of the nature of the mortgage and of the purpose for which it was given and held by plaintiff, and represented to defendant that the mortgage was not a lien on the premises, and especially on the inchoate interest of the wife therein, and trusting in such representations the defendant was induced to and did purchase the premises, alleged such facts as estopped the plaintiff from enforcing the foreclosure of the mortgage.—*Mark v. Murphy*, 76 Ind. 534.

[c] (*Sup.* 1883)

The holder of mortgage notes who induced a purchaser to take them by representing that the mortgage was a paramount lien was thereby estopped to assert that there was a prior mortgage.—*Dodge v. Pope*, 93 Ind. 480.

[d] (*Sup.* 1894)

A trustee who retains money from which it is his duty to pay his beneficiary the amount of taxes which he represents is due upon the trust fund puts himself in such a position that equity will charge him primarily with the taxes, and will hold him estopped to deny that such taxes were not regularly levied.—*Thiebaud v. Tait*, 36 N. E. 525, 138 Ind. 238.

[e] (*App.* 1898)

The owner of land mortgaged it, and with the money thereby obtained erected a house, erroneously supposing it to be on her land. Afterwards, having learned that the house was on the land of an adjoining owner, she sold her land, representing that the house was on, and a part of, the realty conveyed. Thereafter the mortgage was foreclosed, and the foreclosure purchaser removed the house onto the land purchased, for which act the original owner sued him as for a conversion. *Held*, that plaintiff was estopped from asserting title to the house on account of her representations to her grantee.—*Dutton v. Ensley*, 51 N. E. 380, 21 Ind. App. 46, 69 Am. St. Rep. 340.

[f] (*App.* 1902)

Plaintiff held a recorded chattel mortgage on certain corn, and represented to defendants, who had no actual knowledge of the mortgage, that he was the agent of the mortgagor for the sale of the corn, and that it was free from all liens, except that plaintiff was entitled to a small amount out of the proceeds. Defendants purchased the corn, paying plaintiff the amount he claimed to be due him. Defendants had part of the corn delivered to them, and paid the mortgagor the remainder due thereon after deducting the amount paid to plaintiff. *Held*, that plaintiff was precluded from setting up any claim to the corn as against defendants.—*Moore v. Smith*, 64 N. E. 623, 29 Ind. App. 503.

[g] (*Sup.* 1906)

A wrongdoer will not be allowed to take advantage of his own fraud, or corrupt or crim-

inal conduct.—State ex rel. Ketcham v. Terre Haute & I. R. Co., 166 Ind. 580, 77 N. E. 1077.

[h] (Sup. 1907)

A party to a contract reciting a consideration of \$1 was estopped to deny its consideration as against an assignee of a contract for a valuable consideration who had no knowledge that the original consideration of \$1 was not paid.—Dill v. Frazee, 169 Ind. 53, 79 N. E. 971.

[i] (App. 1910)

A mortgagee suing to enforce notes and a mortgage, on being informed of a sale of the property by mortgagors conditional on the buyer arranging for dismissal of the suit, taking up the notes and satisfying the mortgage, agreed, in consideration of receiving a certain sum, to cancel the suit, and to accept an additional amount in consideration and full satisfaction for the larger amount due from mortgagors, the additional amount to be paid in 10 days, providing suit was canceled and canceled notes turned over to the buyer. *Held*, the mortgagors having parted with their property in reliance on the contract which the buyer performed, except as prevented by mortgagee, the mortgagee could not disregard his representation by the written agreement that the pending case would be canceled made in effect to mortgagors, and was estopped to proceed to judgment on the notes.—Klitzke v. Smith, 91 N. E. 748.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 218, 227-229.

See, also, 16 Cyc. p. 749.

### § 85. — Future events.

[a] (Sup. 1864)

In an action brought against a steamer, under the statute regulating liens upon water craft, to enforce the collection of a demand originating in this state, the master of the steamer, who was substituted as defendant upon giving bond, answered that the steamer was sold under proceedings in Kentucky to enforce a claim; that one B. became the purchaser, relying on and induced by the statements of the plaintiff that he had a claim against the steamer and would file it in said proceedings; that the purchaser would get a title freed from all liens upon the boat; and that B. subsequently transferred the title to the defendant. *Held*, that the answer did not show an estoppel.—Roose v. McDonald, 23 Ind. 157; (1864) Brown v. Same, Id. 162, 163.

[b] (Sup. 1874)

One of several heirs of A. owning an estate in common, in which the widow of A. held a dower interest only, represented to the other heirs that, if they and the widow would unite with himself in the sale and conveyance of said estate, he would invest the proceeds of the sale in certain real estate in the name of the widow. The sale and conveyance were

made accordingly, and the proceeds were invested by said heir in said real estate, the deed of which was taken by him generally "to the heirs of A." *Held*, that the alleged representation by said heir was a promise only as to how he would invest the proceeds of the sale, and was not a statement of a fact of which a false representation could be alleged.—Adkins v. Adkins, 48 Ind. 12.

[c] (Sup. 1884)

In a suit for partition by a widow against a grantee of her husband's administrator, an answer that defendant was induced to purchase by her representations that he would get a good title to the entire land, and that she, as widow, would claim no interest, but would take her interest in other lands, was sufficient to show an estoppel in pais.—Wire v. Wyman, 93 Ind. 392.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 220, 221.

See, also, 16 Cyc. p. 752.

### § 86. — Validity of bills or notes.

[a] The maker of a note, who tells a prospective assignee or purchaser thereof that there is no defense to it, is estopped to set one up in a suit by such person.—(Sup. 1857) Paul v. Baugher, 8 Ind. 501; (1858) Powers v. Talbott, 11 Ind. 1; (1858) Rose v. Wallace, Id. 112; (1861) Rose v. Teeple, 16 Ind. 37, 79 Am. Dec. 408; (1861) Wright v. Allen, 16 Ind. 284; (1861) Morrison v. Weaver, Id. 344; (1872) Rose v. Hurley, 39 Ind. 77; (1883) Plummer v. Farmers' Bank of Mooresville, 90 Ind. 386; (1894) Krathwohl v. Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

[b] (Sup. 1858)

A maker is estopped to set up want of consideration against one who purchased the note, upon the promise or representation of the maker that the note was valid and would be paid.—Powers v. Talbott, 11 Ind. 1; Rose v. Wallace, Id. 112.

[c] (Sup. 1860)

In an action on a note by an assignee, defendant pleaded a want of consideration and fraud. Plaintiff replied, alleging an estoppel in that he took the assignment for a consideration paid on the representation of defendant, during the negotiation, that the note was valid. *Held*, that the note having been given on an executory consideration of services to be rendered, which were not performed when the assignment was made, and such fact being known to plaintiff, as well as the fact that it was obtained by fraud, the estoppel was not available to defeat defendant's defense.—Black v. Mitchell, 14 Ind. 397.

[d] (Sup. 1861)

Where certain persons represented themselves to be assignees of a note, and thereupon the makers represented that they should pay it within a certain time, it was *held* that the mak-

ers were not estopped from contesting its validity, even although the purchase had not been in fact completed at the time of their representation; for they, not knowing this, could not be presumed to have intended to induce the purchase.—*Morrison v. Weaver*, 16 Ind. 344.

[e] (Sup. 1861)

Where the maker of a note informs a person, who has already purchased it, that it is all right and will be paid, he is not estopped by such promise to afterwards contest the validity of the note, since such purchaser did not take it on the faith of such representations.—*Carter v. Harris*, 16 Ind. 387.

[f] Representations, by the payor of a note, that it is valid, and he has no defense against it, made to a purchaser of such note after he has become the owner thereof, do not operate as an estoppel against the payor, nor can such representations, repeated by the purchaser thereof to any person to whom he may sell the same, have such effect in favor of such second purchaser.—(Sup. 1862) *Jones v. Dorr*, 19 Ind. 384, 81 Am. Dec. 406; (1863) *Windle v. Canaday*, 21 Ind. 248, 83 Am. Dec. 348.

[g] (Sup. 1863)

A., having purchased from a third party a note made by B., was thereafter informed by B. that the note was good, that he would pay it, that it was secured by mortgage, and that, if A. would give him time on it, he would pay him 10 per cent. interest; A. accordingly gave him time indefinitely during which A.'s assignor became insolvent. *Held*, that B. was not estopped to deny the validity of the note, or to set up a failure of consideration.—*Ray v. McMurtry*, 20 Ind. 307, 83 Am. Dec. 322.

[h] (Sup. 1867)

If the maker of a note, by himself or an agent, represents to a person about to take an assignment of the note that the note is a valid obligation, and that he has no defense to it, he will be estopped to plead a failure of consideration to a suit by the assignee.—*Vanderpool v. Brake*, 28 Ind. 130.

[i] (Sup. 1877)

Where the maker induced one to take an assignment of a note by assuring him that he had no defense thereto, and would pay him at maturity, he is estopped to assert a defense against such assignee.—*Reagan v. Hadley*, 57 Ind. 500.

[j] (Sup. 1882)

A representation, made by the maker of a note after assignment, that he has no defense to the note, does not estop him from afterwards setting up a defense, but where the representation is made before assignment, and relied upon in the purchase of the note, the rule is otherwise.—*Hoover v. Kilander*, 83 Ind. 420.

[k] (Sup. 1882)

In a suit by the assignee of a promissory note, to which defendant, one of the makers pleaded a material alteration, plaintiff replied that at the time of purchasing the note he told defendant he was going to do so, gave him a general description of the note, and was told by defendant that he had no defense. *Held*, that the reply was bad, as it did not show that defendant knew of the alteration, nor that it had been made before assignment.—*Koons v. Davis*, 84 Ind. 387.

[l] (Sup. 1890)

In an action on a note, which it was admitted was given for a gambling debt, and void under the statute (Rev. St. 1881, § 4950), unless defendant was estopped from setting up such defense against plaintiff, as assignee, there was evidence that, at one time before the purchase of the note, defendant told plaintiff that it was all right, and that he would pay it; but undisputed evidence showed that plaintiff knew what the note was given for before he purchased it, and there was no claim that he relied upon or was induced by defendant's statement when he purchased the note. *Held*, that there was no estoppel, and that a judgment in plaintiff's favor could not be sustained.—*Spray v. Burk*, 123 Ind. 565, 24 N. E. 588.

[m] (App. 1892)

Where a note given on a Bohemian oats contract is delivered, not to the seller of the oats, but to a third person, who, afterwards becoming indebted to the seller, delivers him the note with the approval of the maker and the maker then, in an action on the note, shows that the entire transaction, including the giving of the note, was between the original parties to the note, and that the person to whom it was first delivered was the agent only of the seller, a representation afterwards made by the maker to the seller that the note was perfectly good does not amount to an estoppel in pais, as there was no new consideration moving to the maker, and the facts were known to both parties.—*Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

[n] (Sup. 1896)

Where the maker of a promissory note, after looking it over, told one who was about to purchase it that it would be all right, and would be paid as it fell due, and the note was purchased on the faith of such statement, the maker was estopped from defending an action on the note on the ground that it had been altered since the date of its execution.—*Krathwohl v. Dawson*, 38 N. E. 407, 39 N. E. 496, 140 Ind. 1.

[o] (App. 1895)

Under Rev. St. 1894, § 6962, providing that a married woman shall be bound the same as any other person by an estoppel in pais, a statement by a married woman that her note is all right, and that she has no defenses there-



to, and that she will pay it, will estop her from claiming, as defenses to an action on it by one who purchased it relying on her statement, that it was given for the debt of a third person, and was without consideration.—*Stephenson v. Clayton*, 14 Ind. App. 76, 42 N. E. 491.

[p] (App. 1898)

The fact that the payee of a note told the surety, after it was past due, that he had given the maker an extension, and relying thereon, the surety failed to indemnify himself from the maker, who became insolvent after the extension, does not raise an equitable estoppel in favor of the surety, where he did nothing to enforce the collection, and it does not appear that the extension was without his consent.—*Olson v. Chism*, 51 N. E. 373, 21 Ind. App. 40.

[q] (App. 1899)

Defendant is estopped from claiming that his signature as surety on a note given plaintiff was a forgery, where, before the note was due, and while the maker was solvent, plaintiff, not knowing of the forgery, took it to defendant, to see if he would buy it, and he, after examining it, though knowing his signature was not genuine, made no claim of forgery, but arranged for a subsequent meeting to negotiate for taking up or purchasing it, and plaintiff by reason thereof delayed action on the note till after the death and insolvency of the maker.—*Kuriger v. Joest*, 52 N. E. 764, 54 N. E. 414, 22 Ind. App. 633.

[r] (App. 1901)

Where the indorser of a note before purchasing it took it to the maker and asked if it was all right, and he did not intimate that he had any defense to the note, he was estopped from showing it void, as given for money won on a wager.—*Pritchett v. Ahrens*, 59 N. E. 42, 26 Ind. App. 56, 84 Am. St. Rep. 274.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 222-226.

See, also, 16 Cyc. pp. 752-754.

### § 87. — Relying and acting on representations.

[a] (Sup. 1855)

An intestate died seized of several tracts of land. His widow owned by inheritance an adjoining lot. A. wished to purchase the interest of several of the heirs, and the widow assured him that the tract she owned was part of the intestate's land, and she received a deed from the heirs, describing the premises conveyed as their interest in the land owned by the intestate at the time of his death. *Held*, that the widow was estopped, though ignorant of her legal right in the land she inherited, to claim any interest in so much of it as would have passed by the conveyance had her representations been true; and this, although her declarations was not in writing.—*Barnes v. McKay*, 7 Ind. 301.

[b] (Sup. 1878)

To estop the owner of real estate from claiming a sawmill erected thereon by her statements, the person relying on such estoppel must not have known of the owner's rights.—*Long v. Anderson*, 62 Ind. 537.

[c] No declarations or acts give rise to an estoppel, unless they have been relied on and acted upon by the person in whose favor the alleged estoppel is set up.—(Sup. 1879) *Colter v. Calloway*, 68 Ind. 219; (App. 1902) *Evans v. Odem*, 65 N. E. 753, 30 Ind. App. 207.

[d] (Sup. 1884)

Title to land may be acquired by estoppel, as where parties have been induced to purchase by false representations as to the location of the boundary line.—*Pitcher v. Dove*, 99 Ind. 175.

Where a deed described the first line as running from the initial point south 100 rods, but the corner was a stone still further south, and the grantee, in ignorance thereof, was induced to purchase by a device of the grantor who had knowledge, relying on his representations that the first line extended south to the stone, the grantor is estopped to dispute the fact.—*Id.*

[e] (Sup. 1887)

Where a mortgagee hears the owner of the equity of redemption represent to a person from whom he is seeking to obtain a loan that his mortgage is satisfied, and on the faith of such a representation a loan is obtained, such mortgagee cannot afterwards enforce his mortgage as against one executed to secure the loan obtained by the mortgagor.—*Kelley v. Fisk*, 110 Ind. 552, 11 N. E. 453.

[f] (Sup. 1889)

It is a general rule that one who makes representations cannot withdraw or deny them to the prejudice of a third person who has acted upon them in good faith, even though there is no preconceived design to defraud.—*Babcock v. People's Sav. Bank*, 20 N. E. 732, 118 Ind. 212.

[g] (Sup. 1889)

Where one who has agreed to convey land represents to another, who is about to make a mortgage loan to the vendee, that the vendee has a sufficient interest in the land to make the mortgage good, he is estopped to afterwards assert that the vendee did not have a mortgageable interest.—*Wisehart v. Hedrick*, 118 Ind. 341, 21 N. E. 30.

An estoppel may arise where there is no previously formed design to defraud, for the fraud which the law condemns consists in denying a representation upon which another has acted and the repudiation of which will entail a loss upon him.—*Id.*

[h] (App. 1906)

Misrepresentations, to be sufficient to create an estoppel, must be believed and acted on to

the plaintiff's injury.—*Stevens v. Wooderson*, 38 Ind. App. 617, 78 N. E. 681.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 230-234.

See, also, 16 Cyc. pp. 734-741.

**§ 88. Admissions and receipts.**

Admissions on Sunday, see SUNDAY, § 1.

**[a] (Sup. 1867)**

The admissions of a party operate against him in the nature of an estoppel, where, in good conscience and honest dealing, he ought not to be permitted to gainsay them.—*Ridgway v. Morrison*, 28 Ind. 201.

**[b] (Sup. 1881)**

Where after a county treasurer's defalcation was discovered defendants, as his sureties, consummated a settlement with the county and signed notes for the amount thereof, one of the makers of such notes who was a surety for the county treasurer for only one of the years in question was estopped to claim that he was only liable for the defalcation proved to have occurred during the continuance of the first bond.—*Caldwell v. Board of Com'rs of Fayette County*, 80 Ind. 90.

**[c] (Sup. 1892)**

Admissions that have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct they have influenced, though the admission or declaration is made in express language to the person himself, or is made in general terms, or may be implied from the open and general conduct of the party.—*Brickley v. Edwards*, 30 N. E. 708, 131 Ind. 3.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 235-241; 10 CENT. DIG. Compromise, § 14.

See, also, 16 Cyc. pp. 755-757; note, 38 Am. Dec. 631.

**§ 89. Acquiescence.**

Acquiescence in assertion of title by another, see ante, § 70.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 242-284.

See, also, 16 Cyc. pp. 765-769, 791-795.

**§ 90. — Assent to or ratification of acts of others in general.**

**[a] (Sup. 1864)**

Plaintiff executed a bond and mortgage and deposited it in escrow with instructions that it should not be delivered until the mortgagor had been furnished an indemnity bond of P. by T. The person with whom it was deposited, without the indemnity bond having been furnished, and without plaintiff's knowledge, delivered the mortgage to the mortgagee who was ignorant of the conditions of the deposit and took in good faith. After plaintiff became aware of the delivery, he agreed with T. to take a bond of B.

instead of that of P., and neglected for two months to notify the mortgagee that the delivery was improper. *Held*, that plaintiff was not estopped to claim that the mortgage was invalid.—*Berry v. Anderson*, 22 Ind. 36.

**[b] (Sup. 1864)**

A lessee agreed in his lease to erect certain buildings, which he should own and be entitled to remove at the end of the term, and to secure the payment of the rent such buildings were declared to be mortgaged to the lessors. At the time the lease was signed and acknowledged, the buildings had been erected. D. was a subscribing witness to the execution of the lease, and by an arrangement subsequently made between him and the lessee he became the prospective owner of the improvements to be erected by the lessee on the land. *Held*, that D. was estopped by his own acts to deny the ownership of said lease and improvements by the lessee, or his right to incur them by liens.—*Blakemore v. Taber's Ex'r*, 22 Ind. 466.

**[c] (Sup. 1868)**

The owner of realty refused to pay the taxes and permitted it to be returned as delinquent. He procured a third person to bid it in at the sale, and to assign the certificate to his daughter, and had the county auditor convey the land to his daughter under the certificate. *Held* that, in an action after such owner's death against his daughter by the other heirs for partition of the realty, plaintiffs were not estopped from denying the validity of the sale for the taxes or the title of defendant under it.—*Voorhees v. Hushaw*, 30 Ind. 488.

**[d] (Sup. 1879)**

A. was the owner of a distillery which was burned, and certain personal property previously attached as fixtures was left in the ruins. The United States government seized on this property for violation of the internal revenue laws, and sold it to B., who received a deed to it. B. invited A. to come and remove all the property which he claimed, and A. accepted said invitation, but left behind certain property which B. sold. *Held*, that A. was not estopped from claiming the property so sold or its proceeds.—*Colter v. Calloway*, 68 Ind. 219.

**[e] (Sup. 1879)**

Where a guardian, knowing that his ward and her mother have agreed with a third party that the ward should serve him as a house servant for a certain sum per week, payable to the ward, allows the agreement to be executed, he is estopped from suing the employer for the wages of his ward.—*Boulton v. Black*, 68 Ind. 269.

**[f] (Sup. 1882)**

Mere silence of guarantors of a lessee, when notified that they would be held for a default which had occurred, and the fact that thereafter other defaults occurred and liabilities accrued on the belief of the lessor that the guarantors were bound, would not estop them from setting up, as a valid defense to their liability

on such lease, that they signed and delivered the lease to the lessee with instructions not to deliver it until one who was named in the lease with themselves as a party, under the name and style of a certain firm name, had also signed, and that he had refused to sign or become a member of such firm.—*Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 242-256.

See, also, 16 Cyc. p. 791.

### § 91. — Assent to or participation in judicial proceedings.

[a] (Sup. 1863)

The holder of a judgment against C. and S., jointly, assigned it. C. sold part of his land, which by mesne conveyances became the property of D. The remainder of it was levied on, but failed to satisfy the judgment. S. had property sufficient to satisfy it. *Held*, that S. was estopped to avail himself of the claim that he was surety only for C., in contravention of the equitable rights of D., and to seek to hold the land in D.'s hands liable to the judgment.—*Dougherty v. Richardson*, 20 Ind. 412.

[b] (Sup. 1881)

Parties cannot avail themselves of the benefit of an order or judgment and at the same time disregard the conditions on which it was granted.—*Leary v. Shaffer*, 79 Ind. 567.

[c] (Sup. 1881)

An appraisal of goods levied on under execution fixes a sum below which the goods cannot be legally sold, but such appraisal does not conclude either party on the question of the value of such goods in a subsequent action.—*Burr v. Mendenhall*, 80 Ind. 49.

[d] (App. 1891)

A guardian and the sureties on his bond are estopped from disputing the authority of the court to make the appointment, and from denying that he was the legal guardian of the ward, as recited in the bond, for the purpose of excusing a retention of the ward's money.—*State ex rel. Haines v. Parrish*, 27 N. E. 652, 1 Ind. App. 441.

[e] (App. 1899)

The fact that a judgment creditor did not disavow a settlement made by his attorney, by reason of which the judgment debtor failed to take an appeal, will not estop him from denying the settlement, where he did not know all the facts about the settlement, or that an appeal was intended.—*City of Hammond v. Evans*, 55 N. E. 784, 23 Ind. App. 501.

[f] (App. 1908)

Parties to an action, who made no objection to the court trying the action as an equitable action to redeem from a mortgage foreclosure sale, are bound in a subsequent action to such theory, though the complaint contained a paragraph in the usual form to quiet title on

which no issue was joined.—*Hanley v. Mason*, 42 Ind. App. 312, 85 N. E. 381, 732.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 257-259.

See, also, 16 Cyc. p. 795.

### § 92. — Acceptance of benefits.

Acceptance by estate of benefits of transaction between legatee and executor, see EXECUTORS AND ADMINISTRATORS, § 124.

[a] (Sup. 1874)

The receipt of damages assessed in proceedings before county commissioners for the opening of a private way will not estop the person receiving the same from resisting the opening of the way over his lands, where the money is accepted under a mistake as to the amount of work that will be done in opening the way by the person for whose benefit it is proposed to be opened.—*Stewart v. Hartman*, 46 Ind. 331.

[b] (Sup. 1876)

In an action by the assignee on a nonnegotiable note, where one of the two makers answered fraud and want and failure of consideration, and there was a reply of general denial only, the defendant pleading such answer could not be debarred from such defenses because, after execution of the note, he being surety thereon, he used and appropriated another note received by him or his principal in consideration of the note sued on, by indorsing and delivering the other note to a bank in payment of another note of his principal, held by the bank, on which he was indorser, and thus carried out the original intention of the parties to the note sued on, and availed himself of all its advantages as to himself.—*Woodward v. Begue*, 53 Ind. 176.

[c] (Sup. 1881)

Where a conveyance of land, allotted to a widow in partition against her children, of which the former husband died seized, was made by the widow, who had remarried, having a daughter by the former marriage, who, after arriving at full age and before her mother's death, executed a quitclaim deed to the purchaser with full knowledge of her rights, such child was not estopped from setting up title to the land by descent from her mother, even though she had received, after her mother's death, from her stepfather, the amount of the purchase money which her mother had not expended, knowing the source from which the same was derived.—*Avery v. Akins*, 74 Ind. 283.

[d] (Sup. 1881)

Where one who desires to erect in a water course a dam which abuts on the land of another, etc., under 2 Rev. St. 1876, p. 281, has caused the proper proceedings to be instituted, and has, within one year from the date of judgment, paid to the injured party the amount found due as damages, and such party has voluntarily accepted the same, he is estopped from

afterwards controverting plaintiff's rights as established by the judgment, though such judgment may have been erroneous.—*Test v. Larsh*, 76 Ind. 452.

[e] (Sup. 1884)

The widow of an intestate desired that the administrator should sell her interest in the land of the estate, and executed an instrument requesting him to do so. The administrator offered for sale and sold the entire estate in the land, that of the widow as well as that of the children, pursuant to an order of the court directing a sale for the payment of debts. He advertised to sell the land as guardian, administrator, and agent. The widow received all or nearly all the money realized from the sale. The purchaser entered into possession under the deed executed by the administrator, and remained in possession undisturbed for more than eight years. No part of the money paid by the purchaser or any part of that received by the widow was repaid, nor was there any offer to repay it. *Held*, that the title of the purchaser at the sale was good as against the widow, though the court could not order her interest to be sold to pay the debts of the estate; the facts showing an estoppel.—*Pepper v. Zahnsinger*, 94 Ind. 88.

[f] (Sup. 1885)

Where an owner of realty dies leaving a widow and children of a previous marriage, a quitclaim deed of such children during the widow's life, and the receipt by them of the purchase money, will not estop them from asserting title to the widow's portion after her death, where the purchaser had notice of their interest.—*Bryan v. Uland*, 101 Ind. 477, 1 N. E. 52.

[g] (Sup. 1887)

If a contract, not originally binding for want of mutuality, be so far executed that the party asserting its invalidity has actually received the benefit contracted for, he will be estopped from refusing performance on his part, on the ground that it was not originally binding on the other, who has performed its conditions on his part.—*Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

[h] (Sup. 1888)

In an action to foreclose a mortgage, given by a married woman as surety for her husband, against him after her death, a demurrer to his answer, in which he claims the land by descent from her, and prays that his title be quieted as against the mortgage, is properly sustained, since, having procured the mortgagee's money by the mortgage, he is estopped from disputing its validity.—*Ellis v. Baker*, 116 Ind. 408, 19 N. E. 193.

[i] (Sup. 1894)

Where the grantees of an escrow receive the same before the condition has been performed, and reconvey the property therein granted, they will be estopped from saying no title

passed to them thereby.—*Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269.

[j] (Sup. 1894)

The fact that a party to a contract which is void as against public policy has received the benefits therefrom does not estop him, when sued thereon, from setting up such defense.—*Brown v. First Nat. Bank of Columbus*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206.

[k] (Sup. 1896)

A landowner, who has accepted and retained a sum awarded in condemnation proceedings, is estopped from questioning the validity of the proceedings.—*Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014.

[l] (Sup. 1896)

A sheriff received a check in payment for a deed issued under sale in execution, and delivered it to plaintiff in execution, who knew the agreement under which the check was taken. *Held*, that plaintiff in execution was estopped to urge that the sheriff had no authority to take the check as payment.—*Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518.

[m] (Sup. 1906)

Those claiming under decedent are estopped from asserting that plaintiff never accepted decedent's offer to contract, where plaintiff fully performed the terms of the contract with decedent's knowledge and consent.—*Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 260-263.

See, also, 16 Cyc. pp. 787-791.

§ 93. — Permitting improvements or expenditures.

Estoppel to deny dedication, see DEDICATION, §§ 16, 39.

[a] (Sup. 1860)

The inhabitants of a township received part of the price of school lands and interest on the balance, and expended it according to law for several years. The purchaser made valuable improvements thereon. *Held*, that they were estopped from objecting to the sale.—*State ex rel. Parish Grove Tp. v. Stanley*, 14 Ind. 409.

[b] (Sup. 1868)

A property holder cannot quietly permit money to be expended in work which benefits his land, under a contract with a city, and then deny the power of the city to make the contract.—*Hellenkamp v. City of Lafayette*, 30 Ind. 192.

[c] (Sup. 1877)

A property owner who is injured by the maintenance of a stairway, built in an alley by an adjoining property owner under a private contract with the city authorities, is not estopped to maintain an action for its abatement as a nuisance by the fact that his agent

knew that the person building it had expended a large sum of money in its construction, and made no objections.—*Pettis v. Johnson*, 56 Ind. 130.

[d] (Sup. 1879)

The fact that, at the time A. was engaged in erecting a gristmill 75 feet from B.'s house, B. stood by and encouraged the erection, will not estop him from bringing an action for injuries to his property resulting from said erection, unless he knew or could have foreseen what harm would necessarily result from such erection.—*Hudson v. Densmore*, 68 Ind. 391.

[e] (Sup. 1881)

Where the owner of land through which a way runs sees another making costly improvements thereon without objection, he is estopped to deny that the way is public.—*Ross v. Thompson*, 78 Ind. 90.

[f] (Sup. 1888)

Where the owner of land permits a railroad, under a parol license, to expend its money and build its road over his land, neither he nor his grantee, after the lapse of 20 years, during which the possession of the company has been open and continuous, can maintain ejectment therefor, even though the owner may have received no compensation.—*Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261.

[g] (Sup. 1890)

Where an owner of land stands by and permits a railroad company to enter and construct its road or complete its grade, or expend a considerable amount of money in the construction of its roadbed, he waives his right to maintain either an action of ejectment or for an injunction to prevent further prosecution of the work, and in such event he is left to his action for damages.—*Strickler v. Midland R. Co.*, 25 N. E. 455, 125 Ind. 412.

[h] (Sup. 1891)

A landowner conveyed part of his tract to a stone company, together with a right to construct a line of railway over the remaining part to connect the land granted with a public railroad. *Held*, that no estoppel arose against the grantor in favor of third persons whom the stone company wrongfully permitted to use the easement, but who had knowledge of the deed creating it, by the fact that the grantor did not object to the action of such third persons in constructing, at considerable expense, a continuation of the switch from the lands of the stone company to their own lands.—*Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. 412.

[i] (App. 1891)

Where an incoming tenant enters to sow wheat, a jury may infer from the silence of the outgoing tenant consent to such entry, and, that being so, the outgoing tenant is estopped to deny the lawfulness of the incoming tenant's possession.—*Stephenson v. Elliott*, 28 N. E. 326, 2 Ind. App. 233.

[j] (App. 1896)

That a property owner permitted a natural gas company, without objection, to lay gas pipes across other lands and highways on each side of where his land abuts on a highway, does not estop him to deny the right of the company to lay the pipes in front of his land, though it is necessary to so lay the pipes in order to connect the company's pipe line with its wells.—*Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156, 39 N. E. 423, 42 N. E. 640.

[k] (App. 1899)

Where an owner of land did not know of the construction of a gas pipe line on a highway adjacent thereto, he is not estopped from asserting his right to notify a person removing it to leave, because he had not objected to its maintenance after its completion.—*Huffman v. State*, 52 N. E. 713, 21 Ind. App. 449, 69 Am. St. Rep. 368.

[l] (Sup. 1900)

Where owners of real estate abutting a way while using the way and on the faith thereof erected buildings and made improvements on their abutting real estate with reference thereto and with knowledge of each other, they could not be deprived of the use of the way without a consent of such others, though the deeds under which they held were mere licenses to use the way, or they held under parol licenses to use the same.—*Roush v. Roush*, 55 N. E. 1017, 154 Ind. 562.

[m] (Sup. 1900)

Riparian owners, by giving straw to a strawboard company to induce its location near them, and standing by while the company spends large sums in the erection of its plant, without knowledge or notice of the subsequent unlawful corruption of the stream, and the creation of a public nuisance, by the discharge of the waste from the factory into the stream, are not estopped from claiming damages and an injunction.—*Weston Paper Co. v. Pope*, 57 N. E. 719, 155 Ind. 394, 56 L. R. A. 899.

[n] (Sup. 1904)

Where the owner of land, with full knowledge of his rights, stood by while an electric railroad made a considerable excavation and embankment, and constructed its road on his farm, and made no protest except to the excavation of gravel, the railroad was justified in assuming that he assented to the construction of the road, and the owner was estopped to recover possession of the land, after the road had been completed, large sums of money expended, and the interest of the public in the road as a line of common carriage had become fixed.—*Indiana R. Co. v. Morgan*, 70 N. E. 368, 102 Ind. 331.

The fact that the road had not the power of eminent domain was immaterial.—*Id.*

[o] (Sup. 1907)

Complainant, after the death of her husband, was fraudulently induced by E. to repudiate the husband's will and take under the law.

Immediately thereafter two-thirds of the husband's real estate was sold to pay debts and purchased by E., who thereafter induced complainant to convey the other third to her in consideration of a contract for support, after which E., relying on such conveyances, expended \$2,000 for repairs and betterments on the property. *Held* that, as between complainant and E., the latter, by reason of such expenditure, etc., was not entitled to claim that complainant was estopped to set aside her election for fraud.—*Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 264-275.

See, also, 16 Cyc. pp. 765-769.

**§ 94. — Permitting sale or mortgage of property.**

Sale of decedent's property under order of court, see EXECUTORS AND ADMINISTRATORS, § 377.

[a] (Sup. 1855)

If one having the title to an estate, and knowing it, stand by and see another, who is ignorant of it, purchase the estate, and suffer him to improve it under the belief that his title is valid, such a one is bound by the sale, and cannot invoke the aid of a court of justice to dispute it.—*Gatling v. Rodman*, 6 Ind. 289.

"Standing by" does not import actual presence, but implies "knowledge under such circumstances as to render it the duty of the possessor to communicate it."—*Id.*

[b] (Sup. 1857)

Where land is devised to A., subject to the maintenance of his mother, and he allows her to sell, joining her in the deed, and requests the purchaser to make the notes for the unpaid part of the price to her, he is estopped from setting up a claim for the purchase money, and, though he caused the notes to be so executed to defraud creditors, he cannot question her title to them.—*Hunt v. Coon*, 9 Ind. 537.

[c] (Sup. 1862)

To constitute an equitable estoppel by standing by without objection and witnessing a sale of land, it is indispensable that the party to be concluded should have been fully apprised of his title, and that the other party, at the same time being ignorant of such adverse title, should have been misled by such acquiescence, and induced thereby to change his position.—*Junction R. Co. v. Harpold*, 19 Ind. 347.

[d] (Sup. 1886)

One who defends his title to property purchased by him at a sheriff's sale, against the claims of a prior owner or lien-holder, upon the ground that the claimant is estopped from asserting his title by the fact that he was present at the sale, and gave no notice of his claim, must show that he himself purchased in good

faith, and in ignorance of the claim.—*Woodward v. Wilcox*, 27 Ind. 207.

[e] (Sup. 1889)

The mortgagee is not estopped from maintaining an action against a constable for sale of the mortgaged property by the facts that she knew that the constable had levied on the property as that of the mortgagor, and that her attorney was at the trial when the property was ordered sold, and that she was not present at the sale, though she had notice of it, and did not take steps to assert title.—*McDaniel v. State ex rel. McHugh*, 118 Ind. 239, 20 N. E. 739.

[f] (Sup. 1891)

In a suit to restrain, by injunction, the sale, under execution, against a third person, of certain real estate, which the complainant alleges to be his own property, where it appears that before the judgment was rendered or the execution issued the property was conveyed by the judgment debtor to the complainant, and the deed was recorded on the same day, an answer which alleges that at the sale (which took place after the complaint was filed) the complainant stood by and saw the property sold as the property of the judgment debtor, and purchased by the judgment creditor, the defendant, and made no claim thereto, fails to state facts creating an estoppel, and is bad on demurrer.—*Blue Ridge Marble Co. v. Duffy*, 128 Ind. 79, 27 N. E. 430.

[g] (App. 1899)

Where, in an action on gravel-road certificates assigned to plaintiff by the county superintendent, defendant answered that such certificates and the assessments on which they were based had been paid under an agreement with the contractor performing the work, with the knowledge of the superintendent, who had agreed to cancel the certificates, a reply that the defendant, with the knowledge of the assignment of the certificates to plaintiff, had refrained from informing defendant of such payment until plaintiff's rights against the superintendent for the wrongful assignment were lost, alleged facts sufficient to constitute an estoppel in pais.—*Farmers' Bank of Frankfort v. Orr*, 55 N. E. 35, 25 Ind. App. 71.

[h] (App. 1901)

Where a wife induces the vendor of her husband to convey the land to her without the husband's knowledge or consent, and then claims to own the same, and afterwards obtains a divorce from the husband, who has known of her claim to the land for many years, the failure of the husband to demand the land in the divorce suit will prevent his subsequent recovery of the land.—*Stanbrough v. Stanbrough*, 60 N. E. 714, 27 Ind. App. 25.

**FOR CASES FROM OTHER STATES,**

SEE 19 CENT. DIG. Estop. §§ 245-247, 276-284.

**§ 95. Silence.**

By married women, see HUSBAND AND WIFE, § 129.

[a] (Sup. 1884)

Defendant, with a view to purchasing a mill privilege, inquired of adjoining landowners and was told that the dam was at its lawful height, and had been so for more than 20 years; and plaintiff knew of such inquiries, but did not inform defendant that the dam was too high and injured plaintiff's land. *Held* that, had there been an allegation of payment of purchase money, these facts would have estopped plaintiff to claim damages for injuries to his land, caused by the dam, subsequent to defendant's purchase.—*Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 285-287.

See, also, 16 Cyc. pp. 681, 759.

**(C) PERSONS AFFECTED.**

Breach of contract of assignment of patent rights, see PATENTS, § 211.

Estoppel by deed, see ante, §§ 25, 27-31.

Estoppel by record, see ante, § 9.

Existence of alley by prescription, see MUNICIPAL CORPORATIONS, § 671.

**§ 97. Persons to whom estoppel is available.**

[a] (Sup. 1857)

A devisee takes as a purchaser, but not as a purchaser for valuable consideration, who alone can claim the benefit of an estoppel in pais.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

[b] (Sup. 1862)

Representations, made by the maker of a note, that it is all right, and will be paid, to a purchaser after he has become the owner, and which are repeated by him to his assignee, are not sufficient as an estoppel against the maker in favor of such assignee.—*Jones v. Dorr*, 19 Ind. 384, 81 Am. Dec. 406.

[c] (Sup. 1869)

It follows from the very principle on which the whole doctrine of estoppel rests that they operate neither in favor of nor against strangers, but affect only the parties and their privies in blood, in estate, or in law. A stranger can neither take advantage of nor be bound by an estoppel. This rule applies equally whether the estoppel arises by deed, by record, or from matter in pais.—*Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577.

[d] (Sup. 1888)

One who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about or silently acquiesced in the dis-

crepancy between the instrument and the agreement as made.—*Keister v. Myers*, 115 Ind. 312, 17 N. E. 161.

[e] (Sup. 1892)

In an action on a note and mortgage by the assignee, it appeared that before the assignment was made, in answer to inquiries, defendant wrote one S. that the note and mortgage are "all right, and will be paid when due"; that S. gave defendant's letter to the payee, who used the same in selling the securities to plaintiff; that defendant did not know the purpose of the payee to sell the note to any one but S. *Held*, that defendant was not estopped, by his letter to S., to plead non est factum as against plaintiff.—*Brickley v. Edwards*, 131 Ind. 3, 30 N. E. 708.

[f] (Sup. 1895)

Where the maker of a note is estopped, in favor of the holder thereof, to set up a defense thereto, the holder's assignee is entitled to the benefit of that estoppel.—*Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 289.

See, also, 16 Cyc. p. 777.

**§ 98. Persons estopped.**

Judgment debtor by acts of purchaser at execution sale, see EXECUTION, § 302.

[a] (Sup. 1864)

A lessee agreed in his lease to erect certain buildings, which he should own and be entitled to remove at the end of the term; and, to secure the payment of the rent, such buildings were declared to be mortgaged to the lessors. At the time the lease was signed and acknowledged, the buildings had been erected. D. was a subscribing witness to the execution of the lease, and, by an arrangement subsequently made between him and the lessee, he became the prospective owner of the improvements, to be credited by the lessee on the land. *Held*, that as D. was estopped by his own acts to deny the ownership of the lease and improvements by the lessee, or his right to incumber them by liens, all persons claiming under or through D. were bound by that estoppel, unless they could show fraud or want of consideration.—*Blakemore v. Taber's Ex'r*, 22 Ind. 466.

[b] (Sup. 1879)

A grantee, who was present when his grantor assented to the location of a boundary, is estopped to deny such location by the acts of the grantor.—*Mull v. Orme*, 67 Ind. 95.

[c] (Sup. 1890)

Defendants agreed with a corporation, owner in common with themselves of certain water rights appurtenant to the land of each, to repair the dam and improve the water power, the corporation to pay its proportion of the expense of the first repairs, and of keeping it in perpetual good order. This contract was executed on behalf of the corporation by its

president and treasurer, who at that time held a mortgage previously executed by the corporation on all its realty, but they gave defendants no notice of it, and represented that they had full power to manage the corporate affairs. Defendants repaired the dam at large expense. Then the corporation sold its land to plaintiffs, who procured an assignment to themselves of the mortgage, and foreclosed to perfect their title. *Held*, that there could be no decree against defendants, for plaintiffs were in no better position than their assignors, who had estopped themselves from setting up the mortgage against defendants, thereby cutting off their right, secured by the contract executed subsequently to the mortgage, to contribution from the mortgaged land for the expenses of keeping up the water power.—*Maxon v. Lane*, 124 Ind. 592, 24 N. E. 683.

[d] (App. 1905)

A defendant, claiming land as against the heirs of a decedent, proved that decedent contracted with defendant whereby he was to take possession thereof and take care of decedent during his life, in consideration of which he should convey the land to defendant, and that defendant performed his part of the contract; that decedent made a deed to defendant and deposited it with a third person, and stated that defendant could have it, if he desired; and that decedent stated to defendant that the property was his. Defendant, after the making of the deed, continued to perform his part of the contract. *Held*, that decedent's heirs were estopped from claiming the land by denying the delivery of the deed.—*Fifer v. Rachels*, 76 N. E. 186, 37 Ind. App. 275.

[e] (Sup. 1906)

Where the owner of land conveyed it by deed absolute to a banker, but, by a separate instrument, executed on the same day, the banker held the land in trust for the grantor's children, and the separate instrument was not recorded and the fact that the land stood in the banker's name induced persons to make deposits with him, in a subsequent suit by his trustee in bankruptcy to quiet title to the land, the beneficiaries in the trust were not estopped to assert their rights as against the plaintiff.—*Ellison v. Ganiard*, 167 Ind. 471, 79 N. E. 450.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 290.

See, also, 16 Cyc. pp. 778–781.

(D) MATTERS PRECLUDED.

Estoppel by deed, see ante, § 32.

§ 99. Extent of estoppel in general.

[a] (Sup. 1887)

One who purchases land from the grantees of devisees thereof, agreeing to pay, as part of the price, costs adjudged against the administrator of the estate personally, is estopped to dispute a claim of the administrator against

the estate for such costs, although the claim, if allowed, would be a charge on the real estate.—*Mackey v. Ballou*, 112 Ind. 198, 13 N. E. 715.

[b] (Sup. 1907)

The doctrine of equitable estoppel is based upon promoting the equity of an individual case, and may not be carried further than the end for which the estoppel is created.—*Cleveland, C., C. & St. L. R. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 291.

See, also, 16 Cyc. p. 782.

§ 101. Title or claim to property.

[a] (Sup. 1884)

Title to land may be affected by an estoppel in pais.—*Pitcher v. Dove*, 99 Ind. 175.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 293.

See, also, 16 Cyc. p. 783.

§ 106. Availability at law.

[a] (Sup. 1855)

An equitable estoppel is available at law as well as in equity.—*Dickerson v. Board of Com'rs. of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 291, 299.

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Pleading in action to enforce assessment for public improvement, see MUNICIPAL CORPORATIONS, § 567.

§ 107. Pleading as element of cause of action.

[a] (Sup. 1903)

In an action to enforce the collection of an assessment for a street improvement, plaintiff cannot rely on an estoppel because of defendant's failure to object to the performance of the work, where such estoppel is not set up in the complaint.—*Taylor v. Patton*, 66 N. E. 91, 160 Ind. 4.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 297.

See, also, 16 Cyc. pp. 806–808.

§ 108. Demurrer raising defense.

[a] (Sup. 1875)

Where an estoppel by record plainly appears on the face of a complaint or answer, it is not necessary to set it up in answer or reply, but the question may be raised by demurrer.—*Greenup v. Crooks*, 50 Ind. 410.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 298.

See, also, 16 Cyc. p. 809.



**§ 109. Pleading as defense.**

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 290-303.

See, also, 16 Cyc. pp. 800, 810.

**§ 110. — Necessity.**

[a] (Sup. 1867)

Under the provisions of 2 Gav. & H. St. p. 87, an estoppel in pais cannot be shown under a general denial, but must be specially pleaded.—Wood v. Ostram, 29 Ind. 177.

[b] An equitable estoppel must be pleaded.—(Sup. 1881) Robbins v. Magee, 76 Ind. 381; (1884) Clauser v. Jones, 100 Ind. 123; (1885) City of Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937; (Sup. 1887) Fleener v. Claman, 14 N. E. 76, 112 Ind. 288; (1893) Board of Com'rs of Carroll County v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; (1894) Bowles v. Trapp, 139 Ind. 55, 38 N. E. 406; (1895) Kieffer v. Klinsick, 42 N. E. 447, 144 Ind. 46; (1898) Center School Tp. v. State ex rel. Board of School Com'rs of Indianapolis, 49 N. E. 961, 150 Ind. 168; (1898) Frain v. Burgett, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55; (1902) International Building & Loan Ass'n v. Watson, 64 N. E. 23, 158 Ind. 508; (1903) Adams v. Adams, 66 N. E. 153, 160 Ind. 61.

[c] (Sup. 1902)

In a suit to foreclose a mortgage executed by a husband and wife on the wife's separate property, where she pleads suretyship, if she has in any manner legitimately estopped herself from asserting the alleged invalidity of the contract on the ground that she, as a married woman, had entered into it as a surety, such matter of estoppel was required to be set up as a defense, as facts creating an estoppel to be available must be specially pleaded.—International Building & Loan Ass'n v. Watson, 64 N. E. 23, 158 Ind. 508.

[d] (Sup. 1904)

A defense by way of estoppel is not available under a general denial.—Webb v. John Hancock Mut. Life Ins. Co., 69 N. E. 1000, 162 Ind. 616, 66 L. R. A. 632.

[e] (Sup. 1907)

Where, in an action for extra work done under a contract, plaintiff alleges that it did the work in its endeavor to carry out the contract, and that it had no knowledge that the work was not included in the contract, defendant cannot plead as estoppel that plaintiff did have such knowledge, since it would be neither a denial nor the allegation of new matter, as required by Burns' Ann. St. 1901, § 350; and defendant is therefore within the rule that an estoppel in pais, though not specially pleaded, is not waived where there is no opportunity to plead it.—Cleveland, C. & St. L. R. Co. v. Moore, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 300.

See, also, 16 Cyc. p. 809.

**§ 112. — Sufficiency of allegations.**

[a] (Sup. 1864)

In a suit against a railroad company to recover for land belonging to complainant, taken for the use of the road, the answer alleged that a certain one, being in possession of the land and claiming the ownership with full knowledge of complainant, died, leaving a widow and minor heirs; that the guardian of such heirs sold the land to defendant company under an order of sale, and that the sale was confirmed by the court; and that afterwards complainant, the grandfather of such minors, on becoming their guardian, brought suit against the former guardian on his bond, setting out the sale and receipt of the purchase money, alleging the failure to pay over the full amount so received, and asking judgment for \$1,500, which defendant insisted was an affirmation of the judicial sale and estopped complainant from maintaining his suit. *Held*, that the answer was not good as a plea in estoppel, since it did not show that defendant purchased the lot or paid the consideration on faith of some act or statement of complainant, or of his silence under circumstances which required him to speak and disclose his title, nor any act of complainant subsequent to such purchase which amounted to a ratification of the sale made by the former guardian.—Terre Haute, A. & St. L. R. Co. v. Norman, 22 Ind. 63.

[b] (Sup. 1873)

Where a complaint praying for an injunction to restrain the collection of a tax assessed for the construction of a gravel road, under the act of 1865, alleges for cause the illegality of the assessment, an answer of estoppel, on the ground that plaintiffs stood by while the work progressed, etc., is defective, which does not allege that the tax was collectible, or that the treasurer was about to collect or was threatening to collect the tax, or show that the plaintiffs had a right of action for which they might have instituted proceedings earlier to enjoin the collection of the tax.—Sim v. Hurst, 44 Ind. 579.

[c] (Sup. 1881)

In an action for a partition wherein plaintiff claimed an interest in the land by a devise from one to whom the same had been conveyed, defendant's answer attempted to set up a matter of estoppel by alleging that before defendant became a purchaser of the land, and before the deed on which plaintiff relied was executed, the grantor to whom an interest in the lands had descended informed him that he had no interest in the lands. *Held*, that the answer was defective, in that for aught that appeared therein the statement on which defendant relied may have been before any portion of the land had descended to the grantor.—Patterson v. Nixon, 79 Ind. 251.

[d] Where an estoppel is relied on, it must be pleaded with particularity and precision.—(Sup. 1881) Sims v. City of Frankfort, 79 Ind. 446; (1882) Cole v. Lafontaine, 84 Ind. 446; (1884)

*Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; (1897) *Dudley v. Pigg*, 48 N. E. 642, 149 Ind. 363.

[e] (Sup. 1882)

An answer to a petition of an administrator to sell lands to pay a debt to parties named, which had been allowed by the court against the estate, that defendant was a purchaser from an heir to whom the land was awarded by judgment in partition, with the knowledge and consent of the administrator, or that defendant purchased the land from the heirs for full value, with and on the faith of the administrator's consent to such purchase, shows no estoppel, and is bad, as it does not plead with particularity and certainty the facts constituting the alleged estoppel.—*Cole v. Lafontaine*, 84 Ind. 446.

[f] (Sup. 1883)

Where an estoppel is pleaded, the facts essential to its existence must be clearly averred.—*Stewart v. Beck*, 90 Ind. 458.

[g] (Sup. 1883)

In an action by a widow to disaffirm a conveyance by her husband of his lands, on the ground that she was a minor at the time of joining in such conveyance, an answer alleging that defendants have, with the knowledge of plaintiff, made valuable and lasting improvements on the land, but not showing the nature of such improvements nor when they were made, is insufficient as a plea of estoppel.—*Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374.

[h] (Sup. 1885)

No intendments are made in favor of a plea of estoppel, but it is incumbent on the pleader to fully plead all the facts essential to the existence of the estoppel.—*Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728.

[i] (Sup. 1887)

A plea of estoppel which does not show that the party sought to be estopped misrepresented or concealed any facts from the party claiming an estoppel, or that the latter was induced to act in the premises by anything said or done by the former, is demurrable.—*Baals v. Stewart*, 109 Ind. 371, 9 N. E. 403.

[j] (App. 1895)

In an action to foreclose a mechanic's lien, and for judgment of foreclosure against a junior mortgagee, an answer which alleges that plaintiff informed the mortgagee that he released his lien, and thereby induced the mortgagee to advance money, and accept a mortgage on the property as security therefor, and that plaintiff, with full knowledge of all the facts, accepted, and still retains, a part of the money so advanced, is not demurrable.—*Acker v. Massman*, 12 Ind. App. 696, 41 N. E. 77.

[k] (App. 1895)

Where a married woman, in an action on her note, relies on defenses that she was mar-

ried when she made it, and that it was given for the debt of a third person, and was without consideration, a reply setting up estoppel in pais by her statements need not allege that she had knowledge of the defenses when she made the statement and promise to pay.—*Stephenson v. Clayton*, 14 Ind. App. 76, 42 N. E. 491.

[l] (App. 1896)

A reply stating that defendant, whose name was forged to the note in suit, after the maturity of the note, on being asked about its payment, admitted his liability thereon, and that he would stand good for it; that plaintiff refrained from suing the other maker, who had forged defendant's name, and who at the time was worth sufficient property out of which plaintiff could have secured payment of the note; that plaintiff had extended the time of payment, and that the other grantor was insolvent,—does not sufficiently plead an estoppel, where it is not alleged that the note was shown to defendant, or that he admitted he executed it.—*Lewis v. Hodapp*, 14 Ind. App. 111, 42 N. E. 649, 56 Am. St. Rep. 295.

[m] (App. 1896)

Rev. St. 1894, § 7051 (Rev. St. 1881, § 5206), provides that when the property of any person engaged in business shall be seized, or where his business shall be suspended by the action of creditors, or put into the hands of any assignee, receiver, or trustee, then the debts owing to laborers (not exceeding \$50 to each employé) which have accrued within six months preceding the seizure shall be preferred debts, and shall be first paid in full, and, if there be not sufficient to pay them in full, then the same shall be paid to them pro rata after paying costs. *Held*, that an answer of estoppel in an action thereunder, counting upon plaintiff's failure to make known his claim, is bad, when defendant's want of knowledge of its existence is nowhere alleged.—*Bell v. Iliner*, 16 Ind. App. 184, 44 N. E. 576.

[n] (App. 1902)

In an action for rent of certain personality, an answer alleging that plaintiff had represented to defendant that he had sold the property a year before to a third person, who was in possession and from whom defendant purchased, sets up an equitable estoppel; it not being necessary to allege plaintiff's actual knowledge of the facts, nor that the representations were made with intention that defendant should act on them.—*Hufford v. Lewis*, 64 N. E. 90, 29 Ind. App. 202.

[o] (Sup. 1905)

When an estoppel is relied on, it must be set forth with particularity and precision, and nothing can be supplied by inference or intendment; and where a reply alleged facts estopping defendant to set up his defense, but failed to allege ignorance of the truth of matters alleged in estoppel, the reply was insufficient.—*Bartholomee v. Town of Lowell*, 72 N. E. 1030, 165 Ind. 224.

[p] (**App.** 1906)

A cross-complaint by defendant, in an action by the heirs of a decedent, which alleges the making of a contract by decedent by the terms of which defendant was to take possession of the real estate in controversy and take care of decedent during his life, in consideration of which he would convey the land to defendant; that he entered into possession of the land and performed his part of the contract; and that subsequently decedent executed a deed to him, depositing it with a third person, but informing him that he could have possession of the deed at once, if he wished—is sufficient to authorize the court to find that decedent had by his declaration and the procurement of services estopped himself and his heirs from denying the delivery of the deed.—*Fifer v. Rachels*, 76 N. E. 186, 37 Ind. App. 275.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 302.

See, also, 16 Cyc. p. 810.

### § 113. — Reply or demurrer to plea or answer.

[a] (**Sup.** 1837)

If the declaration show that the defendant is estopped to deny the facts contained in his plea, the plaintiff need not reply the estoppel, but demur.—*Trimble v. State*, 4 Blackf. 435.

[b] (**Sup.** 1861)

Where an estoppel by the execution of a mortgage was apparent on the face of the pleadings, but no demurrer to the answer was filed, and issue was taken on the objectionable parts of the answer, plaintiff waived the conclusiveness of the estoppel, and formed an issue of fact on which defendants were entitled to offer evidence.—*French v. Blanchard*, 16 Ind. 143.

[c] (**Sup.** 1872)

Where defendant pleads facts intended to constitute an estoppel, the failure to demur waives the question as to the sufficiency of such facts.—*Atkinson v. Lindsey*, 39 Ind. 296.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 303.

See, also, 16 Cyc. p. 810.

### § 114. Pleading in avoidance of defense.

[a] (**Sup.** 1906)

While, in an action on a note, no reply is necessary to answer of non est factum, it is proper to plead by way of reply facts showing that defendant is estopped from setting up the defense contained in the answer.—*Bowen v. Laird*, 77 N. E. 852, 166 Ind. 421.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 304.

See, also, 16 Cyc. p. 810.

### § 116. Presumptions and burden of proof.

[a] (**Sup.** 1884)

Where a noncommercial note is shown to have been given without consideration, and the

assignee claims a right to enforce it on the ground of estoppel, the burden of showing the facts constituting the estoppel rests on the assignee.—*Second Nat. Bank of Lafayette v. Brady*, 96 Ind. 498.

[b] (**Sup.** 1908)

The burden is on parties who would rely on the fruits of an election to treat a mortgage as invalid to show a course of conduct inconsistent with a right asserted under it.—*First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank of Wabash*, 171 Ind. 323, 86 N. E. 417.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 306.

See, also, 16 Cyc. p. 811.

### § 117. Admissibility of evidence.

[a] (**Sup.** 1884)

An estoppel to claim title to land, as by falsely representing the location of a boundary line, may be established by parol evidence.—*Pitcher v. Dove*, 99 Ind. 175.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 307.

See, also, 16 Cyc. p. 812.

### § 118. Weight and sufficiency of evidence.

[a] (**App.** 1905)

An estoppel to be available must be established by evidence.—*Heck v. Greenwood Tel. Co.*, 73 N. E. 960, 35 Ind. App. 244.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. §§ 306, 308.

See, also, 16 Cyc. p. 812.

### § 120. Instructions.

Repetition of instructions, see TRIAL, § 229.

[a] (**Sup.** 1861)

In a suit brought to recover lands from the vendees of parties holding title under a judgment void for want of jurisdiction, it was held that an instruction "that, to constitute an equitable estoppel, it must be shown that the plaintiffs were apprised of each sale to innocent vendees before it was made, so that they might have had opportunity to inform the purchaser of their interest in the property," was well enough; its evident meaning being that it must be shown that the plaintiffs were apprised of each intended sale, etc., before it was made, and it could not have been understood otherwise.—*Cox v. Matthews*, 17 Ind. 367.

[b] (**Sup.** 1901)

A charge that if a fair preponderance of the evidence showed that the wife was the owner of property mortgaged by the husband, and that the property was mortgaged without her knowledge or consent, or if it was executed with her consent, and the mortgagee knew that it was hers and that it was mortgaged to secure her husband's debts, he could not recover it, is

not misleading, as throwing the burden on the wife of disproving the mortgagee's plea of estoppel; other instructions having been given which explicitly told the jury that the plea of estoppel must be established by a fair preponderance of the evidence.—*Morgan v. Hoadley*, 59 N. E. 935, 136 Ind. 320.

FOR CASES FROM OTHER STATES,

SEE 19 CENT. DIG. Estop. § 310.

See, also, 16 Cyc. p. 813.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EVIDENCE.

## *Scope-Note.*

[INCLUDES means of ascertaining the truth respecting matters of fact in issue in civil actions and proceedings in general; admissibility for that purpose of relevant facts, statements, oral or written, opinions, character, reputation, etc.; modes of proof and production of evidence other than testimony of witnesses, particularly documentary evidence, and exclusion of oral by documentary evidence; burden of making proof, and operation of presumptions; and sufficiency and effect of evidence in civil cases in general.

[EXCLUDES competency of witnesses, attendance, and production of documents, etc., by witnesses, and examination and credibility of witnesses (see *Witnesses*); taking and use of written testimony (see *Depositions*; *Affidavits*); acknowledgment and record of written instruments (see *Acknowledgment*; *Records*); estoppel to assert or deny matters of fact (see *Estoppel*); discovery of evidence (see *Discovery*); evidence to sustain particular causes of action or defenses thereto (see *Contracts*; *Torts*; and specific heads); evidence in particular forms of civil actions (see titles of various forms of action); evidence to sustain or defeat particular remedies in actions (see *Arrest*; *Attachment*; and other specific heads); evidence in actions for particular forms of relief (see *Divorce*; *Ejectment*; *Replevin*; *Specific Performance*; and other specific heads); evidence in civil proceedings other than actions (see *Habeas Corpus*; *Mandamus*; and titles of other special proceedings); rules of evidence peculiar to procedure in equity (see *Equity*), in admiralty (see *Admiralty*; *Shipping*; *Collision*), or under insolvent acts (see *Insolvency*) or bankrupt acts (see *Bankruptcy*); evidence in criminal prosecutions (see *Criminal Law*; and titles of particular crimes); admissibility of evidence as dependent on pleadings, and what constitutes variance and its effect (see *Pleading*); practice in reception of evidence (see *Trial*; *Reference*); province of court and jury as to questions of fact, and instructions to juries on weight, etc., of evidence (see *Trial*); correction of errors and review of decisions in regard to admission or rejection of evidence or involving sufficiency or weight of evidence (see *Exceptions*, *Bill of*; *New Trial*; *Appeal and Error*). For complete list of matters excluded, see cross-references, post.]

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*See—*

Incorporation of evidence into case or statement on appeal. **APPEAL AND ERROR**, § 60.

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Review of rulings as dependent on motion for new trial in lower court. **APPEAL AND ERROR**, § 289.

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**APPEAL AND ERROR**, §§ 1047-1058.

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**APPEAL AND ERROR**, §§ 689-692.

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**APPEAL AND ERROR**, §§ 202-206.

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**APPEAL AND ERROR**, § 260.

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**APPEAL AND ERROR**, §§ 208-210, 268, 294, 693-697, 987-1024, 1093, 1094.

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## I. JUDICIAL NOTICE.

In criminal prosecutions, see **CRIMINAL LAW**, § 304.

Pleading matters judicially noticed, see **PLEADING**, § 6.

### § 5. Matters of common knowledge in general.

[a] (**Sup.** 1882)

Courts will take judicial notice that ordinary vehicles cannot pass each other without hindrance or delay on a road less than 8½ feet in width.—*Wayne, Union & State Line Turnpike Co. v. Moore*, 82 Ind. 208.

[b] (**App.** 1892)

The court cannot take judicial notice as to whether a partition fence sufficient to restrain and inclose "sheep" will also restrain and inclose "hogs."—*Enders v. McDonald*, 5 Ind. App. 297, 31 N. E. 1056.

[c] (**Sup.** 1894)

The court judicially knows that the appropriation of an alley only 20 feet wide to the use of a double-track railroad will greatly interfere with, prevent, and obstruct the safe and unobstructed passage of vehicles upon such alley.—*Haus v. Jeffersonville, M. & I. R. Co.*, 37 N. E. 805, 138 Ind. 307.

[d] (**App.** 1895)

That the parents of a boy derive no financial profit from his bringing up is not a matter of judicial cognizance.—*Citizens' St. R. Co. v. Lowe*, 39 N. E. 165, 12 Ind. App. 47.

[e] (**App.** 1896)

It is a matter of universal knowledge that the ingenuity of man has failed to construct a locomotive engine which can be operated successfully, and not permit the escape of fire at times.—*Lake Erie & W. R. Co. v. Gossard*, 42 N. E. 818, 14 Ind. App. 244.

[f] (**Sup.** 1904)

In construing a contract giving a license to drill wells in land for oil and gas, the court has judicial knowledge, as a matter of common knowledge, that gas or oil does not exist in paying quantities under all the lands within a recognized district, and that there is no other generally acknowledged way to determine whether or not it does exist than putting down a well.—*Consumers' Gas Trust Co. v. Littler*, 70 N. E. 303, 162 Ind. 320.

[g] (**Sup.** 1904)

The Supreme Court on mandamus to compel a gas company to sink wells in territory controlled by the company to obtain gas for heating purposes will take judicial notice of the matter of common knowledge that gas no longer exists in such territory in sufficient quantities for heating purposes.—*State ex rel. City of Indianapolis v. Indianapolis Gas Co.*, 71 N. E. 139, 163 Ind. 48.

[h] (**Sup.** 1906)

Courts cannot take judicial notice of the character of light supplied and maintained at any given time by an incorporated town of the state.—*Chicago, I. & L. R. Co. v. Town of Salem*, 76 N. E. 631, 166 Ind. 71; *Id.*, 166 Ind. 703, 76 N. E. 634.

[i] (**Sup.** 1906)

Judicial notice will be taken that the berm of a canal serves to prevent backlying material from falling into the canal.—*Null v. Williamson*, 166 Ind. 537, 78 N. E. 76.

[j] (**Sup.** 1909)

The court to aid the petition will not judicially notice that the *Windfall Herald* is a newspaper having circulation, etc.—*Town of Windfall City v. State ex rel. Wood*, 172 Ind. 302, 88 N. E. 505.

[k] (**App.** 1909)

Courts know, as a matter of common knowledge, that certain pavements are not laid in the winter months.—*Barber Asphalt Pav. Co. v. City of Wabash*, 43 Ind. App. 167, 86 N. E. 1034.

[l] (**App.** 1910)

Courts take notice of matters of common knowledge.—*Princeton Coal Mining Co. v. Howell*, 92 N. E. 122.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 4; 38 CENT.

DIG. Pat. § 543.

See, also, 16 Cyc. p. 852; 28 Cyc. p. 47.

### § 6. Course and laws of nature.

[a] (**Sup.** 1866)

Where a promise was made in November, 1861, to pay a sum of money "after harvest," and suit was commenced in 1864, it was held that the complaint was good, though it did not aver that the time of payment had passed, as the court would take notice of seedtime and harvest.—*Abshire v. Mather*, 27 Ind. 381.

[b] (**Sup.** 1877)

Courts will take judicial notice of the course of the seasons and of husbandry, and that the use of a farm for six months during the cropping season is worth much more per acre than during six months including winter.—*Ross v. Boswell*, 60 Ind. 235.

[c] (**App.** 1909)

Courts take judicial knowledge of the seasons of the year.—*Barber Asphalt Pav. Co. v. City of Wabash*, 43 Ind. App. 167, 86 N. E. 1034.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 5.

See, also, 16 Cyc. p. 854.

### § 7. Qualities and properties of matter.

[a] (**Sup.** 1862)

The court does not judicially know that wine is not intoxicating.—*Jackson v. State*, 19 Ind. 312.

[b] A court will not take judicial notice of the fact that beer is an intoxicating liquor.—(Sup. 1873) *Klare v. State*, 43 Ind. 483; (1883) *Myers v. Same*, 93 Ind. 251.

[c] (Sup. 1885)

The courts will take judicial notice that brandy is an intoxicating liquor.—*Fenton v. State*, 100 Ind. 598.

[d] (Sup. 1891)

The court will take judicial notice of the fact that natural gas is an inflammable and explosive substance, intrinsically dangerous.—*Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

[e] (Sup. 1894)

It is a matter of common observation that glass is a fragile substance, and that its broken edges are sharp and dangerous. It is necessarily one of the natural incidents of the handling of glass in the process of its manufacture that it will be broken without violence from or fault of those who handle it.—*Myers v. W. C. De Pauw Co.*, 38 N. E. 37, 138 Ind. 590.

[f] (Sup. 1895)

The court may take notice as a matter of common knowledge of the fact that natural gas will not explode spontaneously.—*McGahan v. Indianapolis Natural Gas Co.*, 37 N. E. 601, 140 Ind. 335, 29 L. R. A. 355, 49 Am. St. Rep. 199.

[g] (App. 1896)

Courts know judicially that natural gas is highly explosive and combustible, and that it will explode when ignited by fire.—*Alexandria Mining & Exploring Co. v. Irish*, 44 N. E. 680, 16 Ind. App. 534.

[h] (App. 1900)

The court cannot take judicial knowledge that coal or wood, free in their constituent parts from poison, would not have a tendency to produce death if taken into the stomach of an animal.—*Sprinkle v. Bart*, 58 N. E. 862, 25 Ind. App. 681.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 6.

See, also, 16 Cyc. p. 855.

## § 8. Operation and effect of natural forces.

[a] (Sup. 1892)

A court will not take judicial notice that an engine, boiler, and wagon constitute a load of such unusual weight that it is negligence per se to attempt to cross a bridge with them.—*Board of Com'rs of Allen County v. Crevis-ton*, 32 N. E. 735, 133 Ind. 39.

[b] (Sup. 1892)

Where the evidence is in conflict as to whether or not a car, while being pushed, at about four miles an hour, with the brakes set, down a slight grade, to be coupled to another car, would jump forward, at the release of the

brakes, when within six or eight inches of the car with which it was to be coupled, a verdict of a jury will not be disturbed on appeal on the ground that the court should have taken judicial knowledge that a car, under such circumstances, could not jump forward.—*Chicago, St. L. & P. R. Co. v. Champion*, 32 N. E. 874, 23 L. R. A. 861.

[c] (App. 1906)

The courts judicially know that a moving train makes a noise.—*New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804.

[d] (App. 1910)

Judicial notice will be taken of the fact that a detached stone 7½ feet long, 3 feet wide, and 18 inches thick, situated in the roof of an entry to a coal mine, can be carefully secured or taken down, pursuant to the law of gravitation.—*Princeton Coal Mining Co. v. Howell*, 92 N. E. 122.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 7.

## § 9. Scientific facts and principles.

[a] (Sup. 1891)

As the court cannot know that natural gas will not pass under the soil from a leak in a street main to a house in sufficient quantities to cause an explosion, it cannot take notice on demurrer that a complaint alleging such explosion charges an impossibility.—*Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203.

[b] (Sup. 1891)

The courts take judicial notice of that which is known as electricity and of its properties; not of the various methods of generating and transmitting or using it, but of the thing itself and of its nature.—*City of Crawfordsville v. Braden*, 28 N. E. 849, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. Rep. 214.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 8; 38 CENT. DIG. PAT. § 543.

See, also, 16 Cyc. p. 856.

## § 10. Geographical facts.

[a] (Sup. 1855)

The fact of the geographical position of the falls of the Ohio river, and that there are no pilots appointed for other falls in this state, will be judicially taken notice of by this court.—*Cash v. Auditor of Clark County*, 7 Ind. 227.

[b] (Sup. 1859)

The Supreme Court will take judicial notice of the area of an established county.—*Board of Com'rs of Jasper County v. Spittler*, 13 Ind. 235.

[c] (Sup. 1860)

In an action against a railroad for injury to cattle, the court took judicial notice that a part of the road, between two geographical

points, was within the county.—*Indianapolis & C. R. Co. v. Case*, 15 Ind. 42.

[d] (*Sup.* 1861)

Where, in a suit against a railroad company for damages, it was proved that the accident happened at a certain locality, without distinct proof that it was in a certain county, the court took judicial notice of the limits of the county, and of the fact that the place proved was within such limits, and the proof was held sufficient.—*Indianapolis & C. R. Co. v. Moore*, 16 Ind. 43, 56.

[e] The courts will take judicial notice of the prominent geographical features of the country.—(*Sup.* 1866) *Mossman v. Forrest*, 27 Ind. 233; (1878) *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135.

[f] (*Sup.* 1867)

The courts will take notice of the navigability of streams.—*Neaderhouser v. State*, 28 Ind. 257.

[g] (*Sup.* 1867)

The courts will take notice judicially of the geographical position of towns in a county.—*Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429; *Same v. Kirby*, Id. 479.

[h] (*Sup.* 1868)

The court is bound to know that a few hours will take a messenger from Terre Haute to Evansville.—*Ward v. Colyhan*, 30 Ind. 395.

[i] The Supreme Court will take judicial notice that a certain distance from a place named in a county is within that county.—(*Sup.* 1874) *Indianapolis, B. & W. R. Co. v. Lyon*, 48 Ind. 119; (1884) *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

[j] (*Sup.* 1876)

The supreme court may take judicial notice that White river, in Marion county, is not a navigable stream.—*Ross v. Faust*, 54 Ind. 471, 23 Am. Rep. 655.

[k] (*Sup.* 1877)

Where articles of association of a turnpike company state the termini of the road to be within a certain county, the courts of the state will take notice that a road running from one of such termini to the other is located wholly in such county.—*Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 437.

[l] (*Sup.* 1881)

The Supreme Court will take judicial notice that a certain city is located in and is the county seat of a particular county.—*Louthain v. May*, 77 Ind. 109.

[m] (*Sup.* 1882)

Courts take judicial notice of the national surveys and of the territorial boundaries of counties, and, where a full and accurate description of the land is given in a suit to recover it, it can be located in the proper county

without difficulty.—*Wilcox v. Moudy*, 82 Ind. 219.

[n] (*Sup.* 1885)

In an action for killing a horse in Laporte county, the court will take judicial notice that the neighborhood three miles south of Westville is in Laporte county.—*Louisville, N. A. & C. R. Co. v. Hixon*, 101 Ind. 337.

[o] (*Sup.* 1896)

Courts will take judicial notice of the location of a county seat where the circuit court of a county was held at the time a case reached that court on appeal from a board of commissioners.—*Mode v. Beasley*, 42 N. E. 727, 143 Ind. 306.

[p] (*App.* 1896)

A court will take judicial notice that a certain city or town is in a certain county.—*Louisville, N. A. & C. R. Co. v. McAfee*, 15 Ind. App. 442, 43 N. E. 36.

[q] (*Sup.* 1897)

Courts take judicial notice of the area of an established county, and of its limits and boundaries.—*Board of Com'rs of Jackson County v. State ex rel. Brown*, 46 N. E. 908, 147 Ind. 476.

[r] (*App.* 1905)

Courts take judicial notice of the location of the different sections of a township.—*Western Union Telegraph Co. v. Krueger*, 36 Ind. App. 348, 74 N. E. 25.

[s] (*App.* 1907)

The court takes judicial notice of the location of towns in a certain county.—*Cleveland, C. & St. L. R. Co. v. Miller*, 40 Ind. App. 165, 81 N. E. 517.

[t] (*App.* 1910)

Judicial notice is taken of the geological strata of coal in each county and of many other facts connected with coal mines and their operation.—*Princeton Coal Mining Co. v. Howell*, 92 N. E. 122.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 9-14; 37

CENT. DIG. Nav. Wat. § 12.

See, also, 16 Cyc. pp. 858-863; note, 82 Am. St. Rep. 439.

§ 11. Historical facts.

[a] (*Sup.* 1822)

The claims of Virginia, before the year 1783, to the territory northwest of the Ohio; her cession of it in that year to the United States, reserving a tract granted by her to the Illinois regiment, to be divided among the soldiers and officers thereof, according to the laws of Virginia; and her statutes respecting the primary disposal of the soil within this reservation, now known by the name of the "Illinois Grant,"—constitute a part of the history and laws of Indiana, which are to be noticed by its courts without any special proof.—*Henthorn v. Doe ex dem. Shepherd*, 1 Blackf. 157.

## [b] (Sup. 1862)

The court takes judicial notice of a county created by a public statute, but not of the time of the division of counties and the erection of new ones by county commissioners under the general law. In the latter case, such time, if material, must be proved.—*Buckinghouse v. Gregg*, 19 Ind. 401.

## [c] (Sup. 1871)

The courts will take judicial notice of the existence of war or the restoration of peace, when proclaimed by the President.—*Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639.

The court will take judicial notice that all the inhabitants of the state of Louisiana were in insurrection; but they will not take judicial notice that any of such inhabitants maintained a loyal adherence to the United States, or that any part of said state was occupied by the military forces of the United States, or that any person had a license or permit from the President.—Id.

## [d] (Sup. 1871)

Courts will take judicial notice that during the Rebellion the seceded states were at war with the loyal states.—*Brooke v. Filer*, 35 Ind. 402.

## [e] (Sup. 1878)

The court takes judicial notice, as a part of the history of the state, that the grant by the state of Virginia commonly called "Clarke's Grant" (2 Rev. St. 1876, p. 711), was surveyed and located adjacent to the falls of the Ohio river, in the counties of Clarke, Floyd, and Scott, in this state, and that the town of Clarkesville was located and laid out abutting on the Ohio river, within such grant, in said counties of Clarke and Floyd.—*Carr v. McCampbell*, 61 Ind. 97.

## [f] (Sup. 1878)

Courts take judicial notice of matters of public history.—*Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135.

## [g] (Sup. 1896)

The courts take notice of historical facts.—*Smith v. Pedigo*, 33 N. E. 777, 44 N. E. 363, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838.

## [h] (App. 1897)

The courts will take judicial notice of the history of the Wabash and Erie Canal, and the legislation relating to the same.—*Board of Com'rs of Allen County v. Ft. Wayne Water Power Co.*, 46 N. E. 36, 17 Ind. App. 36.

## [i] (App. 1908)

The court knows as a matter of public history that in 1897 the right of crossing on highways had been exercised in a great many cities in the state where electric street railways and steam railroads were both maintained, and that interlocking systems consist in part of appliances that occupy space and would be obstructions if constructed in the streets and highways that would seriously interfere

with the rights of the public therein.—*Michigan Cent. R. Co. v. Hammond, W. & E. C. Electric R. Co.*, 42 Ind. App. 60, 83 N. E. 650.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 15, 16.

See, also, 16 Cyc. pp. 864-870.

## § 12. Statistical facts.

[a] The courts will take judicial notice of the results of the United States census, as shown by the returns.—(Sup. 1879) *Stultz v. State ex rel. Steele*, 65 Ind. 492; (1891) *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157.

## [b] (Sup. 1886)

Courts will take judicial notice of the fact that national bank stock constitutes a material portion of the moneyed capital of the state.—*Wasson v. First Nat. Bank*, 107 Ind. 206, 8 N. E. 97.

## [c] (App. 1892)

The court may take judicial knowledge of the United States Mortality Tables, and, perhaps, other standard tables.—*Shover v. Myrick*, 30 N. E. 207, 4 Ind. App. 7.

## [d] (Sup. 1898)

The courts of Indiana take judicial notice of a census or other enumeration made under the authority of the state or of the United States.—*City of Huntington v. Cast*, 48 N. E. 1025, 149 Ind. 255.

## [e] (App. 1900)

The court will take judicial notice that the city of Evansville, Ind., is a city incorporated under the statutes relating to cities having more than 50,000 and less than 100,000 inhabitants.—*City of Evansville v. Frazer*, 56 N. E. 729, 24 Ind. App. 628.

## [f] (Sup. 1903)

The Supreme Court will take judicial notice of the population of a county as ascertained by the United States census.—*Board of Com'rs of Whitley County v. Garty*, 68 N. E. 1012, 161 Ind. 464.

## [g] (Sup. 1909)

The statistics prepared by the board of statistics established by the state including tabulated information as to the number and thickness of veins of coal, their depths, kind of coal, how mined, number of mines in each county, the owners, number of miners, etc., required to be collected by Burns' Ann. St. 1908, § 859', are official public documents of which the court will take notice.—*State v. Barrett*, 172 Ind. 169, 87 N. E. 7.

## [h] (Sup. 1910)

The court takes judicial notice, to determine the probable expectancy of life, of the Carlisle Tables of Mortality.—*Pittsburg, C., & St. L. R. Co. v. Sudhoff*, 90 N. E. 467.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 17.

See, also, 16 Cyc. pp. 870, 871.

### § 13. Phenomena of animal and vegetable life.

[a] (Sup. 1906)

Courts judicially know that horses sometimes become frightened at unusual objects.—*Baltimore & O. S. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 18.

See, also, 16 Cyc. p. 874.

### § 16. Language, words and phrases, and abbreviations.

[a] (Sup. 1877)

The letters "C. O. D." are not cabalistic, but have acquired a fixed and determinate meaning, which courts and juries will recognize from their general information.—*United States Exp. Co. v. Keefer*, 59 Ind. 263.

[b] (Sup. 1877)

Courts and juries will recognize that a note payable at "Citizens' Bank, Noblesville, Ind." is payable in Indiana.—*Burroughs v. Wilson*, 59 Ind. 536.

[c] (App. 1905)

The Appellate Court knows that "f. o. b.," used in connection with a shipment of goods, means "free on board."—*Kilmer v. Moneyweight Scale Co.*, 76 N. E. 271, 36 Ind. App. 568.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 20.

See, also, 16 Cyc. p. 875.

### § 17. Time, days, and dates.

[a] (Sup. 1883)

A husband in 1838 sold and conveyed land owned by him by deed in which his wife did not join. She was at the time a minor, and attained her majority on April 23, 1842. *Held*, in a proceeding by her for the assignment of dower, commenced January 30, 1862, that the court would take notice, without any averment to that effect, that 20 years had not elapsed from April 23, 1842, up to the time the proceedings were commenced.—*Harding v. Third Presbyterian Church*, 20 Ind. 71.

[b] (Sup. 1877)

The Supreme Court will recognize that the date of a written notice from a surety to a payee was on Sunday, that the notice was given on that day, and was void.—*Chrisman v. Tuttle*, 59 Ind. 155.

[c] (Sup. 1885)

Courts take judicial notice of matters of general knowledge, and thus, in reckoning time, follow the hours as they move consecutively forward.—*Hedderich v. State*, 101 Ind. 564, 1 N. E. 47, 51 Am. Rep. 768.

[d] The court will take judicial notice of the computation of time, and upon what day of the week a certain day of the month falls.—(Sup. 1890) *Swales v. Grubbs*, 126 Ind. 106, 25

N. E. 877; (1893) *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. 1022.

[e] (Sup. 1894)

The Supreme Court judicially knows that the 12th day of July, 1891, was Sunday.—*Roberts v. Farmers' & Merchants' Bank of Attica*, 36 N. E. 128, 136 Ind. 154.

[f] (App. 1902)

The court will take judicial notice that about 3:20 a. m. on October 12th it is not daylight.—*Cincinnati, H. & I. R. Co. v. Worthington*, 30 Ind. App. 663, 65 N. E. 537, 66 N. E. 478, 96 Am. St. Rep. 355.

[g] (App. 1905)

A court will take judicial notice that a time between 4 and 6 o'clock in the afternoon of September 16th was before sunset.—*Dayton & W. Traction Co. v. Marshall*, 75 N. E. 824, 36 Ind. App. 491.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 21.

See, also, 16 Cyc. p. 856.

### § 18. Weights, measures, and values.

[a] (App. 1908)

Courts take judicial notice that wheat, corn, and tobacco have fluctuating values.—*Lindsey v. Hewitt*, 42 Ind. App. 573, 86 N. E. 446.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 22.

See, also, 16 Cyc. p. 837.

### § 19. Matters of art and skill.

[a] (App. 1900)

Judicial notice will be taken that lithographing is an art which requires a high degree of skill, and is expensive.—*Beck & Pauli Lithographing Co. v. Evansville Brewing Co.*, 58 N. E. 859, 25 Ind. App. 662.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 23; 38 CENT.

DIG. Pat. § 543.

### § 20. Management and conduct of occupations.

[a] (Sup. 1878)

Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road.—*Evansville & C. R. Co. v. Smith*, 65 Ind. 92.

[b] (Sup. 1885)

The court will take judicial notice that employes of a bank other than the cashier must have access to the funds.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

[c] (Sup. 1892)

A court judicially knows that telegraph lines are maintained, operated, and used in connection with railroads, and that it is necessary to do so to properly operate a railroad, to give

advice as to the time of running trains, and their arrival at certain points, to direct the running of trains, and transact the business of the road; that the telegraph is generally used and is necessary in connection with a proper system in running a railroad.—*State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 133 Ind. 69, 18 L. R. A. 502.

[d] (App. 1894)

The court will take judicial notice of the fact that ordinarily a stop of a passenger train for three minutes at a station for the purpose of allowing passengers to get on or off the train is reasonable and adequate.—*Louisville, N. A. & C. R. Co. v. Costello*, 36 N. E. 290, 9 Ind. App. 462.

[e] (Sup. 1895)

The Supreme Court knows judicially that there is a system of banking in the state into which individuals and partnerships enter not governed by any articles of incorporation, and that in such arrangement, if the business is large, agents must be appointed to perform the functions and assume the duties of the bank officers.—*State v. Arnold*, 38 N. E. 820, 140 Ind. 628.

[f] (App. 1895)

The court knows judicially that coupling cars is a dangerous undertaking.—*Evansville & R. R. Co. v. Malott*, 41 N. E. 549, 13 Ind. App. 289.

[g] (App. 1896)

The Appellate Court knows judicially that the right of way of railway companies is frequently used for other purposes than that of simply operating their trains thereon.—*Pittsburgh, C. & St. L. R. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597.

[h] (App. 1905)

Courts take judicial notice that certain conduct is within the scope of the employment of the conductor of a train.—*Indianapolis & E. R. Co. v. Barnes*, 74 N. E. 583, 35 Ind. App. 485.

[i] (App. 1907)

It is a matter of common knowledge that switching is done by a railroad company only as necessity arises in the course of transacting the railroad's business.—*Grand Trunk Western R. Co. v. Stafe*, 40 Ind. App. 695, 82 N. E. 1017.

[j] (App. 1910)

Courts take judicial notice of the manner in which railroads are ordinarily operated, and judicially know that a freight brakeman has to do with cars and brakes thereon.—*Cleveland, C., C. & St. L. R. Co. v. Heineman*, 90 N. E. 899.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 24.

See, also, 16 Cyc. pp. 854, 876.

§ 21. Customs and usages.

[a] The court cannot take judicial notice of local customs or usages.—(Sup. 1828) *Rapp v. Grayson*, 2 Blackf. 130; (1874) *Hitesman v. State*, 48 Ind. 473.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 25.

See, also, 16 Cyc. p. 878.

§ 22. Corporations and associations and members thereof.

Corporate charters, see post, § 31.

[a] (Sup. 1861) \*

In a suit on a ditching contract purporting to have been made by defendants as directors of a draining association, the question whether there was such a corporation was for the judicial knowledge of the court.—*Herod v. Rodman*, 16 Ind. 241.

[b] (Sup. 1861)

Although the court knows, judicially, all the statutes under which plankroad companies are organized, yet it cannot know judicially under which one any particular company was organized, or whether it has not adopted the provisions of some other act.—*Danville & W. L. Plank-Road Co. v. State*, 16 Ind. 456.

[c] (Sup. 1862)

The court took judicial notice that the Ohio Insurance Company was by public law a bank of discount and deposit.—*Gordon v. Montgomery*, 19 Ind. 110.

[d] (Sup. 1866)

Under the act authorizing the organization of associations for the purpose of constructing levees and drains, the existence of such associations must be judicially taken notice of by the courts of the county or counties in which the articles of association are recorded.—*Delawter v. Sand Creek Ditching Co.*, 26 Ind. 407.

[e] (Sup. 1867)

An act which requires the courts of the county in which the articles of association are recorded to take judicial notice of the existence of corporations formed for such purposes does not require the supreme court to take such judicial notice.—*Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274.

[f] (Sup. 1867)

The courts will not take judicial notice whether a railroad company owns and operates a road through a particular county when there is no law prohibiting it from doing so.—*Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429; *Same v. Kibby*, Id. 479.

[g] (Sup. 1879)

The courts will not take judicial notice that a particular telegraph company is one "engaged in telegraphing for the public" within the meaning of 1 Rev. St. 1876, p. 868, § 1, imposing a penalty on companies thus engaged from neglect in respect to the delivery of messages.—*Western Union Tel. Co. v. Axtell*, 69 Ind. 199.

[h] (Sup. 1892)

The courts will take judicial knowledge of the counties in the state into and through which railroads pass.—*Baltimore & O. R. Co. v. Brant*, 31 N. E. 464, 132 Ind. 37.

[i] (Sup. 1906)

The courts will take judicial notice that a company organized and operating a street railway under the laws of the state is a carrier of passengers.—*Indianapolis St. R. Co. v. Ray*, 78 N. E. 978, 167 Ind. 236.

[j] (Sup. 1907)

Courts take judicial notice that an incorporated railroad company cannot commit negligence in the operation of its engines, cars, or trains except through the acts of its servants.—*Southern R. Co. v. Elliott*, 170 Ind. 273, 82 N. E. 1051.

[k] (Sup. 1908)

Courts cannot know judicially the substance of by-laws, or the customs of private corporations.—*Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 26-28.

See, also, 16 Cyc. pp. 880-883.

### § 23. Matters relating to government and its administration in general.

[a] The courts will take judicial notice of the government surveys and the legal subdivisions of the public lands.—(Sup. 1866) *Mossman v. Forrest*, 27 Ind. 233; (1877) *Murphy v. Hendricks*, 57 Ind. 593; (1880) *Burton v. Ferguson*, 69 Ind. 486.

[b] (Sup. 1866)

The viewers appointed to lay out a highway reported in favor of its utility, and that they had laid out the same, "commencing at the quarter post between sections 9 and 10, township 31, range 10, on the land owned by A., and running through the lands of A. and B. to the quarter post between sections 15 and 16, there to terminate, at the intersection of the road to C." *Held*, that the court will take judicial notice that section 15 is immediately south of section 9, in the same township, and that the course from the quarter post between sections 9 and 10 to the quarter post between sections 15 and 16 is south.—*Mossman v. Forrest*, 27 Ind. 233.

[c] (Sup. 1871)

The supreme court of Indiana will take judicial notice that the lands in Ripley county were surveyed and laid out by act of congress, and that their sides are east, west, north, and south, and that there can be no such description of, or in relation to, a congressional survey of them as the "southeast side" of a quarter section.—*Buchanan v. Whitam*, 36 Ind. 257.

[d] (Sup. 1875)

Where, in the description of land in an assessment made thereon to aid in the construction of a ditch by a drainage association, it does not appear in what county the land is situated, the court may know judicially from the congressional survey that it is in a certain county.—*Bannister v. Grassy Fork Ditching Ass'n*, 52 Ind. 178; *Rich v. Same*, *Id.* 187.

[e] (Sup. 1878)

The courts take judicial notice of the location of the counties of the state, and that the description "town 22" in a conveyance is equivalent to "town 22 north."—*Dawson v. James*, 64 Ind. 162.

[f] (Sup. 1881)

Since courts take judicial notice of the public surveys in the state, they will take judicial knowledge of the fact that the survey of fractional section 15, town 8 south, range 11 west, in the county of Vanderburgh, contains more than 27 acres.—*Craven v. Butterfield*, 80 Ind. 503.

[g] (Sup. 1881)

Courts take judicial notice of public surveys and of the existence and location of the several base lines from which the surveys are made.—*Dutch v. Boyd*, 81 Ind. 146.

[h] (Sup. 1882)

Where lands are described in a mortgage by a section, township, and range, without giving the county or state where situated, the fact that the lands are in this state being presumed, the court, from the description, may take judicial notice of the county in which the lands are located.—*Brown v. Ogg*, 85 Ind. 234.

[i] (Sup. 1884)

A complaint to collect a ditch assessment which definitely states the termini of the ditch, and the section, township, and range of the lands to be affected thereby, is not bad because it does not expressly state in what county or state the proposed ditch or lands to be affected by its construction are situated; those being matters of which the court may take judicial notice.—*Smith v. Clifford*, 99 Ind. 113.

[j] (Sup. 1887)

Courts take judicial notice of the county in which a public highway is located, when the lands to be affected by it are described by sections, townships, and ranges.—*Adams v. Harrington*, 114 Ind. 66, 14 N. E. 603.

[k] (Sup. 1889)

The courts of a state will take judicial notice of the fact that a particular legal subdivision of a section of land in that state is not fractional.—*Peck v. Sims*, 120 Ind. 345, 22 N. E. 313.

[l] (Sup. 1898)

The court knows judicially in which county land is situated, where the section, township, and range are given.—*Richardson v. Hedges*, 49 N. E. 822, 150 Ind. 53.

[m] (Sup. 1906)

Courts take judicial notice that there is but one republican party in the state.—*State ex rel. Garn v. Board of Election Com'rs of Marshall County*, 167 Ind. 276, 78 N. E. 1016.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 29, 30.

See, also, 16 Cyc. pp. 899-919.

### § 24. Nature and constitution of government.

[a] (Sup. 1856)

The existence of ferries, they being established by county commissioners, and not by enactment of the legislature directly, will not be noticed by the court, but, in any particular instance, must be proved.—*State v. Wise*, 7 Ind. 645.

[b] (Sup. 1861)

The court has no judicial knowledge whether or not there are proper and legitimate modes of expending money in procuring the passage of an act of the legislature, and therefore it cannot say that an averment in an answer of such expenditure, with such purpose and result is either immaterial or vicious.—*Judah v. Trustees of Vincennes University*, 16 Ind. 56.

[c] (Sup. 1862)

The court will take judicial notice of the power of the city to improve streets.—*Macey v. Titcombe*, 19 Ind. 135.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 29.

### § 25. Political divisions and bodies.

Pleading, see PLEADING, § 6.

[a] (Sup. 1853)

School districts being public corporations organized under a public statute, the courts will judicially take notice of their organization.—*Swailes v. State*, 4 Ind. 516.

[b] (Sup. 1861)

The court cannot judicially know the corporate name of a city incorporated under the general law of 1852, since such act does not prescribe by what name existing corporations adopting its provisions shall be known.—*Johnson v. Common Council of City of Indianapolis*, 16 Ind. 227.

[c] (Sup. 1870)

The Supreme Court cannot take judicial notice of the names of the townships composing a county, as the townships are formed by the board of commissioners, and are not created, bounded, and named by the Legislature, as counties are.—*Bragg v. Board of Com'rs of Rush County*, 34 Ind. 405.

[d] (Sup. 1871)

Judicial notice will not be taken of the number of wards into which a city is divided.—*Moberry v. City of Jeffersonville*, 38 Ind. 198.

[e] (Sup. 1872)

A court cannot take judicial knowledge of the number of wards, or the number of councilmen in a city.—*Baker v. Tobin*, 40 Ind. 310.

[f] (Sup. 1878)

Where the complaint on an injunction bond for damages resulting from the delay caused by the injunction restraining plaintiff from completing a contract with county commissioners for the improvement of the streets surrounding the public square of the county seat does not aver that the county seat was an incorporated town, the court cannot take judicial notice of that fact, and no question arises as to the power of the trustees of the town to make the improvements.—*Sipe v. Holiday*, 62 Ind. 4.

[g] (Sup. 1879)

A court will take judicial notice that a town was incorporated under a certain special charter, and that it subsequently incorporated under the general laws of the state.—*Stultz v. State ex rel. Steele*, 65 Ind. 492.

[h] (Sup. 1881)

Courts take judicial notice of the existence and names of cities and towns, but not of their exact limits or boundaries.—*Grusenmeyer v. City of Logansport*, 76 Ind. 549.

[i] The courts will take judicial notice of the incorporation of a city.—(Sup. 1883) *Town of Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230; (1892) *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45.

[j] (Sup. 1896)

Act March 9, 1899, provides for the relocation of the county seat of Crawford county on petition of 55 per cent. of the electors of the county, and prescribes as conditions precedent an appraisalment and election under a prior act. *Held*, that on petition for removal judicial notice will be taken that the appraisalment and election have been had as prescribed.—*Mode v. Beasley*, 42 N. E. 727, 143 Ind. 306.

All the courts of the state take judicial notice, not only of the location of a county seat, but of public acts of the intermediate agencies exercised in relocating the same.—*Id.*

[k] (Sup. 1910)

The Supreme Court does not judicially know that the boundaries of a particular tract



form any part of the boundaries of the town within which it lies.—*Town of Windfall City v. State*, 92 N. E. 57.

**FOR CASES FROM OTHER STATES.**

SEE 20 CENT. DIG. Evid. §§ 31-33.

See, also, 16 Cyc. pp. 907-910.

**§ 27. Laws of the state.**

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 35-48.

See, also, 16 Cyc. pp. 883-808; note, 11 Am. Dec. 780.

**§ 28. — In general.**

[a] (Sup. 1833)

Judicial notice is taken by courts of the statutes of the state.—*Board of Com'rs of Madison County v. Burford*, 93 Ind. 383.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 35, 36, 43.

See, also, 16 Cyc. pp. 883, 889; note, 11 Am. Dec. 780.

**§ 29. — Public statutes.**

[a] (Sup. 1836)

A statute providing for the laying out and offering for sale of lands belonging to the state is a public act, of which the courts are bound to take notice.—*West v. Blake*, 4 Blackf. 234.

[b] (Sup. 1855)

The act prohibiting the sale of spirituous liquors (*Loc. Laws* 1848, p. 586) is a public statute, which courts are bound to notice without its being pleaded.—*Levy v. State*, 6 Ind. 281.

[c] (Sup. 1861)

Courts are bound to know judicially when laws take effect.—*State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Matlock v. Indiana & I. Cent. R. Co.*, 16 Ind. 176; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

[d] (Sup. 1863)

A suit was brought for damages for breach of warranty, on the ground of a prior incumbrance in the shape of a mortgage of the premises to the sinking fund. The defendant set up the statute of limitations, and alleged that the mortgage was executed and had become forfeited at least 20 years before the inception of this suit (February 24, 1861). The dates of the execution and forfeiture did not appear by the record. *Held*, that the court would judicially notice the passage of the act of January, 19, 1846, by which the time for the payment of mortgages to the sinking fund was extended for 5 years from and after January 1, 1847.—*Parent v. Walmsly's Adm'r*, 20 Ind. 82.

[e] The courts of a state should take judicial notice of what is and what is not the public statutory law of the state.—(Sup. 1869) *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710;

(1909) *State ex rel. Colbert v. Wheeler*, 172 Ind. 578, 89 N. E. 1.

[f] (Sup. 1891)

The court takes judicial notice of the law regulating an officer's fees.—*Benson v. Christian*, 129 Ind. 535, 29 N. E. 26.

[g] (Sup. 1898)

In determining whether a decree for sale of land conveyed by a debtor, through a trustee, to himself and wife, as tenants by entireties, to defraud his creditors, would benefit them, the court must take judicial notice that the wife would be entitled to a third of it as against any one purchasing it at sheriff's sale to pay a judgment against said debtor.—*Marmion v. White*, 51 N. E. 930, 151 Ind. 445.

[h] (Sup. 1903)

Township Reform Law (Acts 1899, p. 157, c. 105) § 12, provides that the circuit court of each county should, at the next term after the taking effect of the law, appoint the members of the advisory board in each township. *Held*, that the court will take judicial notice that the law went into effect, and the next term of the circuit court convened and must have closed, prior to the execution of the contract in suit, and that the law therefore applied to it.—*Moss v. Sugar Ridge Tp.*, 68 N. E. 896, 161 Ind. 417.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 36, 37, 39, 43-46, 48.

See, also, 16 Cyc. p. 889; note, 11 Am. Dec. 780.

**§ 30. — Private statutes.**

[a] (Sup. 1839)

If a statute of a private nature contain a clause declaring it a public act, it will be noticed by the courts as a public act.—*Brookville Ins. Co. v. Records*, 5 Blackf. 170.

[b] (Sup. 1866)

Courts do not take judicial cognizance of special acts of the legislature.—*Toledo, L. & B. R. Co. v. Nordyke*, 27 Ind. 95.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 38.

See, also, 16 Cyc. p. 896; note, 11 Am. Dec. 780.

**§ 31. — Charters of public and private corporations.**

[a] (Sup. 1820)

Judicial notice will be taken of the charters of private corporations recognized by the constitution at its adoption as corporations existing under charters granted by the territorial legislature, the charter becoming by such recognition a public act.—*Vance v. Farmers' & Mechanics' Bank of Indiana*, 1 Blackf. 80.

[b] (Sup. 1846)

The charter of the Whitewater Valley Company is a public act, and the court and

jury are bound to take notice of it without its being proved.—*Russell v. Branham*, 8 Blackf. 277.

[c] (Sup. 1854)

A private corporation may have charge of an interest of so public a concern as to render its charter a public act, and such an act is the act of 1838 relating to the Vincennes University, which recognizes the existence of the corporation, etc.; and hence the court will take judicial notice of said act, and it is not necessary to set it out in the pleadings.—*State v. Trustees of Vincennes University*, 5 Ind. 77.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 40, 41.

### § 32. — Municipal ordinances.

[a] (Sup. 1833)

Courts do not take judicial notice of ordinances of incorporated towns, and, where suit is predicated upon such ordinance, so much of it as relates to the action must be set out or filed with the complaint.—*Clevenger v. Town of Rushville*, 90 Ind. 258.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 42; 3 CENT. DIG. App. & E. § 2959.

See, also, 16 Cyc. p. 898; 28 Cyc. p. 47; note, 11 Am. Dec. 780.

### § 34. Laws of United States.

[a] (Sup. 1834)

Judicial notice will be taken by the courts of Indiana of the swamp land act of Congress, passed September 28, 1850, under which land in controversy was patented to another state.—*Hamilton v. Shoaff*, 99 Ind. 63.

[b] (Sup. 1839)

Judicial notice is taken of acts of congress granting swamp lands to the state.—*Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749.

[c] (Sup. 1891)

The courts will take judicial knowledge of Act Cong. Feb. 23, 1854 (10 Stat. 267), authorizing the Governor of the state to select out of the lands of the United States within the state subject to private entry 19,040 acres of land in legal subdivisions, etc., and the public acts of the Governor in exercising the authority conferred on him by such act in making the selection of the land and the patent issued to the state by the Secretary of the Interior for the land so selected, and hence will take judicial notice that a part of a certain section was so selected and patented.—*State ex rel. Schumacher v. Gramelspacher*, 26 N. E. 81, 126 Ind. 398.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 49, 50.

See, also, 16 Cyc. p. 889; note, 11 Am. Dec. 780.

### § 35. Laws of other states.

[a] (Sup. 1826)

The statutes of a foreign state cannot be judicially noticed.—*Elliott v. Ray*, 2 Blackf. 31.

[b] (Sup. 1836)

The courts of this state do not take notice of the statutes of another state, unless they be specially pleaded.—*Irving v. McLean*, 4 Blackf. 52.

[c] The courts will not take judicial notice of the laws of the other states, but they must be proved in the same manner as other facts.—(Sup. 1848) *Doe, ex dem. Holman v. Collins*, 1 Ind. 24; *Smith*, 58. (1859) *Johnson v. Chambers*, 12 Ind. 102; (1876) *Tyler v. Kent*, 52 Ind. 583; (1877) *Patterson v. Carrell*, 60 Ind. 128; (1881) *Robards v. Marley*, 80 Ind. 185; (1883) *Bethell v. Bethell*, 92 Ind. 318.

[d] (Sup. 1865)

The court cannot take judicial notice of the rate of interest allowed in another state.—*Kenyon v. Smith*, 24 Ind. 11.

[e] (Sup. 1889)

The Supreme Court for some purposes may take judicial notice of the judicial decisions of other states, but as matters of law or fact applicable to a particular case the law of a foreign state, whether declared by judicial decisions or otherwise, must be pleaded and proved.—*Cincinnati, H. & D. R. Co. v. McMullen*, 20 N. E. 287, 117 Ind. 439, 10 Am. St. Rep. 67.

[f] (App. 1898)

The courts of Indiana will not take judicial notice of whether a notary public in Ohio has power to take affidavits, such power being conferred by statute only.—*Teutonia Loan & Building Co. v. Turrell*, 49 N. E. 852, 19 Ind. App. 469, 65 Am. St. Rep. 419.

[g] (Sup. 1903)

The courts will not take judicial notice of the laws of other states, but they must be proved in the same manner as other facts.—*Old Wayne Mut. Life Ass'n v. Flynn*, 68 N. E. 327, 31 Ind. App. 473.

[h] (App. 1903)

In an action in Indiana against a railroad company for death by wrongful act in the state of Illinois, statutes of Illinois relative to the warnings required to be given by railroads, in the way of bells, whistles, etc., which are relied on, must be pleaded and proved.—*Baltimore & O. R. Co. v. Ryan*, 68 N. E. 923, 31 Ind. App. 597.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 51; 3 CENT. DIG. App. & E. § 2959.

See, also, 16 Cyc. pp. 884–886, 893; note, 11 Am. Dec. 780.

**§ 37. Laws of foreign countries.**

[a] (Sup. 1860)

The courts do not take judicial notice of laws of foreign countries.—*Coplinger v. The David Gibson*, 14 Ind. 480.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 52; 3 CENT. DIG. App. & E. § 2959.

See, also, 16 Cyc. pp. 884–886, 895; note, 11 Am. Dec. 780.

**§ 41. Existence, organization, and terms of courts.**

[a] Appellate courts take judicial notice of the terms of the circuit or district courts.—(Sup. 1859) *Morgan v. State*, 12 Ind. 448; (1862) *Buckinghouse v. Gregg*, 19 Ind. 401; (1877) *Spencer v. Curtis*, 57 Ind. 221; (1883) *Wallace v. Ransdell*, 90 Ind. 173; (1895) *Anderson v. Anderson*, 141 Ind. 567, 40 N. E. 131, 1082.

[b] (Sup. 1872)

The Supreme Court will take judicial notice of the commencement of terms of courts of this state.—*Roberts v. Masters*, 40 Ind. 461.

[c] (Sup. 1879)

All persons must take notice, and the courts must know, when the circuit courts of this state may hold their regular sessions. It is matter of public law, and need not be averred. When it is alleged in the complaint that the judge of the court of common pleas in Porter county granted an injunction on the 7th day of October, 1871, in a case pending in the Porter circuit court, all the world must know by the law fixing the times of holding the Porter circuit court that it was not in session at that time.—*Merrifield v. Weston*, 68 Ind. 70.

[d] (Sup. 1881)

The court will take judicial notice of what is "the twentieth judicial day" of the term of the court below next succeeding a certain other day.—*Lewis v. Wintrode*, 76 Ind. 13.

[e] (Sup. 1882)

The Supreme Court knows judicially who are the regular judges of the circuit courts.—*Zonker v. Cowan*, 84 Ind. 395.

[f] (Sup. 1882)

The Supreme Court will take judicial notice of the provisions of 1 Rev. St. 1876, p. 380, § 83, relating to the terms of the common pleas court, and that such court was not therefore governed by the general law relating to the rendition of judgments and the completion of the record thereof at the next term after the trial of causes in the circuit courts.—*Reed v. Higgins*, 86 Ind. 143.

[g] (Sup. 1883)

Courts take notice of the names and official signatures of their officer.—*Beller v. State*, 90 Ind. 448.

[h] (Sup. 1884)

The absence of a showing that the person before whom an application for new trial as a matter of right was verified was the clerk of the court is immaterial, since the court judicially knows its own officers.—*Hammann v. Mink*, 99 Ind. 279.

[i] (Sup. 1885)

The Supreme Court will take judicial notice that no term of the circuit court intervened between certain dates.—*McCrary v. Anderson*, 2 N. E. 211, 103 Ind. 12.

[j] (Sup. 1886)

The Supreme Court will take judicial notice of the fact that the term of the circuit court of a county began on a certain day.—*Carmony v. State*, 5 N. E. 679, 105 Ind. 546.

[k] (App. 1893)

An omission to fill the blank showing the day of the month on which a judgment by default was rendered does not make a complaint to vacate a judgment bad, since, when the month is given, the court will take judicial notice of the term when the judgment was rendered.—*Durre v. Brown*, 7 Ind. App. 127, 34 N. E. 577.

[l] (App. 1893)

The appellate court takes judicial notice of who the judges of the courts of general jurisdiction of the state are, and when their terms of office expire.—*Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613.

[m] (App. 1897)

The appellate court takes judicial notice of the terms of the circuit courts.—*Sanders v. Hartge*, 46 N. E. 604, 17 Ind. App. 243; *Indiana Mut. Building & Loan Ass'n v. Paxton*, 47 N. E. 1082, 18 Ind. App. 304.

[n] (Sup. 1900)

Judicial notice will be taken that the 19th day of October, 1897, on which exceptions were filed, was a day of the September, and not of the March, term of court.—*Taylor v. Canaday*, 57 N. E. 524, 59 N. E. 20, 155 Ind. 671.

[o] (App. 1903)

The court will take judicial notice that a certain person was one of the judges of the superior court of a certain county at the date of the signing of a bill of exceptions.—*Indianapolis St. R. Co. v. Lawn*, 66 N. E. 508, 30 Ind. App. 515.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 56–60.

See, also, 16 Cyc. pp. 911, 919; note, 4 L. R. A. 34.

**§ 42. Rules and procedure of courts.**

[a] (Sup. 1873)

Unless a rule of court limiting the time for making application for a change of venue to be made a part of the record, this court can-

not on appeal notice the existence of such a rule.—*Knarr v. Conaway*, 42 Ind. 260.

[b] (*Sup.* 1883)

Courts are required to take judicial knowledge of their own rules.—*Morgan v. Hays*, 91 Ind. 132.

[c] (*Sup.* 1889)

Appellate courts do not take judicial notice of the rules of the court below.—*Rout v. Ninde*, 118 Ind. 123, 20 N. E. 704.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 61.

See, also, 16 Cyc. pp. 915, 919; note, 4 L. R. A. 34.

§ 43. Judicial proceedings and records.

[a] (*Sup.* 1856)

It is the duty of the court to judicially notice that a demurrer is not based on some ground authorized by the statute.—*Lane v. State*, 7 Ind. 426.

[b] (*Sup.* 1881)

The court will not take judicial notice of the contents of a particular writ of restitution read in evidence, though the record shows that it was issued by a justice of the peace, and shows the subject-matter of the suit and the parties to it.—*Endsley v. State*, 76 Ind. 467.

[c] (*Sup.* 1882)

A court in which an order authorizing an administrator to sell real estate was made cannot take judicial knowledge of the proceedings in which the order was made in a suit by the grantee for partition in which he sought to establish his title by the administrator's deed.—*La Plante v. Lee*, 83 Ind. 155.

[d] (*Sup.* 1883)

Judicial notice will be taken that a notice at Ft. Wayne, served December 20th, to take depositions at Topeka, Kan., on the 26th of the same month, gives sufficient time.—*Fitzpatrick v. Papa*, 89 Ind. 17.

[e] (*App.* 1896)

The Appellate Court takes judicial knowledge of its own records, and it may, in the consideration of a case before it, either on its own motion or at the suggestion of counsel, inspect its records.—*Cluggish v. Koons*, 43 N. E. 158, 15 Ind. App. 599.

[f] An appellate tribunal takes judicial notice of its own records, and may, in considering a cause before it, inspect its records on its own motion or at the suggestion of counsel.—(1905) *Hancock v. Diamond Plate Glass Co.*, 75 N. E. 659, 37 Ind. App. 351; *Id.* (1906) 38 Ind. App. 699, 77 N. E. 413.

[g] (*Sup.* 1906)

Courts take judicial notice of the records in a pending case.—*State v. Simpson*, 166 Ind. 211, 76 N. E. 544, 1005.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 62-65; 3 CENT. DIG. App. & E. §§ 2959, 2960.

See, also, 16 Cyc. pp. 915-920.

§ 44. Offices and official position and authority.

Judicial officers, see ante, § 41.

[a] (*Sup.* 1859)

The courts of a state are presumed to know who the executive may be at any time when the fact may be called in question.—*Hizer v. State*, 12 Ind. 330.

[b] (*Sup.* 1878)

The courts will take judicial notice that the trustee of the civil, is also trustee of the school, township.—*Inglis v. State ex rel. Hughes*, 61 Ind. 212.

[c] (*Sup.* 1909)

Since the state auditor is a constitutional officer required by Const. art. 6, § 1, to perform such duties as are enjoined on him by law, the Supreme Court must take notice of the fact that the auditor has no authority to collect current defaulted insurance taxes, either in his official capacity or as an individual.—*Daily v. State ex rel. Bigler*, 171 Ind. 646, 87 N. E. 4, transferred from the Appellate Court (1908) 42 Ind. App. 690, 86 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 66.

See, also, 16 Cyc. pp. 899-904, 913-915; note, 13 Am. Dec. 192.

§ 45. Elections and appointments to office.

[a] (*Sup.* 1880)

Judicial notice is taken of the time of holding general elections.—*Urmston v. State ex rel. Kuehn*, 73 Ind. 175.

[b] (*Sup.* 1888)

The courts take judicial notice that the election in 1886 was on the 2d day of November, and could not take place on the 4th day of that month. They also take judicial notice that there was an election for Governor on the 4th day of November, 1884.—*State v. Patterson*, 10 N. E. 289, 18 N. E. 270, 116 Ind. 45.

[c] (*Sup.* 1890)

The Supreme Court will take judicial notice of the time fixed by law for the holding of elections.—*Copeland v. State ex rel. Davis*, 25 N. E. 866, 126 Ind. 51.

[d] (*Sup.* 1897)

Under Rev. St. 1894, § 5900 (Rev. St. 1881, § 4424), providing that the township trustees of each county shall meet at the office of the county auditor "on the first Monday in June, 1873, and biennially thereafter, and appoint a county superintendent," whose official term shall expire as soon as his successor is appointed and qualified, and that, should a vacancy occur, the appointee shall hold for the unexpired portion of

the term, the courts will take judicial notice of the years in which the trustees should meet on the first Monday in June to elect successors to the county superintendents then in office.—*Wampler v. State ex rel. Alexander*, 47 N. E. 1068, 148 Ind. 557, 38 L. R. A. 829.

[c] (Sup. 1901)

The court will take judicial notice of the vote cast at an election, as shown by the returns made to the secretary of state.—*In re Denny*, 59 N. E. 359, 156 Ind. 104, 52 L. R. A. 722.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 67.

See, also, 16 Cyc. p. 901.

§ 46. Official proclamations and orders.

[a] (Sup. 1850)

Courts take judicial notice of the governor's proclamations.—*Dunning v. New Albany & S. R. Co.*, 2 Ind. 437.

[b] (Sup. 1877)

The courts of this state take judicial notice of a proclamation by the Governor, declaring in force an act of the Legislature containing an emergency clause.—*Dowell v. State*, 58 Ind. 333.

[c] (Sup. 1885)

In an action for trespass by cattle alleged to have entered plaintiff's land by breaking a partition fence, the court will not take judicial notice of an order made by the county commissioners under Rev. St. Ind. 1881, § 4835, providing that if animals break into an inclosure, or wander on the land of another, the person injured may recover, provided that in townships in which, by order of the county commissioners, domestic animals are permitted to run at large, it shall appear that the fence through which the animals broke was lawful.—*Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 68.

See, also, 16 Cyc. pp. 903, 906.

§ 47. Administrative rules and regulations.

[a] (Sup. 1877)

Courts should take judicial notice of the legal times for the sessions of boards of county commissioners.—*Collins v. State*, 58 Ind. 5.

[b] (Sup. 1882)

The state courts take judicial notice of the regulations of the United States army.—*Board of Com'rs of Vermillion County v. Hammond*, 83 Ind. 453.

[c] (App. 1905)

The regulations of the Post-Office Department are a part of the public records, of which courts take judicial notice.—*Carr v. First Nat. Bank of Jeffersonville*, 73 N. E. 947, 35 Ind. App. 216, 111 Am. St. Rep. 159.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 69.

See, also, 16 Cyc. p. 903.

§ 48. Official proceedings and acts.

[a] (Sup. 1879)

The courts will take judicial notice that since the War of the Rebellion the state adjutant general has made records of the muster rolls of the different regiments of volunteers furnished by the state in the military service of the United States.—*Board of Com'rs of Monroe County v. May*, 67 Ind. 562.

[b] (Sup. 1889)

The court will take judicial knowledge that the Secretary of State recorded a patent, and that the record book containing it had been by him turned over to the Auditor of State.—*Nitche v. Earle*, 19 N. E. 749, 117 Ind. 270.

[c] (Sup. 1891)

The courts will take judicial notice of the facts that the governor selected a particular tract of land in pursuance of an act of congress, and that a patent therefor was issued to the state for the use of Indiana University by the secretary of the interior, in pursuance of such act.—*State ex rel. Schumacher v. Gramelspacher*, 126 Ind. 398, 26 N. E. 81.

[d] (App. 1893)

The courts know judicially that owners of land do not place value on the lands for assessment, and therefore the owners could not be bound for the acts of the assessor or appraising officer.—*Chicago & E. R. Co. v. Smith*, 33 N. E. 241, 6 Ind. App. 262.

[e] (App. 1895)

The courts know judicially that the emergencies in connection with the business of collecting money for taxes and public improvements in a city like Indianapolis are such as to make it absolutely impossible that all or any considerable portion thereof should be paid in legal tender money.—*Indiana Bond Co. v. Bruce*, 41 N. E. 958, 13 Ind. App. 550.

[f] (Sup. 1908)

The courts take judicial notice of the reports of the State Board of Tax Commissioners.—*City of Jeffersonville v. Louisville & J. Bridge Co.*, 169 Ind. 645, 83 N. E. 337.

[g] (Sup. 1909)

County commissioners may, but are not required to, notice that a proposed highway route is the same as that described in a former proceeding, wherein it was found not to be of public utility.—*McKaig v. Jordan*, 172 Ind. 84, 87 N. E. 974.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 70.

See, also, 16 Cyc. pp. 904-906.

**§ 49. Official signatures and seals.**

[a] (Sup. 1880)

The jurat in an affidavit on which an information was based was signed, "Rufus P. Wells, C. P. C. C." (clerk Porter circuit court). *Held*, that the court in which the information was filed would be presumed to know that the signature was that of its clerk.—*Buell v. State*, 72 Ind. 523.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 71.

See, also, 16 Cyc. pp. 902, 920; note, 22 L. R. A. 850.

**II. PRESUMPTIONS.***See—*

From failure to plead writing or other compliance with statute of frauds. FRAUDS, STATUTE OF, § 148.

From omission to make allegations in pleading. PLEADING, § 37.

In aid of pleading. PLEADING, § 34.

In criminal prosecutions. CRIMINAL LAW, §§ 305-323.

Instructions as to presumptions. TRIAL, §§ 205, 234.

Pleading matters of presumption. PLEADING, § 7.

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*See—*

Abandonment of highway. HIGHWAYS, § 70.

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Ademption of legacy. WILLS, § 770.

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ALTERATION OF INSTRUMENTS, § 27.

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Of owner of property injured by fire set by railroad company. RAILROADS, § 480.

Of passenger. CARRIERS, § 344.

Of person injured at railroad crossing. RAILROADS, § 346.

Of person injured on or near railroad tracks. RAILROADS, § 390.

Of person injured on or near street railroad tracks. STREET RAILROADS, § 112.

Of servant injured. MASTER AND SERVANT, § 265.

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- DEDICATION, § 41.
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- Of contract. **CONTRACTS**, § 45.
- Of deed. **DEEDS**, § 194.
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- DIVORCE, § 174.
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- EASEMENTS, § 36.
- Election between dower and right of inheritance. **DESCENT AND DISTRIBUTION**, § 65.
- To take under law. **WILLS**, § 792.
- Enactment of statutes. **STATUTES**, § 283.
- Estoppel or waiver as to warranties or conditions in insurance policy. **INSURANCE**, § 640.
- Exceptions to report of referee. **REFERENCE**, § 100.
- Exclusiveness of right to patent. **PATENTS**, § 185.
- Execution, existence, and genuineness of will. **WILLS**, § 289.
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- Of mortgage. **MORTGAGES**, § 55.
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- Gifts by wife to or for husband. **HUSBAND AND WIFE**, § 49¾.
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- Judgment as estoppel or defense. **JUDGMENT**, § 956.
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- Loss of or injury to goods stored. **WAREHOUSEMEN**, § 34.
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- Causing injuries to passengers. **CARRIERS**, § 316.
- Causing injuries to persons at railroad crossings. **RAILROADS**, § 346.
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- Causing injuries to travelers on street. **MUNICIPAL CORPORATIONS**, § 817.
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- Of master causing injuries to servant. **MASTER AND SERVANT**, § 265.
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To vessel. SHIPPING, § 19.

Transfer and ownership of bill or note. BILLS AND NOTES, § 496.

Undue influence in procuring execution of will. WILLS, § 163.

USURY, § 113.

Validity of assessment for public improvements. MUNICIPAL CORPORATIONS, § 484.

Of assessment rolls or books. TAXATION, § 442.

Of contract. CONTRACTS, §§ 99, 141.

Of deed. DEEDS, § 196.

Of enactment of statutes. STATUTES, § 61.

Of execution sale. EXECUTION, § 259.

Of exercise of power by city in designating fire limit. MUNICIPAL CORPORATIONS, § 603.

Of gift. GIFTS, § 47.

Of municipal ordinances. MUNICIPAL CORPORATIONS, § 120.

Of writ of execution. EXECUTION, § 104.

Value of mortgage, to sustain recovery of nominal damages for wrongful satisfaction. DAMAGES, § 12.

Vendor's lien. VENDOR AND PURCHASER, § 281.

Width of railroad right of way. RAILROADS, § 68.



**In particular civil actions or proceedings.***See—*

Abatement of nuisance. NUISANCE, § 75.

ACCOUNT STATED, § 19.

Against agent. PRINCIPAL AND AGENT, § 190.

Sureties. PRINCIPAL AND SURETY, § 159.

Alienation of affections. HUSBAND AND WIFE, § 333.

ASSAULT AND BATTERY, § 26.

Bail bonds. BAIL, § 90.

Bastardy proceedings. BASTARDS, § 54.

BILLS AND NOTES, §§ 490-499.

Bonds. BONDS, § 130.

Of executors and administrators. EXECUTORS AND ADMINISTRATORS, § 537 (9).

Of guardians. GUARDIAN AND WARD, § 182.

Of public officers. SHERIFFS AND CONSTABLES, § 169.

Or undertaking in attachment proceedings. ATTACHMENT, § 350.

Or undertakings on appeal. APPEAL AND ERROR, § 1246.

Breach of contract. CONTRACTS, § 348.

Of covenant. COVENANTS, § 118.

BREACH OF MARRIAGE PROMISE, § 20.

By or against bank. BANKS AND BANKING, § 227.

Foreign corporation. CORPORATIONS, § 673.

Guardian. GUARDIAN AND WARD, § 131.

Husband or wife, or both. HUSBAND AND WIFE, § 232.

By owner of property taken for public use. EMINENT DOMAIN, § 295.

CANCELLATION OF INSTRUMENTS, § 45.

Compensation of attorney. ATTORNEY AND CLIENT, § 166.

Of broker. BROKERS, § 84.

Of physicians. PHYSICIANS AND SURGEONS, § 24.

Condemnation proceedings. EMINENT DOMAIN, § 200.

Contract of suretyship. PRINCIPAL AND SURETY, § 159.

Conversion by bailee. BAILMENT, § 16.

DEATH, § 58.

Determination, establishment, and protection of water rights. WATERS AND WATER COURSES, § 152.

Disbarment proceedings. ATTORNEY AND CLIENT, § 53.

DIVORCE, § 109.

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Election contests. ELECTIONS, § 201.

Enforcement of drainage assessments. DRAINS, § 90.

Of lien for taxes or money paid for invalid tax title. TAXATION, § 827.

Of vendor's lien. VENDOR AND PURCHASER, § 281.

Equitable relief against judgment. JUDGMENT, § 461.

Establishment of boundaries. BOUNDARIES, § 33.

Of claim to property taken on execution. EXECUTION, § 194.

FALSE IMPRISONMENT, § 22.

Foreclosure of mortgages—

CHATTEL MORTGAGES, § 278.

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Forfeited recognizance. RECOGNIZANCES, § 12.

FRAUD, § 50.

HABEAS CORPUS, § 85.

Injuries at railroad crossings. RAILROADS, § 346.

By or to artificial ponds, reservoirs, channels, and dams. WATERS AND WATER COURSES, § 179.

From defects or obstructions in bridges. BRIDGES, § 46.

From defects or obstructions in streets. MUNICIPAL CORPORATIONS, § 817.

From fires caused by operation of railroads. RAILROADS, § 480.

From flowage. WATERS AND WATER COURSES, § 179.

From negligence. NEGLIGENCE, §§ 120-122.

From negligence or misconduct of sheriff or constable. SHERIFFS AND CONSTABLES, § 138.

To animals on or near railroad tracks. RAILROADS, § 441.

To passengers. CARRIERS, §§ 316, 344.

To persons on or near street railroad tracks. STREET RAILROADS, § 112.

To servants. MASTER AND SERVANT, § 265.

Insurance policies. INSURANCE, §§ 646, 817.

JUDGMENT, § 942.

LIBEL AND SLANDER, § 101.

Loss of or injury to goods in course of transportation. CARRIERS, §§ 132, 163, 185.

To goods stored. WAREHOUSEMEN, § 34.

To property of guest at hotel. INNKEEPERS, § 11.

LOST INSTRUMENTS, § 23.

MONEY RECEIVED, § 18.

Obstruction of navigable waters. NAVIGABLE WATERS, § 26.

Probate proceedings and actions relating to wills or probate. WILLS, §§ 287-289.

QUIETING TITLE, § 44.

REFORMATION OF INSTRUMENTS, § 43.

Removal of fixtures. FIXTURES, § 35.

Restraining enforcement of drainage assessments. DRAINS, § 91.

Enforcement of taxes. TAXATION, § 611.

Sale of allotment of work on drain. DRAINS, § 48.

SEDUCTION, § 17.

Setting aside transfer in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 270-281.

SUBSCRIPTIONS, § 21.

TRESPASS, § 44.

USURY, § 113.

WORK AND LABOR, § 26.

**§ 53. Nature and scope in general.**

[a] (Sup. 1906)

Presumptions of law are such inference as are warranted by the legal experience of courts in administering justice, and are usually founded on reasons of public policy, and social convenience and safety, and presumptions of fact are inferences which enlightened common sense and experience may draw from the connection, relation, and coincidence of facts and circumstances with each other, and must always be drawn from the evidence.—*City of Indianapolis v. Keeley*, 167 Ind. 516, 79 N. E. 490.

[b] (App. 1909)

The presumption is against the party having the burden of proof.—*Cleveland, C. & St. L. R. Co. v. Moore*, 90 N. E. 93.

[c] (Sup. 1910)

Presumptions of law are usually grounded upon public policy, social convenience, or safety, and are either such as the statutes expressly declare, or such inferences as the courts generally in their legal experience have recognized and sanctioned in the administration of justice.—*Modern Woodmen of America v. Craiger*, 92 N. E. 113.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 73.

See, also, 16 Cyc. pp. 1050, 1073.

**§ 54. Grounds.**

[a] (App. 1910)

While evidence that the ditch of hot water into which a servant fell headed in the employer's power house might justify an inference that the hot water came from the power house, yet it could not justify any further inference that the ditch was customarily used as a conduit for hot water, or that the presence of hot water on the occasion in question was known, or was the result of any negligence, since one inference cannot be based on another.—*United States Cement Co. v. Whitted*, 90 N. E. 481.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 74.

See, also, 16 Cyc. pp. 1050, 1073.

**§ 55. Identity of persons and things.**

[a] (Sup. 1864)

Evidence that a person of the same name as defendant was served with a subpoena is prima facie evidence that it was served on the defendant.—*Wire v. Heaston*, 5 Ind. 539.

[b] (Sup. 1883)

Evidence that three persons, bearing the same names as defendants, received distributive shares from a decedent's estate, was sufficient to raise the presumption that they were the heirs.—*Aultman, Miller & Co. v. Timm*, 93 Ind. 158.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 75.

See, also, 16 Cyc. pp. 1055-1057; note, 17 L. R. A. 824.

**§ 56. Personal status and condition in general.**

[a] (Sup. 1872)

The law presumes that all parties to a suit are adults unless the contrary is made to appear.—*Rowe v. Arnold*, 39 Ind. 24.

[b] (Sup. 1883)

No length of separation of husband and wife will create any presumption of itself that the parties are divorced.—*Wiseman v. Wiseman*, 89 Ind. 479.

[c] (Sup. 1884)

An answer setting up an agreed partition is not subject to objection, though it does not show that either of the parties at the time of the alleged agreed partition was of full age, as the law presumes all parties to a suit are adults, unless the contrary is made to appear.—*McSweeney v. McMillen*, 96 Ind. 208.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 76.

See, also, note, 89 Am. St. Rep. 198.

**§ 57. Nature and condition of property or other subject-matter.**

[a] (Sup. 1872)

The presumption is that a party in possession of personal property is the owner.—*Wiseman v. Lynn*, 39 Ind. 250.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 77, 78.

See, also, note, 36 Am. St. Rep. 582.

**§ 59. Love of life and avoidance of danger.**

[a] (App. 1904)

The presumption is that the instinct of self-preservation is possessed and exercised.—*Terre Haute Electric Co. v. Kiely*, 72 N. E. 658, 35 Ind. App. 180.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 79.

See, also, 16 Cyc. p. 1057; note, 116 Am. St. Rep. 108.

**§ 63. Sanity.**

Presumptions as to continuance of condition, see post, § 67.

[a] (Sup. 1859)

Every person is presumed to be sane until the contrary appears.—*Dearmond v. Dearmond*, 12 Ind. 455.

[b] (Sup. 1871)

Every man is presumed to be sane or of sound mind, until the contrary is shown.—*Rush v. Megee*, 36 Ind. 60.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 83.

See, also, note, 36 L. R. A. 721.

**§ 64. Intent.**

[a] (Sup. 1904)

It will not be presumed that a street railway company will violate its contract with the city, and an allegation in a complaint that it intends to do so, in advance of any act of the company constituting such violation, will not prevail against the presumption of good faith.—*Mordhurst v. Ft. Wayne & S. W. Traction Co.*, 71 N. E. 642, 163 Ind. 268, 66 L. R. A. 105, 106 Am. St. Rep. 222.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 84.

See, also, 16 Cyc. p. 1082.

**§ 65. Knowledge of law.**

See WILLS, § 487.

[a] (Sup. 1843)

It is considered that every person is acquainted with the law, both civil and criminal, and no one can, therefore, complain of the misrepresentations of another respecting it.—*Platt v. Scott*, 6 Blackf. 389, 39 Am. Dec. 436.

[b] (Sup. 1846)

A person is presumed to know the legal effect of his contract.—*Mears v. Graham*, 8 Blackf. 144.

[c] (Sup. 1849)

A party is bound, in the absence of any misrepresentation of facts, by the legal effect of his contract, and he is presumed to know what will be its legal effect, and to intend that it shall have that effect.—*State ex rel. Board of Com'rs of Laporte County v. Van Pelt*, 1 Ind. 304, Smith, 118.

[d] (Sup. 1882)

All persons are required to take notice of existing provisions of a public statute, and are bound thereby.—*Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121.

[e] (App. 1906)

There is no presumption that every person knows the law, since such a presumption would obviously be untrue.—*American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526.

[f] (Sup. 1910)

Testator is bound to know, when he makes a will, that the law for the construction of wills and descent of property may be changed before he dies. Rehearing (1909) 89 N. E. 303, denied.—*Hays v. Martz*, 90 N. E. 309.

[g] (App. 1910)

The treasurer of a county is presumed to know the law, and that he cannot charge a fee or commission against an incorporated town in the county for the collection of taxes levied by the proper officer of the town and extended by the county auditor on the county tax duplicate and collected by the county treasurer.—*Holts-*

*claw v. State ex rel. Knightstown*, 92 N. E. 121.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 85.

See, also, 16 Cyc. p. 1083.

**§ 67. Continuance of fact or condition.**

See WILLS, § 32.

Continuance of ownership of property, see PROPERTY, § 9.

Continuance of partnership relation, see PARTNERSHIP, § 259.

Existence of vendor's lien, see VENDOR AND PURCHASER, § 281.

[a] (Sup. 1859)

Where the relation of husband and wife existed at the time the claim sued on accrued, it will be presumed, the contrary not being shown, that it still exists.—*Woolley v. Turner*, 13 Ind. 253.

[b] (Sup. 1871)

Where it is shown by evidence that a man has been at one time insane or of unsound mind, the law presumes that he remains so, until it appears that he has been either wholly or temporarily restored to sanity.—*Rush v. McGee*, 36 Ind. 69.

[c] (Sup. 1882)

In an action to set aside a fraudulent conveyance, the debtor's insolvency, conceded to exist in November, 1876, will be presumed to have continued in December, 1877.—*Adams v. Slate*, 87 Ind. 573.

[d] (Sup. 1883)

Presumptions cannot be indulged against the continuance of the marriage contract.—*Wiseman v. Wiseman*, 89 Ind. 479.

[e] (App. 1892)

A statute of another state, proven to have existed, will be presumed, in the absence of evidence showing its repeal, to be still in force.—*Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229.

[f] (Sup. 1896)

A grantor shown to be mentally weak prior to the date of a deed is presumed to be in the same condition at its date.—*Stumph v. Miller*, 41 N. E. 812, 142 Ind. 442.

[g] (Sup. 1904)

It is only where mental unsoundness is of a character to appear permanent, and to forbid the reasonable expectation of recovery, that a presumption of continuance of such unsoundness will be indulged. It does not arise from intermittent temporary unsoundness, resulting from sickness, injury, intoxication, or other transitory cause, so that an instruction stating that, where it has been established that a person is of unsound mind, the presumption is that that state of unsoundness continues until the con-

trary is shown, is too broad.—*Branstrator v. Crow*, 69 N. E. 668, 162 Ind. 362.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 87, 88, 103;  
24 CENT. DIG. Fraud. Conv. § 804; 27  
CENT. DIG. Ins. Per. § 6.

See, also, 16 Cyc. pp. 1052, 1053; note,  
35 L. R. A. 117; note, 50 Am. Rep. 297.

### § 70. Making, validity, and genuineness of writings.

[a] (Sup. 1876)

Where a pleading alleges a promise, without setting out a copy thereof or alleging that it is in writing, it will be presumed to have been by parol.—*Krutz v. Stewart*, 54 Ind. 178.

[b] (Sup. 1881)

A party who shows that a name is in the handwriting of a person whose signature is in question has a right to have an inference of its genuineness made in his favor.—*Herbert v. Berrier*, 81 Ind. 1.

[c] (App. 1897)

An alteration made after the execution of an instrument is presumed to be made by the party claiming under it.—*Casto v. Evinger*, 46 N. E. 648, 17 Ind. App. 298.

[d] (App. 1908)

A letter received in due course of mail in response to a letter sent by the receiver is presumed, in the absence of anything to the contrary, to be from the one whose name is signed to it, but the presumption that the name signed to a telegram is that of the sender may be overcome by affirmative evidence to the contrary.—*Western Union Tel. Co. v. Troth*, 43 Ind. App. 7, 84 N. E. 727.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 91.

### § 71. Mailing and delivery of mail matter.

Rebuttal of presumptions, see post, § 89.

[a] (Sup. 1879)

A person having a note for collection, who gives notice of nonpayment to the owner by depositing a letter in the post office, need not prove that the letter was received.—*Locke v. Merchants' Nat. Bank*, 66 Ind. 353.

[b] (App. 1891)

The depositing of a letter in a post office addressed to one is prima facie evidence that it was received in the usual course of mail.—*Home Ins. Co. of New York v. Marple*, 27 N. E. 633, 1 Ind. App. 411.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 92.

See, also, 16 Cyc. pp. 1065-1070.

### § 73. Corporate acts and records.

Pleading matters of presumption or implication, see PLEADING, § 7.

[a] (Sup. 1865)

In an action where a city is a party, it will be presumed, nothing appearing to the contrary, that it is incorporated under the general law for the incorporation of cities.—*City of Logansport v. Wright*, 25 Ind. 512.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 94.

See, also, note, 22 L. R. A. 276.

### § 74. Evidence withheld or falsified.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 95-100.

See, also, 16 Cyc. pp. 1058-1064; note,  
14 L. R. A. 470.

### § 75. — In general.

[a] (Sup. 1882)

In an action for divorce, alimony and fraud in the seduction, marriage and abandonment of plaintiff and her bastard child, the fact that the child is not brought into the courtroom cannot be taken as evidence for or against her, and, if brought in, the jury cannot take its appearance for any purpose.—*Bishop v. Redmond*, 83 Ind. 157.

[b] (Sup. 1886)

In an action against a railroad company for the death of a passenger caused by its negligence, and a defense that the passenger was riding on a fraudulent pass, when it appears that it is in the power of the railroad company to show positively and clearly the material facts concerning the pass, and thus prove its allegation, a failure to do so furnishes a strong inference against the defense raised, and will not rebut the presumption that deceased was a bona fide passenger.—*Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120.

[c] (App. 1906)

If a party to a civil case has evidence peculiarly within his own knowledge, and does not produce it, it is presumed that, if produced, its effect would be detrimental to him.—*Western Union Tel. Co. v. McClelland*, 38 Ind. App. 578, 78 N. E. 672.

[d] (App. 1907)

The jury has the right to consider the unexplained absence of witnesses and the failure of a party to submit evidence presumably within his knowledge.—*Southern Indiana R. Co. v. Osborn*, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 95.

See, also, 16 Cyc. pp. 1058, 1059.

### § 77. — Failure to call witness.

Comments by counsel on failure to produce evidence or call witness, see TRIAL, § 122.  
Instructions as to failure to call witness, see TRIAL, § 211.

## [a] (Sup. 1882)

The failure of plaintiff suing for breach of promise of marriage, accompanied by seduction, after defendant has given evidence tending to show improper relations between plaintiff and another, to produce and examine the latter on the subject, creates no presumption against plaintiff, and is not a proper matter for the consideration of the jury.—*Haymond v. Saucer*, 84 Ind. 3.

## [b] (App. 1892)

An action for the alienation of a wife's affections, though adultery is not charged, is an action for seduction, within the meaning of Rev. St. 1881, § 501, excluding the wife from testifying in an action by a husband for seduction of his wife; and it is not error in such action to charge that no unfavorable inferences are to be drawn from the fact that the wife does not testify.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 702, 50 Am. St. Rep. 266.

## [c] (Sup. 1901)

Where, in a will contest, the administrator invokes the provision of Burns' Rev. St. 1894, § 505 (Horner's Rev. St. 1897, § 497; Rev. St. 1881, § 497), rendering a physician incompetent to testify to confidential communications with his patient, it was error for the court to permit contestant's attorney to argue that the administrator's objection should be taken as an admission that the physician's evidence would be unfavorable to his case, and for the court to charge that, inasmuch as the administrator might waive such objection, and himself call the physician as a witness, the jury might consider the administrator's conduct in failing so to do, and objecting to the evidence, in determining the case, since the presumption that the witness' testimony would have been unfavorable does not apply to a failure to call a privileged witness.—*Brackney v. Fogle*, 60 N. E. 303, 156 Ind. 535.

## [d] (App. 1903)

Where, in an action against a street railway company for personal injuries by collision with plaintiff's vehicle, defendant gave no evidence, the jury might draw an inference of carelessness, rather than of pure accident, from the fact of such silence.—*Indianapolis St. R. Co. v. Darnell*, 68 N. E. 609, 32 Ind. App. 687.

## [e] (App. 1908)

In an action on a promissory note, where it appears that a certain witness, if produced, could give satisfactory evidence as to the genuineness or want of genuineness of the defendant surety's signature thereon, if plaintiff has it peculiarly within his power to produce such witness, but fails so to do, the presumption is warranted that the evidence of the witness, if produced, would be unfavorable to plaintiff.—*Closson v. Bligh*, 41 Ind. App. 14, 83 N. E. 263.

## [f] (App. 1909)

In suit to recover a deposit made for plaintiff, the jury might infer, from the bank's failure to call the cashier when the deposit was made, and who was within reach, that his testimony would have been unfavorable to it.—*Second Nat. Bank v. Gibboney*, 43 Ind. App. 492, 87 N. E. 1064.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 97.

See, also, 16 Cyc. p. 1002.

## § 78. — Suppression or spoliation of evidence.

## [a] (Sup. 1867)

The destruction of a contract by a person claiming under it, after he knows that there is to be a difficulty about it, is strong presumptive evidence that its terms were unfavorable to his claim.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

A party who, in an action for realty, destroys evidence by which his title may be impeached, raises strong, but not a conclusive, presumption against its validity.—*Id.*

## [b] (Sup. 1890)

Although the Code provides means for compelling an unwilling party to furnish evidence under his control, this does not affect the question of inferences to be drawn from his refusal to furnish facilities for a full investigation of the case; and it is not error to admit evidence showing that, while the facts were under investigation, a party refused to produce a certain letter addressed to him by the other party until he was compelled by order of the court.—*Lockwood v. Rose*, 125 Ind. 588, 25 N. E. 710.

## [c] (App. 1903)

Where a party suppresses evidence in his control, the presumption arises that its production would be against his interest.—*Westervelt v. National Mfg. Co.*, 69 N. E. 169, 33 Ind. App. 18.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 98, 100.

See, also, 16 Cyc. pp. 1058, 1059; note, 34 L. R. A. 581.

## § 80. Laws of other states.

[a] In the absence of evidence to the contrary, it will be presumed that the common law exists in another state.—(Sup. 1835) *Titus v. Scantling*, 4 Blackf. 89; (1850) *Trimble v. Trimble*, 2 Ind. 70; (1857) *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; (1862) *Mendenhall v. Gately*, 18 Ind. 149; (1862) *Crake v. Crake*, Id. 156; (1862) *Buckinghouse v. Gregg*, 19 Ind. 401; (1867) *Smith v. Muncie Nat. Bank*, 29 Ind. 158; (1868) *Schurman v. Marley*, Id. 458; (1875) *Lichtenberger v. Graham*, 50 Ind. 288; (1877) *Patterson v. Carrell*, 60 Ind. 128; (1878) *Smith v. Peterson*, 63 Ind. 243; (1881) *Robards v. Marley*, 80 Ind. 185; (1882) *Rogers v. Zook*, 86 Ind. 237; (1885) Supreme Council Order of

*Chosen Friends v. Garrigus*, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; (1889) *Cunningham v. Jacobs*, 22 N. E. 335, 120 Ind. 306; (Sup. 1903) *Baltimore & O. S. W. R. Co. v. Adams*, 66 N. E. 43, 159 Ind. 688, 60 L. R. A. 396; (1903) *Baltimore & O. S. W. R. Co. v. Hollenbeck*, 69 N. E. 136, 161 Ind. 452; (1904) *Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379; (App. 1904) *Midland Steel Co. v. Citizens' Nat. Bank*, 72 N. E. 200, 34 Ind. App. 107; (1807) *Gates v. Newman*, 46 N. E. 654, 18 Ind. App. 392.

[b] (Sup. 1857)

In the absence of proof it will be presumed that the laws of another state are the same as the laws of the forum.—*Shaw v. Wood*, 8 Ind. 518.

[c] (Sup. 1857)

In a suit on a transcript of a judgment of a justice of the peace of Ohio, in the absence of proof of the law of Ohio at the date of the judgment, *semble*, that the court will presume it to be the same as in Indiana.—*Draggoot v. Graham*, 9 Ind. 212.

[d] (Sup. 1857)

In the absence of evidence to the contrary, it will not be presumed that the common law in another state is the same as it is in the state of the forum.—*Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658.

A chattel mortgage appearing on its face to have been executed in another state will not be upheld to defeat the title of an innocent purchaser here, though shown to have been recorded in the county where executed, it not being valid at common law, and not shown to be valid by the *lex loci contractus*.—*Id.*

[e] (Sup. 1853)

The common law of another state, in a particular case, must be proved as any other fact.—*Billingsley v. Dean*, 11 Ind. 331.

[f] (Sup. 1859)

A document of another state not admissible in evidence by the common law will be rejected where the statute of the foreign state is not produced, though such a document of this state is admissible by our statute.—*Johnson v. Chambers*, 12 Ind. 102.

[g] (Sup. 1862)

Where a right is sought to be enforced in one state, in relation to a subject-matter existing in a foreign state, and no foreign law is proved, and no common-law rule ever was prescribed, and no contract exists, in such case the court will apply the law of the state in which it is sitting.—*Crake v. Crake*, 18 Ind. 156.

[h] (Sup. 1862)

The common law, establishing no rate of interest, will be presumed to be the rule in foreign states.—*Buckinghouse v. Gregg*, 19 Ind. 401.

[i] (Sup. 1867)

Where a note in suit is governed by the law of a state other than that of the forum, it will be presumed that the law of such other state is the common law, in the absence of evidence to the contrary.—*Smith v. Muncie Nat. Bank*, 29 Ind. 158.

[j] (Sup. 1876)

The courts of Indiana will presume, in the absence of proof to the contrary, that a note made payable in another state is governed by the common law, and not by the law merchant.—*Alford v. Baker*, 53 Ind. 279.

[k] (Sup. 1889)

In the absence of evidence to the contrary, it will be presumed that the common law in another state as modified and interpreted is the same as it is in the state of the forum.—*Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538.

The laws of a state to whose courts a party appeals for redress furnish in all cases *prima facie* the rule of decision, and if either party claims the benefit of a different rule, since the courts are presumed to be acquainted only with their own laws, he who asserts the existence of a different rule, as applicable to his case, must aver and prove it, like other facts of which the courts do not take judicial notice.—*Id.*

As to states in which there was established civil governments or systems of domestic law prior to their becoming territories or states of the Union, the presumption that the common law prevails is not indulged, and in such a case, in the absence of anything to the contrary being shown, the court will presume that the foreign law is the same as that which prevails here.—*Id.*

The state of Kansas, although territorially a part of the Louisiana purchase, is not one of the states in which the civil law ever prevailed, and therefore, in a suit involving the laws of that state, it will be presumed that the common law prevails there.—*Id.*

[l] (App. 1893)

The presumption is that the statute law of the forum is also the law of another state.—*Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246, 34 N. E. 581.

[m] (Sup. 1902)

The court will presume that the rule preventing recovery from a master for injury from the negligence of a fellow servant obtains in another state, and a complaint alleging such an injury in another state is demurrable.—*Baltimore & O. S. W. R. Co. v. Reed*, 62 N. E. 488, 158 Ind. 25, 52 L. R. A. 468, 92 Am. St. Rep. 293; *Baltimore & O. S. W. R. Co. v. Jones*, 62 N. E. 994, 158 Ind. 87.

[n] (App. 1904)

There is, strictly speaking, no law merchant peculiar to any particular state; but

it will be presumed that the rules thereof are the same everywhere, the custom of merchants being similar over the commercial world.—*Midland Steel Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107, 72 N. E. 290.

Where a note is governed by the law merchant of a foreign state, the presumption is that such law merchant is the same as in Indiana; but the decisions of the highest court of the foreign state in such case are binding.—Id.

[o] (Sup. 1907)

The law of Illinois is, in the absence of any showing to the contrary, presumed to be the same as that of Indiana.—*Baltimore & O. R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 701.

[p] (Sup. 1907)

On a common-law question, it must be assumed that the common law is in force in a sister state, unless the contrary is shown.—*Southern R. Co. v. Elliott*, 170 Ind. 273, 82 N. E. 1051.

[q] (Sup. 1908)

The common law is presumed to prevail in another state where no statute is pleaded.—*Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705.

[r] (App. 1909)

In an action for an injury alleged to have occurred in another state, where no statute of that state is pleaded making defendant liable for the injury, the action will be regarded as a proceeding upon the theory of a common-law liability controlled by the procedure of Indiana.—*Cobe v. Malloy*, 88 N. E. 620.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 101; 9 CENT. DIG. Chat. Mtg. § 185; 10 CENT. DIG. Com. Law, §§ 14-16.

See, also, 16 Cyc. p. 1084; note, 21 L. R. A. 467, 67 L. R. A. 33; note, 37 Am. Rep. 584.

§ 82. Judicial proceedings.

Proceedings of courts rendering foreign judgments, see JUDGMENT, § 819.

[a] Everything is to be presumed in favor of the regularity of the proceedings of a court of justice.—(Sup. 1841) *Wilcox v. Ratliff*, 5 Blackf. 561; (1849) *Doe ex dem. Hain v. Smith*, 1 Ind. 451, *Smith*, 381; (1856) *Brackenridge v. Dawson*, 7 Ind. 383; (1865) *Owen v. State ex rel. Owen*, 25 Ind. 371; (App. 1893) *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

[b] (Sup. 1865)

After a court of inferior jurisdiction has once acquired jurisdiction of a matter, the same presumptions will be indulged in favor of the regularity of all subsequent proceedings as is entertained in ordinary cases in courts of general jurisdiction.—*Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329.

[c] (Sup. 1877)

In the absence of an affidavit showing them to be different places, it will be presumed that the office of the clerk of the "county court," etc., at which the certificate to a deposition shows it to have been taken, is the same place as the office of the clerk of the "county," etc., where the notice specified it would be taken.—*Harvey v. Osborn*, 55 Ind. 535.

[d] (Sup. 1881)

In the absence of anything appearing in the record to the contrary, it will be presumed that the court entered the proper decree in foreclosure suit, and that the sheriff properly executed the same.—*Rucker v. Steelman*, 73 Ind. 396.

[e] (Sup. 1881)

Where the jurisdiction of an inferior tribunal has once attached, the court will presume in favor of the validity of all its subsequent proceedings, and mere irregularities or defects will not avail in a collateral proceeding.—*Argo v. Barthand*, 80 Ind. 63.

[f] (Sup. 1892)

A board of county commissioners' court is one of limited jurisdiction, and the same presumption of regularity does not attach to the proceedings thereof as to the proceedings of courts of general jurisdiction.—*Rassier v. Grimmer*, 28 N. E. 886, 29 N. E. 918, 130 Ind. 219.

[g] (Sup. 1896)

There is no presumption that title was in issue in a partition proceeding.—*Goss v. Wallace*, 39 N. E. 920, 140 Ind. 541.

[h] (Sup. 1898)

Where a court of general jurisdiction assumes the right to issue a writ of attachment, the validity of such action will be presumed until the contrary is alleged and proved.—*Runner v. Scott*, 50 N. E. 479, 150 Ind. 441.

[i] (App. 1898)

Where an unverified motion to vacate and correct a judgment impeaches the judgment on the grounds that the verdict was returned on the last day of the term, and that the judgment was not entered, read, and signed in open court, and the record of the judgment is regular, it must be presumed, in the absence of any showing, that there was no irregularity.—*Busching v. Sunman*, 49 N. E. 1091, 19 Ind. App. 683.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 104; 25 CENT. DIG. High. § 169; 42 CENT. DIG. Receivers, § 341.

See, also, 16 Cyc. p. 1075; note, 48 L. R. A. 136.

§ 83. Official proceedings and acts.

See MUNICIPAL CORPORATIONS, § 323.

Assessment made by auditor, see TAXATION, § 485.

As to performance of duty by officer conducting execution sale, see EXECUTION, § 259.

Fixing tax on interstate telegraph company, see **TAXATION**, § 319.

Notice of constable's sale under execution, see **JUSTICES OF THE PEACE**, § 135.

Pleading matters of presumption or implication, see **PLEADING**, § 7.

Validity of assessment rolls or books, see **TAXATION**, § 442.

[a] (**Sup.** 1848)

Where a judgment was rendered in the circuit court February 28, 1843, and the execution law of 1843 was published February 11, 1843, the contrary not being shown, it must be presumed from the lapse of time that a copy of the law had been sent to Ripley county, and was on file there when the judgment was rendered, and was consequently in force in the county when the judgment was rendered.—*Doe ex dem. Holman v. Collins*, 1 Ind. 24, Smith, 58.

[b] In general it is presumed that an officer does his duty, and that his proceedings are regular.—(**Sup.** 1854) *Mercer v. Doe ex dem. Nutting*, 6 Ind. 80; (1861) *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; (1861) *Matlock v. Indiana & I. C. R. Co.*, 16 Ind. 176; (1864) *Evans v. Ashby*, 22 Ind. 15; (1864) *Culbertson v. Milhollin*, Id. 362, 85 Am. Dec. 428; (1865) *Jenkins v. Parkhill*, 25 Ind. 473; (1880) *Talbot v. Hale*, 72 Ind. 1; (1880) *Mullikin v. City of Bloomington*, 72 Ind. 161; (1883) *Heagy v. Black*, 90 Ind. 534; (**App.** 1897) *Sanders v. Hartge*, 46 N. E. 604, 17 Ind. App. 243.

[c] (**Sup.** 1856)

It will be presumed, where the contrary is not shown, that the board of commissioners, in the exercise of a discretionary power, did right.—*Nichols v. Howe*, 7 Ind. 506.

[d] (**Sup.** 1857)

The emergency clause in the act of June 14, 1852, regulating the remission of fines and forfeitures, declared the act to be in force from and after its being filed with the clerks of the circuit courts in their respective counties. *Held*, that the Secretary of State is to be presumed to have done his duty in distributing the act to the several counties, and hence the act was in force on December 20, 1852.—*State v. Dunning*, 9 Ind. 20.

[e] (**Super.** 1872)

The state auditor will be presumed to have done his duty until the contrary is shown.—*State ex rel. Attorney General v. McCarty*, Wils. 205.

[f] (**Sup.** 1880)

In a sale of land under the statutory provisions applicable to and providing for the collection and enforcement of school fund mortgages on default in the payment of principal or interest on the mortgage debt, it will be presumed, in the absence of any evidence to the contrary, that the county officers performed their respective duties under the statute in making the sale.—*Bonnell v. Ray*, 71 Ind. 141.

[g] (**Sup.** 1881)

Until the contrary appears, public officers are presumed to have done their duty.—*State v. Wenzel*, 77 Ind. 428.

[h] (**Sup.** 1881)

It cannot be presumed for the purpose of making out a cause of action in favor of plaintiff in an action against a city that its corporate officers will violate the law and perpetrate a wrong. The presumption is the reverse, and, until the contrary appears, they are presumed to have done their duty.—*Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618.

[i] (**Sup.** 1883)

The courts will presume that a report of viewers appointed to locate a public road was made in conformity with the statute, except as the contrary is shown.—*Heagy v. Black*, 90 Ind. 534.

[j] (**Sup.** 1884)

The presumption is that a sheriff in proceeding under an execution did his duty.—*Louden v. Ball*, 93 Ind. 232.

[k] (**Sup.** 1888)

Where a complaint against a municipal corporation declares on a contract alleged to have been entered into by the city, it will be presumed that whatever was necessary to the contract in respect to entries on the record of the proceedings of the council was done.—*City of Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587.

[l] (**Sup.** 1891)

The presumption is that an appointment made by an officer having power to appoint is rightfully made whenever it appears that the appointee qualified and entered into the possession of the office.—*Osborne v. State ex rel. Michaels*, 27 N. E. 345, 128 Ind. 129.

[m] (**Sup.** 1892)

A public officer whose duty it is to conduct and supervise a public work is presumed to rightfully discharge his duty, and what he does within the scope of his authority is regarded as prima facie right, and in accordance with the law.—*Racer v. State*, 31 N. E. 81, 131 Ind. 303; *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600.

[n] (**Sup.** 1895)

It is to be presumed that the appraisers discharged the duties enjoined on them by statute in relation to sewer assessments and assessed benefits to each and all lots or parts of lots benefited by the proposed work.—*Kizser v. Town of Winchester*, 40 N. E. 263, 141 Ind. 694.

[o] (**Sup.** 1897)

Where a town board assumed that a part of a street to be improved was within the town limits, and proceeded to make the improvements accordingly, the Supreme Court will presume, until the contrary is shown, that their action



was lawful.—*Town of Woodruff Place v. Raschig*, 46 N. E. 990, 147 Ind. 517.

[p] (Sup. 1897)

All presumptions are in favor of the correctness of the proceedings of the auditor, and, if in fact any of the chattels placed on the duplicate as omitted property were wrongfully placed there, such fact must be shown by those who call in question the regularity of the auditor's official acts.—*Buck v. Miller*, 45 N. E. 647, 47 N. E. 8, 147 Ind. 586, 37 L. R. A. 384, 62 Am. St. Rep. 436.

[q] (App. 1905)

Public officers are presumed to do their duty.—*People's Gas, Electric & Heating Co. v. Harrell*, 36 Ind. App. 588, 76 N. E. 318.

[r] (Sup. 1908)

In an action by a railroad against a township for an excessive payment of taxes, there being no allegation to the contrary, the Supreme Court must presume that the State Board of Tax Commissioners regularly assessed the railroad, and that the taxes paid were based on the assessments of that board.—*Baltimore & O. S. W. R. Co. v. Oregon Tp. of Clark County*, 170 Ind. 300, 84 N. E. 529.

[s] (Sup. 1910)

It will be presumed that the action of a city council in passing an ordinance was reasonable, unless the contrary appears on the face of the ordinance, or is disclosed by the complaint in a proceeding to restrain the city from enforcing the ordinance.—*Grand Trunk Western R. Co. v. City of South Bend*, 91 N. E. 809, denying rehearing *Grand Trunk & W. R. Co. v. City of South Bend* (1909) 80 N. E. 885.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 105; 44 CENT. DIG. States, § 163.

See, also, 16 Cyc. pp. 1076-1079.

§ 84. Particular facts.

[a] (Sup. 1849)

The contrary not being proved, it will be presumed that an agent selling lands for his principal, and receiving the purchase money therefor, has retained sufficient thereof to compensate him for his services and expenses.—*Sturdevant v. Pike*, 1 Ind. 277.

[b] (Sup. 1858)

It will be presumed, in the absence of evidence to the contrary, that the will was in testator's possession at the time he made a declaration six or eight days after the execution of the will with reference to the will.—*Runkle v. Gates*, 11 Ind. 95.

[c] (Sup. 1874)

While it may be presumed, unless the contrary appears, that a contract sued on in Indiana was made there, there is no presumption that a deceased person, a party to the contract, died in Indiana, or that his estate was within its jurisdiction.—*Whittlesey v. Heberer*, 48 Ind. 260.

[d] (Sup. 1878)

It may be presumed, the contrary not appearing, that a newspaper was published at or before the time of its date.—*Board of Com'rs of Clarke County v. State ex rel. Lewis*, 61 Ind. 75.

[e] (Sup. 1894)

In an action for personal injuries, it will not be presumed as a matter of law that the physician employed was reasonably skillful, or that plaintiff followed his directions.—*City of Columbus v. Strassner*, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719.

[f] (App. 1908)

The law presumes that a person possessing good eyesight must have seen that which was in range of his vision, if he gave attention and looked.—*Lowden v. Pennsylvania Co.*, 41 Ind. App. 614, 82 N. E. 941.

[g] (Sup. 1909)

Where a petition for mandamus to compel a town board to act upon a petition for the disannexing of land from a city is based on Acts 1907, pp. 620, 621, c. 279, §§ 7, 9 (*Burns' Ann. St. 1908*, §§ 8914, 8916), which require the publication in a newspaper of the fact that a petition is filed and the time of presentation of such petition to the town board, and alleges that such notices were filed in the *Windfall Herald*, without more, the court, to aid the petition, will not presume that the *Windfall Herald* is a newspaper having circulation, etc.—*Town of Windfall City v. State ex rel. Wood*, 172 Ind. 302, 88 N. E. 505.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 106.

See, also, 16 Cyc. pp. 1080, 1081.

§ 85. Operation and effect.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 107-109.

See, also, 16 Cyc. p. 1087.

§ 87. — Presumptions of fact.

[a] (Sup. 1854)

A presumption, like a fact proved, remains available to the party in whose favor it arises until overcome by opposing evidence.—*Bates v. Prickett*, 5 Ind. 22, 61 Am. Dec. 73.

[b] (Sup. 1888)

A grant of right of way to a railroad company across certain lands which fails to define the width of the strip is not conclusively presumed to intend to convey 100 feet in width, because a railroad is empowered to lay out its road not exceeding 6 rods wide, and evidence is admissible to show that the road was originally laid out at a less width, so as to explain the intention of the parties.—*Indianapolis & V. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141.

[c] (App. 1904)

A party in whose favor a presumption arises is entitled to its benefit, as a matter of

evidence, without regard to whether the facts on which it depends were elicited by himself or his adversary at one time or another.—*Nichols v. Baltimore & O. S. W. R. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 109.

See, also, 16 Cyc. p. 1087.

### § 89. Rebuttal of presumptions of fact.

Advancement, see DESCENT AND DISTRIBUTION, § 115.

In action to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, § 271.

#### [a] (App. 1891)

Where the receipt of a certain letter is a material issue in the case, and the party to whom it was addressed denies having received it, it is reversible error to instruct the jury that evidence of the mailing of the letter, properly addressed and stamped, is prima facie proof of its receipt by the person to whom it was addressed.—*Home Ins. Co. of New York v. Marple*, 1 Ind. App. 411, 27 N. E. 633.

#### [b] (App. 1896)

The presumption that, at a certain time after a gas pipe was put up, it was properly supported, arising from the fact that it was so supported when put up, is not overcome by the fact that after an explosion, occurring later, no supports were found.—*Metzger v. Schultz*, 43 N. E. 886, 45 N. E. 619, 16 Ind. App. 454, 59 Am. St. Rep. 323.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 111.

See, also, 16 Cyc. p. 1087.

## III. BURDEN OF PROOF.

See—

As affecting right to demur to evidence. TRIAL, § 152.

As affecting right to open and close in introducing evidence or arguing to jury. TRIAL, § 25.

As question of law or fact. TRIAL, § 139.

In criminal prosecutions. CRIMINAL LAW, §§ 326-336.

Instructions as to burden of proof. TRIAL, § 234.

Practice in equity. EQUITY, § 346.

Under general denial. PLEADING, § 378.

As to particular facts or issues.

See—

Acceptance of deed. DEEDS, § 194.

Of gift. GIFTS, § 47.

Ademption of legacy. WILLS, § 770.

Advancements. DESCENT AND DISTRIBUTION, §§ 99, 115.

ADVERSE POSSESSION, § 112.

Agency. PRINCIPAL AND AGENT, § 19.

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ALTERATION OF INSTRUMENTS, § 27.

Appropriation of water. WATERS AND WATER COURSES, § 152.

Arrest. FALSE IMPRISONMENT, § 22.

ASSAULT AND BATTERY, § 26.

Assumption of risk by servant injured. MASTER AND SERVANT, § 265.

Authority of agent. PRINCIPAL AND AGENT, § 119.

Of corporate officer or agent. CORPORATIONS, § 432.

Of partner to bind firm. PARTNERSHIP, § 217.

Bar of statute of limitations. LIMITATION OF ACTIONS, § 195.

BOUNDARIES, § 54.

Breach of contract. CONTRACTS, § 322.

Of covenant. COVENANTS, § 118.

Capacity of corporation to sue. CORPORATIONS, § 519.

Character of transaction as mortgage or other contract. MORTGAGES, § 36.

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Concealment of cause of action. LIMITATION OF ACTIONS, § 195.

Consideration of bill or note. BILLS AND NOTES, § 493.

Of contract. CONTRACTS, § 88.

Of conveyance or other transfer. FRAUDULENT CONVEYANCES, § 277.

Contributory negligence. NEGLIGENCE, § 122.

Of owner of animals injured on or near railroad tracks. RAILROADS, § 441.

Of owner of property injured by fire set by railroad companies. RAILROADS, § 480.

Of passenger. CARRIERS, § 344.

Of person injured at railroad crossing. RAILROADS, § 346.

Of person injured on or near railroad tracks. RAILROADS, § 396.

Of person injured on or near street railroad tracks. STREET RAILROADS, § 112.

Of servant injured. MASTER AND SERVANT, § 265.

Of traveler injured on street. MUNICIPAL CORPORATIONS, § 817.

Conversion. TROVER AND CONVERSION, § 35.

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Creation, existence, and validity of constructive trusts. TRUSTS, § 107.

Of express trusts. TRUSTS, § 41.

Of resulting trusts. TRUSTS, § 86.

DAMAGES, § 163.

DEATH, § 58.

Death of or injury to person insured, and cause thereof. INSURANCE, §§ 646, 817.

DEEDS, §§ 191-197.

Delivery and acceptance of goods sold. SALES, § 181.

Of bill or note. BILLS AND NOTES, § 492.

Of deed. DEEDS, § 194.

Of gift. GIFTS, § 47.

Diversion of waters. WATERS AND WATER COURSES, § 87.

- Duress in procuring execution of contracts in general. **CONTRACTS**, § 90.
- EASEMENTS**, § 36.
- Election under will. **WILLS**, § 803.
- Error in trial court. **APPEAL AND ERROR**, § 901.
- ESTOPPEL**, § 116.
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- Of note on Sunday. **SUNDAY**, § 23.
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- Fencing of railroad right of way in action for injuries to passenger. **CARRIERS**, § 316.
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- Fraudulent conveyance. **FRAUDULENT CONVEYANCES**, §§ 270-281.
- GARNISHMENT**, § 162.
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- Good faith of purchaser of bill or note and payment of value. **BILLS AND NOTES**, § 497.
- Of purchaser of land. **VENDOR AND PURCHASER**, § 242.
- Grant of easement. **EASEMENTS**, § 36.
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- Insanity. **INSANE PERSONS**, § 2.
- Insolvency of grantor in fraudulent conveyance. **FRAUDULENT CONVEYANCES**, § 272.
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- Irregularity of sale on foreclosure. **MORTGAGES**, § 529.
- Judgment as estoppel or defense. **JUDGMENT**, §§ 951, 956.
- Justification for libel or slander. **LIBEL AND SLANDER**, § 101.
- Loss of or injury to goods stored. **WAREHOUSEMEN**, § 34.
- Malice as element of malicious prosecution. **MALICIOUS PROSECUTION**, § 56.
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- Married woman's separate property. **HUSBAND AND WIFE**, § 131.
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- Causing injuries from fires set by railroad company. **RAILROADS**, § 480.
- Causing injuries to animals on or near railroad tracks. **RAILROADS**, § 441.
- Causing injuries to passengers. **CARRIERS**, § 316.
- Causing injuries to persons at railroad crossings. **RAILROADS**, § 346.
- Causing injuries to persons on or near street railroad tracks. **STREET RAILROADS**, § 112.
- Causing injuries to travelers on street. **MUNICIPAL CORPORATIONS**, § 817.
- In use of street. **MUNICIPAL CORPORATIONS**, § 706.
- Of fellow servant. **MASTER AND SERVANT**, § 265.
- Of master causing injuries to servant. **MASTER AND SERVANT**, § 265.
- Or malpractice by physician or surgeon. **PHYSICIANS AND SURGEONS**, § 18.
- Or misconduct of sheriff or constable. **SHERIFFS AND CONSTABLES**, § 138.
- Nonresidence of defendant in bastardy proceedings. **BASTARDS**, § 35.
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- Of property levied on. **EXECUTION**, § 194.
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- Performance of contract. **CONTRACTS**, § 322.
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Alienation of affections. HUSBAND AND WIFE, § 333.

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 From negligence of druggist. **DRUGGISTS**, § 10.  
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 Probate proceedings and actions relating to wills or probate. **WILLS**, §§ 287-289.  
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 Recovery of deposits. **BANKS AND BANKING**, § 154.  
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     **CHATTEL MORTGAGES**, § 173.  
     **MORTGAGES**, § 213.  
**REFORMATION OF INSTRUMENTS**, § 43.  
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 Transfers in fraud of creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, §§ 270-281.  
**SPECIFIC PERFORMANCE**, § 119.  
 Subscriptions to corporate stock. **CORPORATIONS**, § 90.  
 Supplementary proceedings. **EXECUTION**, § 398.  
**TROVER AND CONVERSION**, § 35.  
**WORK AND LABOR**, § 26.

**§ 90. Nature and scope in general.**

[a] (Sup. 1864)

The party upon whom rests the burden of the issue is the same party who, if no proof is offered, will be cast in the suit.—*Judah v. Trustees of Vincennes University*, 23 Ind. 272.

[b] (Sup. 1906)

A prima facie case must always stand until it is broken by the defendant's evidence.—*Cleveland, C., C. & St. L. R. Co. v. Miller*, 165 Ind. 381, 74 N. E. 509.

[c] (App. 1909)

Since plaintiff fails if he introduces no evidence, the burden of proof is upon him.—*Mayer v. C. P. Lesh Paper Co.*, 89 N. E. 894.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 112.

See, also, 16 Cyc. pp. 920-931.

**§ 91. Party asserting or denying existence of facts.**

[a] (Sup. 1855)

The burden of proof is on the party holding the affirmative.—*McClure v. Pursell*, 6 Ind. 330.

[b] (Sup. 1859)

Where a party pleads a fact affirmatively, the onus of proving it rests upon him.—*Hannum v. Curtis*, 13 Ind. 206.

[c] (Sup. 1882)

The burden of proving insanity is on the party alleging it.—*Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142.

As a general rule, the burden of proof in respect to different parts of a cause may be determined by the pleadings, the plaintiff being bound to prove, if denied, what he has affirmed in his complaint or reply, and the defendant what he has affirmed in his answer, but beyond the reply the question must be determined by the nature of the evidence and its relation to the case.—Id.

[d] (Sup. 1894)

A party alleging that a power of attorney has been revoked by mutual agreement has the burden of proving that fact, and, where there is no finding of such fact by the court, the presumption is that the court found against him on that issue.—*Bell v. Corbin*, 36 N. E. 23, 136 Ind. 269.

[e] (Sup. 1896)

The burden of proof as to error in a survey by a county surveyor is upon the party attacking such survey.—*McGinnis v. Boyd*, 42 N. E. 678, 144 Ind. 393.

[f] (App. 1903)

It is incumbent on one who asserts the invalidity of an instrument for failure to record it, to allege and prove such failure.—*Warner v. Warner*, 66 N. E. 760, 30 Ind. App. 578.

[g] (App. 1909)

Every one is presumed to obey the law and to do his duty, so that he who alleges against another an evil act or intent has the burden of proving it.—*Joseph Schlitz Brewing Co. v. Shiel*, 88 N. E. 957.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 113.

See, also, 28 Cyc. p. 46.

**§ 92. Proof of negative.**

[a] (Sup. 1853)

Where the plaintiff grounds his right of action on a negative allegation, the establishment of which is an essential element in his case, he is bound to prove it, though negative in its terms.—*Nash v. Hall*, 4 Ind. 444.

[b] Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative.—(Sup. 1889) *Boulden v. McIntire*, 21 N. E. 445, 119 Ind. 574, 12 Am. St. Rep. 453; (1896) *City of New Albany v. Endres*, 42 N. E. 683, 143 Ind. 192; (1898) *Carmel Natural Gas & Improvement Co. v. Small*, 50 N. E. 470, 150 Ind. 427.

[c] (Sup. 1907)

Where a negative allegation is pleaded to bring a case within an exception, it must be substantially proved.—*Cleveland, C., C. & St. L. R. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 114.

See, also, 16 Cyc. pp. 927, 936.

**§ 93. Facts within knowledge of adverse party.**

[a] (App. 1905)

Where a plaintiff has the means of proving a certain fact and the defendant has not, the plaintiff cannot take advantage of the failure of his adversary to produce it.—*Indiana Trust Co. v. International Building & Loan Ass'n*, 36 Ind. App. 685, 74 N. E. 633.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 115.

See, also, 16 Cyc. p. 936.

**§ 94. Extent of burden in general.**

[a] (Sup. 1855)

Where the party holding the affirmative shows a state of facts raising a presumption in his favor, or otherwise makes out a prima facie case, the burden of proof is cast on the opposite party.—*Unthank v. Henry County Turnpike Co.*, 6 Ind. 125.

[b] (Sup. 1881)

One who sets up a defense whereby he claims a release from one writing by reason of the execution of another does not shift the burden of proof on the subject until he produces the new writing on which he relies in evidence, or.

having shown a good excuse for not producing it, shall have proved its contents.—*Swift v. Ratliff*, 74 Ind. 426.

[c] (*Sup.* 1882)

The burden of an issue made by a special denial is on the plaintiff as well as that of an issue formed by a general denial, and it was error to charge that the burden shifted from the plaintiff to defendant on her special denial.—*Bishop v. State ex rel. Lord*, 83 Ind. 67.

[d] (*App.* 1893)

Where the complaint in an action against an estate on notes providing for reasonable attorney's fees specifically states the amount of the claim for such fees, an admission by the administrator of the execution of the notes, and that the claim for fees is reasonable, is insufficient to shift the burden of proof, since the plaintiff has the right to prove increased fees because of the litigation of the claim.—*McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187.

[e] (*App.* 1906)

The burden of proof rests on the party who states an affirmative and who would not prevail if no evidence were given; but where such party introduces evidence tending to sustain his contention the burden is upon the opposite party.—*New Castle Bridge Co. v. Doty*, 37 Ind. App. 84, 76 N. E. 557.

FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. EVID. §§ 116, 117.

See, also, 16 Cyc. pp. 932-934.

**§ 95. Elements of cause of action or claim.**

[a] (*Sup.* 1904)

A party seeking the benefit of a statute must by averment and proof bring himself within its provisions.—*Indianapolis & G. Rapid Transit Co. v. Foreman*, 69 N. E. 669, 162 Ind. 85, 102 Am. St. Rep. 185.

[b] (*Sup.* 1907)

The burden is on the person claiming under a statute to prove a case within the terms.—*Steinkuehler v. Wempner*, 169 Ind. 154, 81 N. E. 482, 15 L. R. A. (N. S.) 673.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 118.

**§ 96. Matters of defense and rebuttal.**

[a] (*Sup.* 1830)

If the answer admits a fact, but relies on a distinct fact in avoidance, the defendant must prove the fact on which he relies.—*Green v. Vardiman*, 2 Blackf. 324.

[b] Pleas setting up affirmative defenses impose the burden of proof as to such defenses on defendant.—(*Sup.* 1845) *Bowser v. Bliss*, 7 Blackf. 344, 43 Am. Dec. 93; (1854) *Brown v. Woodbury*, 5 Ind. 254; (1855) *Peck v. Hunter*, 7 Ind. 295.

[c] (*Sup.* 1863)

Conceding that answers going to an attachment were in abatement, not being required by statute to be sworn to, they did not shift the burden from plaintiff to prove the issues on the attachment.—*Bradley v. Bank of State of Indiana*, 20 Ind. 528, 535; *Bank of State of Indiana v. Bradley*, 20 Ind. 536.

[d] (*Sup.* 1889)

An instruction that plaintiff was entitled to recover unless the defendant had proven at least one of its defenses by a preponderance of the evidence was correct; defendant having withdrawn the general denial.—*Phenix Ins. Co. of Brooklyn v. Pickel*, 21 N. E. 546, 119 Ind. 155, 12 Am. St. Rep. 393.

[e] (*App.* 1906)

The burden of proving a plea in abatement is on the defendants, as such a plea is regarded unfavorably by the courts.—*Ruth v. Ruth*, 39 Ind. App. 290, 79 N. E. 523.

[f] (*App.* 1907)

Where no general denial is filed, the burden of establishing the affirmative allegations of the answer is on the defendant.—*Etna' Life Ins. Co. v. Bockting*, 39 Ind. App. 586.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 119-121.

See, also, 16 Cyc. p. 934.

**§ 98. Failure to sustain burden.**

[a] (*Sup.* 1855)

If the party on whom lies the burden of the issue offers no evidence, the adverse party is entitled to a judgment.—*Stout v. Morgan*, 6 Ind. 369.

[b] (*Sup.* 1904)

If the evidence on any question is evenly balanced, the decision of the jury on that question must be against the party having the burden of proof.—*Indianapolis St. R. Co. v. Schmidt*, 71 N. E. 201, 163 Ind. 360.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 122.

**IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.**

Of newly discovered evidence, as affecting right to new trial, see *NEW TRIAL*, § 103.

**(A) FACTS IN ISSUE AND RELEVANT TO ISSUES.**

In criminal prosecutions, see *CRIMINAL LAW*, §§ 337-368.

Sufficiency and scope of objections to admission of evidence, see *TRIAL*, §§ 83, 84.

**§ 99. Relevancy in general.**

[a] (*Sup.* 1840)

In an action on a note, receipts dated before the execution of the note, showing pay-

ments on an account or on a different note, are irrelevant on the question of payment.—*Adamson v. Wood*, 5 Blackf. 448.

[b] (Sup. 1847)

The existence of any fact relative to the issue may be proved.—*Newell v. Downs*, 8 Blackf. 523.

[c] (Sup. 1858)

Evidence not pertinent to the issue is inadmissible.—*Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244.

[d] (Sup. 1858)

Evidence is that which produces conviction on the mind as to the existence of a fact.—*Evansville, I. & C. Straight Line R. Co. v. Cochran*, 10 Ind. 500.

[e] (Sup. 1859)

As a general rule, evidence should not be given either in criminal or civil cases which does not directly tend to the proof or disproof of the matter in issue.—*Lovell v. State*, 12 Ind. 18.

[f] (Sup. 1864)

In an action by a son against his father for services, the question being whether certain property which the son managed had been managed as his own or his father's, the record of an action between the father and a third party, showing a claim by the father to such property, is admissible as evidence to show that the son was working for the father, and not for himself; it not being offered as evidence of an adjudicated point.—*Adams v. Adams' Adm'r*, 23 Ind. 50.

[g] (Sup. 1874)

Where the tenant in possession of a farm worked out a gravel-road assessment against the farm, and by agreement with plaintiff claimed credit for the work on a note given for the rent, a receipt given by the gravel company for such work is admissible in evidence on behalf of defendant in an action on the note.—*Camp v. Brown*, 48 Ind. 575.

[h] (Sup. 1877)

An employé, sued, together with his employer, by another employé, for a personal injury, sustained by the latter while performing a particular service, alleged to have been caused by defendant's employé's negligence in performing a different service and in superintending plaintiff's employment, is entitled to introduce in evidence the terms of his contract of employment, for the purpose of determining whether he or his employer, if either, is liable for the injury sustained by plaintiff.—*Hinds v. Harbou*, 58 Ind. 121.

[i] (Sup. 1880)

Where there is evidence tending to establish an hypothesis, evidence based on such hypothesis is admissible; the truth of the hypothesis being ultimately a question for the jury.—*Nave v. Tucker*, 70 Ind. 15.

[j] (Sup. 1881)

In suit against an executor on a note given by testator in his lifetime, evidence as to the testator's sending a sum of money to the payee, and as to the time of sending it, is competent and relevant, and proper to be considered in determining whether the note was given to compensate payee for services and acts of kindness to deceased.—*West v. Cavins*, 74 Ind. 265.

[k] (Sup. 1884)

Where an action was prosecuted on the theory that a partner had promised to pay a note for the benefit of the firm of which plaintiffs were the surviving representatives as the condition on which the defendants had received a credit for that amount of the purchase money for such property, but had failed to make such payment while living, and had died without having paid such sum or any part of it, by reason of which the condition on which the defendants had received credit on the purchase money had been broken, it was proper to reject evidence that plaintiffs had paid the note, as it presented an inquiry entirely collateral to and independent of the theory on which the action was prosecuted.—*Hland v. Kidwell*, 92 Ind. 409.

[l] (Sup. 1889)

In a suit for breach of warranty, a written contract relating to a different transaction from the one sued on is properly excluded.—*Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156, 21 N. E. 1088.

[m] (Sup. 1890)

It is sufficient to entitle testimony to admission that there is some evidence direct or circumstantial tending to make it competent, and it is not necessary that the connecting evidence should distinctly establish the facts which give the character of competency to the testimony offered.—*Cleveland, C. & I. Ry. Co. v. Closser*, 26 N. E. 159, 126 Ind. 348, 9 L. R. A. 754, 22 Am. St. Rep. 593.

[n] (App. 1894)

In an action against a decedent's estate on a note, plaintiff claimed that deceased agreed to pay the amount for which the note was given in consideration of her joining in a reconveyance of property which deceased had conveyed to plaintiff's husband, and that 11 years thereafter the note was executed in pursuance of that agreement. Defendant claimed that deceased did not sign the note, and that, if she did, it was without consideration. *Held*, that testimony of decedent's attorney, who had charge of the transaction between deceased and plaintiff's husband, was admissible, subject to the limitation that plaintiff was not bound by anything said or done in her absence.—*Hedge v. Talbott*, 8 Ind. App. 507, 36 N. E. 437.

[o] (App. 1895)

Papers in another cause, to which neither plaintiff nor defendant was a party, and in



which no judgment was entered, are not competent evidence.—*Corbin v. Thompson*, 12 Ind. App. 511, 40 N. E. 824.

[p] (Sup. 1907)

Evidence of a collateral fact is admissible to prove the controverted fact if a logical and reasonable inference of the existence of the controverted fact can be drawn therefrom.—*Knapp v. State*, 168 Ind. 153, 79 N. E. 1076.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 123, 137-143.

See, also, 16 Cyc. pp. 1117, 1118.

#### § 100. Circumstantial evidence of facts in issue.

[a] (App. 1908)

Circumstantial evidence consists in reasoning from known or proved facts to establish facts which are inferred to exist; but the facts relied upon to establish the inferred facts must be proved by direct evidence, or admitted, and may not themselves be inferred from other facts.—*Evansville Metal Bed Co. v. Loge*, 42 Ind. App. 461, 85 N. E. 979.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 123½.

See, also, 16 Cyc. pp. 1127-1130, 1159-1189.

#### § 103. Personal status and condition.

Judicial notice, see ante, § 15.

Presumptions, see ante, § 56.

[a] (Sup. 1850)

In an action charging negligence in piloting certain boats, evidence that the pilot possessed sufficient skill to pilot a boat is inadmissible; the question being, not whether he could pilot a boat skillfully, but whether he did so in the present case.—*Slade v. State ex rel. McClaskey*, 2 Ind. 33.

[b] (Sup. 1868)

Where the issue was whether the plaintiffs or the defendants were the trustees of a certain church, a certified copy of the record of proceedings of a church meeting at which the alleged election of the defendants as such trustees took place, and parol evidence of such election, were admissible, as being within the issue.—*Hamrick v. Bence*, 29 Ind. 500.

[c] (Sup. 1886)

In an action by a minor against a railroad company for an injury received through the alleged negligence of the company while in its employ, the plaintiff himself having testified before the jury, it is not error to permit the boy's father to testify as to his relative appearance as to age at the time of the injury and at the time of the trial, and that he did not appear older at the time he entered the company's employment than he really was.—*Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594.

[d] (Sup. 1876)

On an issue as to the alleged insanity of a grantor, evidence tending to prove his sanity or insanity previous or subsequent to the execution of the deed, including the record of a subsequent inquisition by which he was found to be insane, is admissible as tending to show his mental condition at the time of its execution.—*Nichol v. Thomas*, 53 Ind. 42.

[e] (Sup. 1883)

Where land inherited of the husband is, on partition, deeded to him and his wife jointly, in an action involving the adequacy of the consideration for making the wife one of the grantees of the deed, it is not error to admit evidence showing the ages, health, and habits of both herself and husband.—*Sedgwick v. Tucker*, 90 Ind. 271.

[f] (Sup. 1888)

In an action against a railway company for injuries, the defendant asked a medical witness what was commonly understood by, and known to, the medical profession, as to plaintiff's physical condition being produced by a certain disease. *Held*, that the testimony was not competent, as it opened up questions purely collateral to the issue.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[g] (App. 1896)

On a claim against a deceased member of an electric light company on a contract between plaintiff's assignor and decedent, giving the former an interest in stock of the company standing in the latter's name, evidence that, at the time the contract was made, plaintiff's assignor was mayor of the city from which the franchise came was properly admitted to show the relation of the parties.—*Payne v. Goldbach*, 14 Ind. App. 100, 42 N. E. 642; *Warder v. Same*, 14 Ind. App. 703, 42 N. E. 687.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 157-159, 161, 162, 165-168.

See, also, 16 Cyc. p. 1133; note, 52 L. R. A. 500.

#### § 105. Nature and condition of property or other subject-matter.

Presumptions, see ante, § 37.

[a] (Sup. 1882)

An affidavit in relation to the loss of a note, after such note had been found and was declared upon, and had been given in evidence, was irrelevant and immaterial; but the admission of such affidavit in evidence was not sufficient error to require the reversal of a judgment in favor of the plaintiff.—*Hays v. Morgan*, 87 Ind. 231.

[b] (Sup. 1894)

Evidence of the cost at the quarry of stone used in the construction of a bridge is not competent to show their inferior quality.—*Board*

of Com'rs of Carroll County v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

[c] (App. 1896)

In an action for personal injuries sustained by the breaking of a cable and the falling of a cage in which plaintiff was descending into a mine, it was error to admit testimony of the state mining inspector that, on a prior occasion, he was at defendant's mine, and found the safety catches removed from the cages, and that he notified defendant to put them on again.—Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594, 43 N. E. 242.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 169-176.

#### § 106. Character or reputation.

Character of defendant in bastardy proceedings, see BASTARDS, § 61.

Character of prosecutrix in bastardy proceedings, see BASTARDS, § 50.

Cross-examination of witness as to character of party, see WITNESSES, § 274.

In actions for assault and battery, see ASSAULT AND BATTERY, § 29.

In actions for malicious prosecution, see MALICIOUS PROSECUTION, §§ 58, 59.

In disbarment proceedings, see ATTORNEY AND CLIENT, § 53.

Recklessness of person causing injury as evidence on question of damages, see DAMAGES, § 165.

[a] (Sup. 1855)

Evidence of the character of a party to a civil proceeding is only admissible when the character is in issue, and it must in those cases be confined to the party's reputation, with special reference to the nature of the question in issue.—Church v. Drummond, 7 Ind. 17.

[b] (Super. 1873)

In a civil action to recover money which the plaintiff claimed the defendants had unlawfully taken from his person under such circumstances as to make them guilty of the crime of robbery or larceny, evidence as to the character of the defendant for honesty and integrity at the time of the act complained of, and at the time of the trial, was inadmissible.—Harrison v. Russell, Wils. 301.

[c] (Sup. 1877)

Evidence of the general good character of the defendant is not admissible in a civil action to recover damages, although the act charged may be indictable, unless it is of such a nature as to involve the character of the defendant, or his character is directly put in issue.—Gebhart v. Burkett, 57 Ind. 378, 26 Am. Rep. 61.

[d] (Sup. 1887)

In an action on a fire insurance policy, where defendant claims that plaintiff purposely destroyed the property with intent to defraud, evidence of the plaintiff's good character as to morality or honesty is not admissible.—Conti-

mental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194.

[e] (Sup. 1898)

Evidence of a fraudulent grantor's reputation for honesty and fair dealing is not admissible.—Vansickle v. Shenk, 50 N. E. 381, 150 Ind. 413.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 177-187.

See, also, 16 Cyc. pp. 1263-1287; 19 Cyc. p. 365; note, 55 C. C. A. 7; note, 53 Am. Dec. 133.

#### § 107. Pecuniary condition.

[a] (Sup. 1857)

R., T., and C. were partners, and dissolved partnership. T. and C. sued R., with whom was joined M., alleging that R. got possession of the effects of the firm, and had assigned a large amount thereof to M., ostensibly to secure payment of a pretended debt of the firm, evidenced by notes executed by R., but really in pursuance of a conspiracy between him and M. to defraud T. and C. The amount of the debt pretended to be due to M. from the firm for money loaned was \$6,000. To show that M. had not at the time that amount of funds, a list of M.'s taxable property, as sworn to by himself, is admissible, and did not require the corroboration of two witnesses or equivalent facts (2 Rev. St. p. 44, § 80).—Reed v. Thayer, 9 Ind. 157.

[b] (Sup. 1881)

Assessment lists, being public instruments made out and arranged by public officers in pursuance of a duty enjoined by law, are competent evidence, as tending to show the amount of property owned by the person assessed.—Painter v. Hall, 75 Ind. 208.

[c] (Sup. 1881)

Evidence as to a wife's want of means at her marriage and at the time of her husband's death do not tend to prove her pecuniary condition several years thereafter.—Clifford v. Farmer, 79 Ind. 520.

A person's manner of living does not tend to prove his pecuniary condition.—Id.

[d] (Sup. 1883)

Where, in an action on a contract, the defense was a release and one of the questions was whether defendant was solvent or insolvent when the release was made, a contract between defendant and another tending to throw light on the question of insolvency is properly admitted.—Wells v. Morrison, 91 Ind. 51.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 188-201.

#### § 108. Motive and intent.

Competency of testimony, see post, § 151.

Declarations showing intent or motive, see post, § 269.

Presumptions, see ante, § 64.

Similar facts and transactions, see post, §§ 133-135.

[a] (Sup. 1875)

On the trial of an action for slander, to refuse to permit defendant to prove that, about the time of the commencement of said action, the plaintiff said she intended to bring suits against the defendant, and prosecute the same until she broke him up, is not error.—*Lipprant v. Lipprant*, 52 Ind. 273.

[b] (Sup. 1881)

To a suit on a note the surety defended on the ground that an extension of time had been given to the principal. The payee, upon the trial, was asked why he had not given an extension, and answered that he knew of the insolvency of the principal. *Held*, that the question and answer were relevant, competent, and material.—*Thompson v. Boden*, 81 Ind. 176.

[c] (Sup. 1884)

In a suit by a wife, alleging that she gave a mortgage on her lands at the instance of her husband and defendant, to defendant, on his agreement to apply a portion of the sum secured on an older mortgage on the same lands securing her husband's debt, and to pay the residue to the husband, but that defendant, instead of so applying it, converted it to his own use, it is error to exclude evidence that the husband, and not defendant, received and disposed of the whole sum borrowed, and also to exclude the husband's testimony that the loan was made for other purposes than the payment of the prior mortgage.—*Sharpe v. Graydon*, 99 Ind. 232.

[d] (Sup. 1885)

A witness cannot state the reasons which influenced him to write a letter, not ambiguous in meaning, in which he gave explicit directions to his agent to do a designated act, as such agent may act on the letter, and the reasons existing in the mind of the writer cannot, unless known to the agent, affect his rights.—*Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

[e] (Sup. 1889)

In an action to recover the proceeds of a check collected by defendant for plaintiff, which defendant had deposited in his own name in a bank which proved insolvent, evidence was admissible to prove that when defendant deposited the proceeds of plaintiff's check he also deposited money of his own, and that he made the deposits separately.—*Cooper v. Smith*, 119 Ind. 313, 21 N. E. 887.

[f] (Sup. 1892)

Evidence tending to show the private intention of the attorney for a railroad company in instituting a condemnation proceeding is inadmissible in an action to recover damages for the appropriation.—*New York, C. & St. L. R. Co. v. Hammond*, 32 N. E. 83, 132 Ind. 475.

[g] (App. 1893)

It appeared, in an action for damages in assigning to plaintiff a forged note, that, when defendant assigned the note an action on it by him was pending against the makers in a foreign state, in which defendants therein pleaded the forgery, and that defendant afterwards dismissed the action. *Held* that, though the plea in such case was no evidence of forgery, the transcript of the record of the court therein was admissible to show defendant's want of faith in the genuineness of the note.—*Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

[h] (App. 1909)

Where a widow claimed in partition a one-third interest for life in the whole of the real estate of her deceased husband, evidence that the husband, before his marriage, stated that he and his intended wife were going to make a marriage contract, by which each was to retain his or her own property, was inadmissible in the absence of any showing of the execution of such a contract.—*Pethel v. Pethel*, 90 N. E. 102.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 202-212.

See, also, 16 Cyc. pp. 1184-1188.

### § 109. Knowledge.

Presumptions, see ante, § 65.

Similar facts and transactions, see post, § 137.

[a] (Sup. 1878)

In a suit for breach of warranty by a vendor of a sawmill and attachments, on the ground that at the time of the sale they were fixtures on the land of one who afterwards conveyed the land to a third person, evidence is admissible that title to the sawmill, engine, etc., was claimed by the owner of the land, and also that the land had been sold for taxes due before plaintiff's purchase.—*Long v. Anderson*, 62 Ind. 537.

[b] (Sup. 1884)

In replevin by a seller against the mortgagee of the buyer, based on the buyer's alleged intent not to pay, defendant's belief, when he took his mortgage, that the mortgagor was insolvent, was incompetent.—*Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

[c] (Sup. 1890)

Whenever it is material to bring home to a party knowledge of a particular fact, it is admissible to show that the fact was generally known and talked about in the neighborhood where the party sought to be charged with knowledge resided, or that it was a matter of common reputation in the business community to which the party belonged.—*Voght v. State*, 24 N. E. 680, 124 Ind. 358.

[d] (App. 1895)

On an issue as to whether, in signing the transfer of a life insurance policy, plaintiff knew that it was such transfer, she may testify

as to how much she understood the policy to be for.—*Criswell v. Whitney*, 13 Ind. App. 67, 41 N. E. 78.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 213-229.

See, also, 16 Cyc. pp. 1176, 1177.

**§ 110. Statements and conduct of parties.**

As part of *res gestæ*, see post, §§ 124-128.

**[a] (Sup. 1876)**

Evidence of the statements and conduct of a party to a suit in relation to the matter in issue is relevant and admissible on the trial thereof on behalf of the opposite party.—*Lucas v. Smith*, 54 Ind. 530.

**[b] (Sup. 1878)**

In an action, on the relation of a county auditor, upon the bond of a county treasurer for money not accounted for, a settlement sheet between them, jointly signed and certified by both as a true statement for a certain period, as reported by the treasurer to the auditor, was relevant.—*Hostetler v. State ex rel. Dean*, 62 Ind. 183.

**[c] (Sup. 1880)**

In an action against an attorney to recover money belonging to plaintiff, and which he retained as compensation for services, testimony of another that plaintiff retained him to bring the action, and authorized him to employ another to assist him, and that pursuant thereto he employed defendant, is admissible, not to prove a declaration by plaintiff, but the fact of employment.—*Nave v. Tucker*, 70 Ind. 15.

**[d] (Sup. 1881)**

Where a purchaser of hotel property has made considerable additions to the equipment thereof, his admissions as to its receipts, profits, and financial prosperity at that time are not competent to show that representations made to him at the time he purchased were not false.—*Huston v. McCloskey*, 76 Ind. 38.

**[e] (App. 1893)**

Testimony of the judge as to statements made by a guardian to procure the allowance of a claim against the ward, to which he was not entitled, is admissible in a suit by the ward on a promise by the guardian, made in consideration of the ward's foregoing a suit to set aside his final settlement, as it is part of the ward's case to prove fraud or mistake in the settlement.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

**[f] (App. 1894)**

Evidence that plaintiff told various persons different stories as to where deceased executed a note to plaintiff does not tend to prove that he did not execute the note, nor does it contradict the testimony of witnesses that deceased told them that he did execute such a note.—*Kennedy v. Graham*, 35 N. E. 925, 37 N. E. 25, 9 Ind. App. 624.

**[g] (App. 1894)**

In an action to recover the difference between the market price of staves plaintiff had transferred to defendant (to sell at not less than the market price) and what he actually received therefor, a statement by an attorney for plaintiff, who prosecuted an action in defendant's name against persons who converted the staves, that he would drop the case for \$600, after an unfavorable judgment in the superior court, is not admissible to prove that he consented to defendant's compromise for \$1,300 after a favorable judgment in the supreme court.—*Fordice v. Beeman*, 10 Ind. App. 293, 36 N. E. 937.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 230-246.

**§ 111. Customs and course of business.**

**[a] (Sup. 1887)**

Where a contract was oral, and the evidence was such as to leave the terms and meaning thereof ambiguous, evidence of the known and usual course of the particular trade or business to which the contract related was competent with a view of raising a presumption that the transaction in question was according to the ordinary and usual course of the business.—*Morningstar v. Cunningham*, 11 N. E. 593, 110 Ind. 328, 59 Am. Rep. 211.

**[b] (App. 1910)**

The manner of delivery of freight shipments may be shown by proof of usage and custom.—*Pittsburg, C., C. & St. L. R. Co. v. Hall*, 90 N. E. 498.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 247-253.

**§ 112. Value of services.**

Opinion evidence, see post, §§ 487, 523.

**[a] (Sup. 1882)**

Plaintiff sued to recover for services rendered in caring for and waiting on defendant's intestate. Plaintiff was a cripple. *Held*, that evidence that he had been seen splitting rails was admissible, as tending to show his physical ability to render the services for which compensation was claimed.—*Hall v. Stanley*, 86 Ind. 219.

**[b] (App. 1892)**

In an action by an attorney for services rendered, a judgment rendered in an action wherein the alleged services were rendered is admissible to prove the amount of recovery and the result of such suit.—*McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 134, 254-258.

See, also, 16 Cyc. p. 1144.

**§ 113. Value or market price of property.**

In actions for breach of covenants, see COVENANTS, § 119.

In condemnation proceedings, see *EMINENT DOMAIN*, § 202.

Opinion evidence, see post, §§ 488, 489, 525.  
Sales of and price paid for property similarly situated as evidence of value, see post, § 142.

[a] (*Sup.* 1862)

The best and only legitimate evidence of the value of land at the time of a sale is the opinion of witnesses whose personal knowledge makes them acquainted with its value. What its owner would have sold it for several months previous is not proper evidence.—*Crouse v. Holman*, 19 Ind. 30.

[b] (*Sup.* 1864)

In an action for the conversion of a steam engine boiler, and machinery of a sawmill, evidence of the value of the property a year after the suit was brought is inadmissible, in the absence of any assurance of counsel that there are no more direct methods of reaching its value, and that it is proposed to introduce other evidence to connect the value of the property at said time with its value at the time the suit was brought.—*Yater v. Mullen*, 23 Ind. 562.

[c] (*Sup.* 1875)

In an action for the possession of land by the purchaser under an execution sale against a mortgagee who had possession, though not entitled to it by the terms of his mortgage, he having refused to deliver possession, evidence of the rental value of the land was competent with reference to the damages which the plaintiff should recover.—*Reed v. Ward*, 51 Ind. 215.

[d] (*Sup.* 1878)

Plaintiff and defendant agreed that defendant should for two years furnish all the buildings, machinery, power, and capital, and plaintiff should perform all the labor necessary for the manufacture into flax tow all the flax straw that could be bought at a certain town by plaintiff, at a price not exceeding the ruling market price at a certain other town, defendant to make all the sales and collect the pay, and pay plaintiff one-third of the net profits for his services. *Held*, that where the chief ground of plaintiff's complaint was that defendant had failed to perform such contract, whereby plaintiff was prevented from realizing profits that he would have made if defendant had performed the contract on his part, it was error to exclude evidence offered by defendant to show the value of the manufactured tow at the place where it was to be manufactured during the period covered by the contract.—*Boyce v. Brady*, 61 Ind. 432.

[e] (*Sup.* 1881)

In an action on an open account for a certain number of bushels of grain at a certain amount per bushel, evidence as to the value of the grain at the time it was sold to defendant is admissible.—*Hillenbrand v. Wittkemper*, 79 Ind. 180.

[f] (*Sup.* 1883)

In an action against a railroad company for the killing of a horse, evidence of a witness as to the value of the horse in the month preceding the accident was competent when taken in connection with the testimony of other witnesses who were acquainted with the horse at a later period, and saw it after it was struck by the locomotive.—*Louisville, N. A. & C. R. Co. v. Detrick*, 91 Ind. 519.

[g] (*Sup.* 1884)

In an action to recover what certain goods sold were worth, above a named sum according to the purchase contract, evidence of the result of an invoice, made some time prior to the sale, at which the purchaser was not present, is not admissible.—*Sweetser v. McCrea*, 97 Ind. 404.

[h] (*Sup.* 1887)

In an action against a railroad company for killing a mare, evidence of her general reputation among horsemen and turfmen for being "rattle headed," or disposed to break, is not admissible.—*Cincinnati, H. & I. R. Co. v. Jones*, 111 Ind. 259, 12 N. E. 113.

[i] (*App.* 1893)

The question of what a tract of land sold for is not proper evidence of its value.—*Chicago & E. R. Co. v. Smith*, 33 N. E. 241, 6 Ind. App. 262.

In an action for damages to land by fire on the question of the value of the land, the court properly excluded testimony of the county auditor, when it was sought to establish by him the value of the land by showing appraisement thereof as it appeared in the assessor's return of appraisements of land for taxation.—*Id.*

[j] (*App.* 1893)

In an action against the owner and contractor to enforce a mechanic's lien, where the issue is the market value of certain stone furnished defendant by plaintiff, evidence is incompetent as to the cost of stripping and quarrying the stone out of the quarry where it was obtained, as such cost does not affect its market value.—*Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. 675.

[k] (*Sup.* 1900)

On trial of the issues under a counterclaim for the balance due under a contract, which plaintiff had agreed to pay over to defendant after satisfying certain liens, evidence of the value of the property after completing the building defendant had erected was properly rejected.—*People's Loan & Savings Ass'n v. Carey*, 58 N. E. 195, 155 Ind. 324.

[l] (*App.* 1901)

In an action for damages for the conversion of corporate shares, evidence of a sale of a number of shares of the same stock a short time before the alleged conversion was evidence of value, which furnished a basis for the computation of plaintiff's damages for the con-

version.—*B. L. Blair Co. v. Rose*, 60 N. E. 10, 26 Ind. App. 487.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 250-296.

See, also, 16 Cyc. pp. 1133-1144.

**§ 114. Facts relevant to particular issues.**

**[a] (Sup. 1881)**

On an issue as to whether a threshing-machine note sued on had been altered after its execution by inserting the figures "10" between "with" and "per cent." making it draw 10, instead of 6, per cent. interest, evidence that the agent who sold the machine promised to pay the makers for time lost while waiting for the machine is immaterial.—*Bunting v. Heilman*, 74 Ind. 344.

**[b] (Sup. 1881)**

On an issue as to whether or not a woman's signature to a deed was genuine, evidence that a subsequent purchaser bought in good faith for value is inadmissible as not being relevant.—*Mays v. Hedges*, 79 Ind. 288.

**[c] (Sup. 1881)**

In an action against a gratuitous bailee for money collected and destroyed in a fire, it being material to show when the money was collected and when it was lost, defendant claiming that some of it was collected and paid over to plaintiff immediately after his return, evidence of the time of plaintiff's marriage and of the time intervening between his return and his marriage was material as fixing the date of his return.—*Bronnenburg v. Charman*, 80 Ind. 475.

**[d] (App. 1899)**

The capacity for speed of a bicycle is not proved by showing that it was high-g geared.—*F. W. Cook Brewing Co. v. Ball*, 52 N. E. 1002, 22 Ind. App. 656.

**[e] (App. 1901)**

In an action by an infant against her stepmother for injuries by an assault, evidence that plaintiff's father informed her sisters of the assault on the day thereof was competent to fix the time, the details not being given.—*Treschman v. Treschman*, 61 N. E. 961, 28 Ind. App. 206.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 125-132.

See, also, 16 Cyc. pp. 1121-1133, 1198-1206.

**§ 115. Matters showing relevancy of other facts.**

**[a] (Sup. 1884)**

Where the defense to foreclosure proceedings was payment, and the owner of the principal interest in the property was dead, a letter from his father to the plaintiff, inclosing a receipt executed by the plaintiff's attorney

to the deceased for a sum in excess of the amount of the mortgage, was admissible, where it appeared that the payment evidenced by the receipt had been at the request of the plaintiff, and the letter connected the payment with the mortgage.—*Cook v. Woodruff*, 97 Ind. 134.

**[b] (Sup. 1891)**

It was not error to permit a witness to testify that a photograph introduced in evidence was a correct representation of the place of the accident.—*Miller v. Louisville, N. A. & C. Ry. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 133.

See, also, 16 Cyc. pp. 1117, 1118.

**§ 116. Matters explanatory of facts in evidence or of inferences therefrom.**

**[a] (Sup. 1877)**

In an action on a joint promissory note against the makers, the latter, on the trial, introduced in evidence a receipt executed by the plaintiff, acknowledging the receipt, from one of the defendants, of a certain sum in money, and his promissory note, to be applied on the promissory note of the other. *Held* that, such receipt having been so given in evidence without objection, evidence showing that the note mentioned in the suit had not been paid was proper.—*Hill v. Sleeper*, 58 Ind. 221.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 134, 135.

See, also, 16 Cyc. pp. 1118, 1119; note, 82 Am. Dec. 343.

**§ 117. Evidence irrelevant unless preceded or followed by other evidence.**

**[a] (Sup. 1858)**

In the absence of all evidence that one plaintiff's claim was satisfied, it is immaterial, and therefore inadmissible, to show that his co-plaintiff had conveyed all the title to him.—*McGill v. Kennedy*, 11 Ind. 20.

**[b] (Sup. 1873)**

In an action for damages for the wrongful ejection of a passenger from a railway train, it is competent for a witness who was present to state what he heard on the occasion of such expulsion, leaving it to others to identify the persons who made the statements.—*Indianapolis, P. & C. R. Co. v. Anthony*, 43 Ind. 183.

**[c] (Sup. 1877)**

In an action on the bond of a defaulting township trustee, the report of a committee appointed by the board of commissioners to investigate the financial condition of the township, showing a balance due from the township to such trustee, was inadmissible, in the ab-

sence of any evidence that either the township or the defendant was a party to the investigation.—*Robinson v. State ex rel. Martin*, 60 Ind. 26.

[d] (*Sup.* 1879)

In a suit for the value of a dwelling and personality therein alleged to have been burned by defendant, in which plaintiff testifies that some of the articles came to her from her husband, whose estate had not been administered, evidence offered by defendant that such estate was never set off to plaintiff, and was worth less than \$500, is immaterial, in the absence of any proof that any portion of the property burned belonged to the deceased husband's estate.—*Burnett v. Overton*, 67 Ind. 557.

[e] (*Sup.* 1887)

In ejectment, proffered evidence of one of the defendants that all matters concerning the real estate in controversy had been compromised, was properly excluded, there being no statement of the manner or nature of the alleged compromise, and nothing to show the materiality of the evidence.—*Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 136.

See, also, 16 Cyc. pp. 1117, 1118.

#### (B) RES GESTÆ.

In criminal prosecutions, see CRIMINAL LAW, §§ 362-368.

#### § 118. Nature of doctrine in general.

[a] (*Sup.* 1877)

The rule admits declarations forming part of the *res gestæ*, treating them as a part of the transaction in question, and therefore as not hearsay; but it is not to be extended to a declaration which is simply narrative of a past event, depending, for its effect, upon the credit of the person making it, and not so connected with the transaction in question as to illustrate its character. Any such declaration is inadmissible.—*Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48.

[b] (*Sup.* 1889)

The declarations of a party are admissible in his favor where they are so connected with some material act as to explain or qualify it, or show the intent with which it was done.—*Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

[c] (*App.* 1907)

The *res gestæ* are the circumstances, facts, and declarations which are connected with and illustrate a litigated fact.—*Pittsburgh, C., C. & St. L. R. Co. v. Haislup*, 39 Ind. App. 394, 79 N. E. 1035.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 297-302.

See, also, 16 Cyc. pp. 1148, 1241-1261.

#### § 119. Facts forming part of same transaction.

[a] (*Sup.* 1886)

Where a question in issue is whether a note in suit was part of the consideration paid for certain land by one of the parties, the contract being in parol, and the grantor dead, parol evidence of the conversation in which the contract was made is competent as part of the *res gestæ*.—*Porter v. Waltz*, 108 Ind. 40, 8 N. E. 705.

[b] (*Sup.* 1892)

Facts, though not in issue, which are so connected with the fact in issue as to form a part of the same transaction or subject-matter, or when they are the effect of the same cause or show the existence of a particular course of business or the intention with which a contemporaneous act was done, are admissible.—*Schmidt v. Packard*, 31 N. E. 944, 132 Ind. 308.

[c] (*Sup.* 1901)

Where contracting parties orally agree on the terms of a lease to be executed in writing, and one of the parties makes a memorandum thereof, which is agreed on by all the parties, it is admissible in an action to enforce the execution of the lease, as a part of the *res gestæ*, though it is not signed.—*St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 59 N. E. 995, 156 Ind. 665.

[d] (*Sup.* 1902)

As a part of the transaction of measuring certain logs purchased by plaintiff of defendant, defendant, who did most of the measuring, wrote down the number of feet of timber therein on a board. His assistant measured the balance of the logs, and all such measurements as made by himself and assistant were transferred the same day by defendant to his daybook. The correctness of such measurements and entries were testified to by defendant and his assistant, and defendant further stated that he could not, from memory alone, recall the number of feet in each log. *Held*, that the reading of such entries by defendant as part of his evidence was proper, they being *res gestæ*, and such evidence not being that exhibited by the books wholly unexplained.—*Place v. Baugher*, 64 N. E. 852, 159 Ind. 232.

[e] (*Sup.* 1905)

Memoranda made by a detective while watching a railroad depot for violation of Burns' Ann. St. 1901, §§ 1586, 1587, requiring the posting of trains, was neither a part of the *res gestæ*, nor made in the ordinary course of business, nor in pursuance of some duty owing by the person making it, and was therefore incompetent.—*Southern R. Co. v. State*, 75 N. E. 272, 165 Ind. 613.

[f] (*App.* 1908)

Entries in account books are admissible in evidence if they are a part of the *res gestæ* of the matter involved, if preliminary founda-

tion is made by showing that they are the books of the party offering them, that the entries are original, when the entries were made, and that they were made in the handwriting of some authorized person.—Johnson v. Zimmerman, 42 Ind. App. 165, 84 N. E. 541.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 303-306.

**§ 120. Acts and statements accompanying or connected with transaction or event.**

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 303, 307-308, 1117, 1119.

**§ 121. — In general.**

[a] (Sup. 1839)

Evidence of declarations, etc., made at the time of a transaction that is the subject of inquiry, and which are a part of the *res gestæ*, is admissible.—Doe ex dem. Sutton v. Reagan, 5 Blackf. 217, 33 Am. Dec. 406.

[b] (Sup. 1851)

In a suit commenced by writ of domestic attachment, the defendant pleaded that when the suit was commenced, and for 18 months previously, he had been an inhabitant of the territory of Wisconsin, etc. It having been first proved that he had left this state two years previous to the commencement of this action, evidence of his declarations when he left that he was going to some of the Western territories, and might or might not return, is admissible.—Burgess v. Clark, 3 Ind. 250.

One's declarations, made at the time of changing his residence, are admissible as part of the *res gestæ* on a question of domicile.—Id.

[c] (Sup. 1853)

When it is material to ascertain the motive of an act, declarations of the party made while doing it, and explanatory of it, are admissible as part of the *res gestæ*, and may be proved by the same testimony as that adduced of the fact itself.—Strange v. Donohue, 4 Ind. 327.

[d] (Sup. 1853)

Evidence of a conversation between the parties at the time the note was made may be admitted, so far as it conduces to prove the consideration thereof.—Orth v. Sharkey, 4 Ind. 642.

[e] (Sup. 1857)

Where an execution was levied during the absence of the owner of the property, the declarations of the owner, at the time he left home, as to his intention in leaving are a part of the *res gestæ*, and admissible in evidence upon the question whether he is a resident householder.—Austin v. Swank, 9 Ind. 109.

[f] (Sup. 1857)

In an action brought by a partner, after the dissolution of the firm, to set aside an

assignment of the effects of the firm, made by his co-partner, ostensibly to secure the payment of a pretended debt of the firm for money loaned, the list of the assignee's taxable property, sworn to by himself, was admitted in evidence to show that, at the time he claimed to have loaned the money, he was not possessed of that amount. *Held*, that the declarations made by the assignee, at the time he went to pay his taxes, to the effect that "there must be some mistake about it, as the taxes must be more than that," are not admissible as part of the *res gestæ*.—Reed v. Thayer, 9 Ind. 157.

[g] (Sup. 1857)

The joint parol declarations of partners to third parties are admissible in evidence to prove the dissolution of a partnership formed by parol; such declarations and acts touching the subject being continuous *res gestæ*.—Cregler v. Durham, 9 Ind. 375.

[h] (Sup. 1865)

In an action against C. for money had and received, it appeared that the plaintiff had placed a sum of money in C.'s hands for the purpose of procuring a substitute for H., who had been drafted, if he passed the examination of the surgeon of the enrolling board. If he did not so pass, the money was to be returned. C., H., and a person who agreed to serve as substitute went to see the surgeon, but were told that no examinations of drafted men were then taking place. A conversation occurred between H. and the surgeon in relation to the former's fitness for the service, and the money was then paid to the substitute. *Held*, that evidence of this conversation was admissible in behalf of the defendant as part of the *res gestæ*, to show his good faith in paying over the money.—Knowlton v. Clark, 25 Ind. 395.

[i] (Sup. 1866)

In a suit against an administrator for taking care of his intestate while a minor, the defense was that the latter lived with the plaintiff's father, A., and that the services sued for were rendered by him. The presence of the minor at A.'s house having been proved, it was *held* that evidence was admissible of A.'s declarations, made when the minor was introduced into the family, to show in what relation he stood to it.—Maxwell v. Ratliff's Adm'r, 26 Ind. 157.

[j] (Sup. 1881)

Where a witness, in an action for damages for an assault, was in a position to clearly see what plaintiff, who was the aggressor, was doing, his declaration, spoken in the excitement of the contest, and which was of such character as to inform defendant that he was in imminent danger of grievous bodily harm, was admissible along with all the other facts and circumstances which occurred while the altercation was still in progress.—Baker v. Gausin, 76 Ind. 317.



In a suit for damages for assault and battery, declarations of a bystander, made during the progress of the altercation, if necessary to a full understanding of the character of the act complained of, are admissible.—Id.

[k] (Sup. 1882)

The heir of a maker of a purchase-money note, in consideration of the assignment of the note to him, for which he received payment from his ancestor's administrator, executed to the payee his own note, which was specified as a note given for purchase money. *Held*, that, in an action to enforce the vendor's lien by the payee against the heir, the declarations of the ancestor, made when he executed the note, that it was as good as a mortgage, and that plaintiff required defendant to make his note in the same form, so that it would be a lien on the land, was admissible, as part of the *res gestæ*, to show an intention to preserve the vendor's lien.—*Boyd v. Jackson*, 82 Ind. 525.

[l] (Sup. 1882)

Declarations made by plaintiff while lying upon the floor where he had been thrown by an assault committed by defendant, and while he was still calling for assistance against their continuance of the assault, were competent as a part of the *res gestæ*; no perceptible interval of time having elapsed between the assault and the making of the declarations.—*Puett v. Beard*, 86 Ind. 104.

[m] (Sup. 1883)

What a grantor said at the time of making a deed as to the consideration on which it was founded was admissible in evidence as a part of the *res gestæ*.—*Kenney v. Phillipy*, 91 Ind. 511.

Declarations of a deceased grantor, made as part of the *res gestæ* at the time of the execution of a deed, are admissible upon the question of its consideration.—Id.

[n] (Sup. 1883)

In an action by an administrator on a note which was in possession of the maker, the answer alleged that the maker had obtained possession of the note from a third party by virtue of an order purporting to have been executed by the deceased payee. *Held*, that declarations relative to such order, made by the maker to a third party at the time he obtained the note, were not admissible as a part of the *res gestæ*.—*Keesling v. Watson*, 91 Ind. 578.

In an action by an administrator on a note payable to his decedent, plaintiff claimed that the note was in defendant's possession, and was obtained from S., who had possession of it without decedent's consent, while defendant claimed that the decedent had agreed to accept certain other notes for the one in suit and executed an order on which S. delivered the note in suit to defendant, and plaintiff produced S., by whom he proved that decedent left the note with him for safe-keeping; that

defendant came to him, and as the result of a couple of interviews he prepared for and delivered to defendant an order to be executed by the decedent; and that afterwards defendant produced the order and delivered it to him with several other notes payable to decedent at different times long thereafter aggregating the amount of the note then held by S., and on cross-examination he was asked what he had said to the witness, and whether defendant did not ask him to go with defendant to the decedent. *Held*, that the statements of defendant were not admissible as a part of the *res gestæ*.—Id.

[o] (Sup. 1884)

In an action to recover property alleged to belong to a decedent's estate, it was competent to permit a witness to state in answer to a question what decedent stated while in possession of the property concerning its ownership that, when he was selling corn to the decedent, he stated the horse and buggy in controversy were his and he would mortgage them to make witness safe, as it was admissible as part of the *res gestæ*.—*McConnell v. Hannah*, 96 Ind. 102.

When declarations qualifying and giving character to an act proper to be given in evidence accompany that act, they are admissible whether self-serving or not, as being part of the *res gestæ*.—Id.

[p] (Sup. 1884)

In a suit in partition where plaintiff introduced in evidence the fact that witness had inquired of a certain person in relation to the title to the property generally, defendant had the right to prove by witness what was said as part of the *res gestæ*, or inquiry proven to have been made.—*McSweeney v. McMillen*, 96 Ind. 298.

[q] (Sup. 1884)

In an action on a fraternal benefit certificate, admissions of decedent, made at a time when he went to see about getting reinstated, that he had received notice of an assessment in contest, and that he had not paid for assessment, and had been suspended for its nonpayment, were not competent as part of the *res gestæ* in connection with the nonpayment of such assessment, as it was made in connection with his application for reinstatement, and in connection with such new transaction.—*Supreme Lodge, Knights of Pythias of the World v. Schmidt*, 98 Ind. 374.

[r] (Sup. 1884)

In an action by a husband for enticing away his wife, declarations of the wife to a third person on the day she eloped with defendant, or within the time when she was presumably under his influence, as to the causes of her leaving, which are not part of the *res gestæ* accompanying the act of leaving, and which do not impute to her husband cruel treatment, are not admissible in mitigation of damages.—*Higham v. Vanosdol*, 101 Ind. 160.

## [d] (Sup. 1886)

Where a question in issue is whether a note in suit was part of the consideration paid for certain land by one of the parties, the contract being in parol, and the grantor dead, parol evidence of the conversation in which the contract was made is competent as part of the *res gestæ*.—Porter v. Waltz, 108 Ind. 40, 8 N. E. 705.

## [ss] (Sup. 1890)

Declarations made contemporaneously with or immediately preparatory to a particular litigated act, which tend to illustrate and give character to the act, are admissible as part of the *res gestæ*.—Hinchcliffe v. Koontz, 23 N. E. 271, 121 Ind. 422, 16 Am. St. Rep. 403.

## [t] (Sup. 1890)

In an action for failure to support and bury decedent according to a contract, which contemplated that decedent should have a home with defendant's family, the testimony of a witness that on one occasion he took the decedent to the house of defendant, and that the wife of defendant refused to permit decedent to enter the house, and said that the writings between them were no good and that they would not keep him any longer, was admissible as a part of the *res gestæ*.—Baughan v. Brown, 23 N. E. 605, 122 Ind. 115.

## [tt] (Sup. 1890)

Declarations made by an agent as a part of the agent's act in his effort to transact the business of his principal are admissible as a part of the *res gestæ*.—Lockwood v. Rose, 25 N. E. 710, 125 Ind. 588.

## [u] (Sup. 1891)

Where the question at issue is whether a woman or her husband was a member of a certain firm, conversations between her and the other members of the firm in regard to the management of the business are admissible as part of the *res gestæ*.—Bingham v. Walk, 128 Ind. 164, 27 N. E. 483.

## [uu] (App. 1891)

A statement made by the writer of a letter, while writing it, is not admissible, as part of the *res gestæ*, in proof of the sending of the letter.—Home Ins. Co. of New York v. Marple, 1 Ind. App. 411, 27 N. E. 633.

## [v] (Sup. 1892)

Where the declarations of an agent are made to the person whose interests are directly involved at the place where the transaction or occurrence happened, so near the occurrence and transaction in point of time as to be justly and reasonably regarded as a part of it, refer directly to the transaction or occurrence, and are not narratives of the past, they are ordinarily to be regarded as a part of the *res gestæ*.—Ohio & M. R. Co. v. Stein, 31 N. E. 180, 32 N. E. 831, 133 Ind. 243, 19 L. R. A. 733.

Where part of a conversation is competent as part of the *res gestæ*, the whole is admissible, unless some part of it is excluded by other rules of law.—Id.

## [vv] (Sup. 1893)

In an action against a railroad company for personal injuries resulting from a collision with one of defendant's trains while crossing its track on a city street with a wagon, it is proper for a witness to allude to the death of another person, sitting in the wagon at the time of plaintiff's injury, as his death was the principal circumstance connected with the collision.—Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

## [w] (App. 1893)

In an action against a railroad company for board and lodging furnished to a trainman at the request of a conductor, evidence of the statement of the conductor at the time the contract was made that he would notify the officers of the railroad as to the arrangements was admissible as part of the transaction.—Toledo, St. L. & K. C. R. Co. v. Mylott, 33 N. E. 135, 6 Ind. App. 438.

## [ww] (Sup. 1895)

Where it is necessary in the course of a cause to inquire into the nature of a particular act and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character as constituting a part of the *res gestæ*.—Robbins v. Spencer, 38 N. E. 522, 40 N. E. 263, 140 Ind. 483.

## [x] (App. 1898)

In *replevin*, in which both parties claimed under a sale from the same person, a receipt was in evidence to show a sale to one of the parties prior to the purchase by the other. *Held*, that statements of the parties, made at the time of the sale, concerning the transaction and the price paid, were admissible in their own behalf as part of the *res gestæ*.—Fox v. Cox, 50 N. E. 92, 20 Ind. App. 61.

## [xx] (App. 1899)

In an action for causing death by frightening horses by unnecessarily blowing a locomotive whistle, the testimony of a wife that she heard the whistle, and said to her husband that "it was brutish, the way they whistled," is inadmissible as part of the *res gestæ*, where she was in her home, some distance away, and did not know about the accident until some time after its occurrence.—Chicago & E. R. Co. v. Cummings, 53 N. E. 1026, 24 Ind. App. 192.

## [y] (Sup. 1901)

Where, in a suit against a bank on a note indorsed by its cashier, the defense was that the officers causing the indorsement had no authority so to do, evidence as to conversations between the officers of the borrowing bank concerning the indorsement was not admissi-

ble as *res gestæ*.—First Nat. Bank of Huntington v. Arnold, 60 N. E. 134, 156 Ind. 487.

[yy] (Sup. 1905)

To render the expression or declaration of one not a party to the action admissible as a part of the *res gestæ*, the person making it must have been so related to the occurrence as to make his declaration a part of it.—Indianapolis St. R. Co. v. Taylor, 164 Ind. 155, 72 N. E. 1045.

[z] (App. 1909)

In an action by an administratrix to recover from decedent's sister securities representing loans of decedent, evidence that at the time decedent was making a loan he stated that the money was his, and that he loaned it in his sister's name to escape taxation, was admissible.—Baker v. Baker, 43 Ind. App. 26, 80 N. E. 864.

[zz] (App. 1909)

Where certain transactions between defendant and a railroad agent, as to the shipment of wool sued for, were in themselves admissible, conversations between defendant and the agent explanatory of such transaction, though in plaintiff's absence, were admissible as *res gestæ*.—Welker v. Appleman, 90 N. E. 35.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 303, 307-338, 1117, 1119.

### § 122. — Before transaction or event.

[a] (Sup. 1880)

In an action for damages for misrepresentations by defendant as to the value of lands exchanged for lands of plaintiff, evidence of a third party that defendant had made similar misrepresentations to him at a time when the several deeds had been signed, but not delivered, *held* admissible as a part of the *res gestæ*, it appearing that the title to the lands to be conveyed by plaintiff was then yet in the father of the witness, and that plaintiff then owed witness, who then and there, before the misrepresentations were made, told defendant that he should induce his father not to perfect the title unless payment of the debt to himself were secured.—Ghormley v. Young, 71 Ind. 62.

[b] (Sup. 1881)

In a suit for assault and battery, evidence of what the parties said during the altercation which was followed by the assault is admissible; and all the words and acts of the parties, and not detached words and sentences, should go to the jury.—Baker v. Gausin, 76 Ind. 317.

[c] (Sup. 1881)

Declarations of a brakeman of his intention to commit a willful injury on a passenger, made several hours before the act, was admissible in evidence for the plaintiff in an action against the company for the injury.—Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19.

[d] (Sup. 1888)

In replevin for a mare in the possession of a third person, and sold to him by an administrator of decedent, where plaintiff claims the mare under a gift from decedent, declarations by the decedent, a day or two before he purchased the mare, that he intended to buy a colt for plaintiff, and declarations after the purchase, and while the mare was ostensibly in his possession, that he bought her for plaintiff, are admissible as part of the *res gestæ*.—Durham v. Shannon, 116 Ind. 403, 19 N. E. 190, 9 Am. St. Rep. 860.

[e] (Sup. 1890)

In an action against a railroad for injuries in a crossing accident, where it appeared that plaintiff's mother was present when plaintiff and plaintiff's father, who was killed in the accident in which plaintiff was injured, were leaving home on the fatal evening, what was said when they were about to depart as to their destination was not mere hearsay, but was a part of the *res gestæ*, and the testimony of the mother in regard thereto was admissible.—Cincinnati, L. St. L. & C. R. Co. v. Howard, 24 N. E. 892, 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. Rep. 96.

[f] (App. 1892)

Declarations of a party made during the year intervening between her first conversation with a child's mother, relative to providing for the child's education if it should be named after her, and the giving of a note for that purpose, such declarations being unconnected with any act forming part of the transaction, and only tending to exhibit the disposition of the declarant's mind in the abstract towards the mother, are not part of the *res gestæ*, and will not be received to overthrow the contract.—Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87.

[g] (App. 1894)

In negotiations for the exchange of a farm for a mill, a representation made by the owner of the farm to the owner of the mill, who had never seen the land, and relied upon his representations, that it was near a thriving town, in which a large sugar manufactory was soon to be erected that would employ 100 hands, is a part of the *res gestæ*, and admissible as such.—Bolds v. Woods, 9 Ind. App. 657, 36 N. E. 933.

[h] (App. 1906)

In an action for death caused by explosions of dynamite in breaking iron machinery, where defendants contended that the work was done by an independent contractor, evidence that one of the defendants told a witness in the morning of the day of the accident that he would be in another city on that day was not admissible as a part of the *res gestæ*.—Falender v. Blackwell, 39 Ind. App. 121, 79 N. E. 393.

[l] (Sup. 1908)

It is not error to refuse to allow a witness to state what an elevator inspector said while inspecting an elevator as to what he intended to do in that connection, where the inspector testified that he did such act; since a declaration respecting a future event is not ordinarily admissible as part of the *res gestæ*, unless it tends to reveal motive, intention, or mental condition, and so unfolds the nature of a main fact.—*M. O'Connor Co. v. Gillaspay*, 170 Ind. 428, 83 N. E. 738.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 339-350.

## § 123. — After transaction or event.

[a] (Sup. 1881)

In an action for injuries caused by being run over at a railroad crossing, statements of the plaintiff's driver, as to the reason he did not see the train, made half an hour after the accident and at a different place, are not admissible as part of the *res gestæ*.—*Pittsburg, C. & St. L. R. Co. v. Wright*, 80 Ind. 182.

[b] (Sup. 1882)

Evidence as to declarations made by plaintiff in the presence of defendants while lying on the floor, where he had been thrown by defendants, and while he was calling for assistance against them, is admissible.—*Puett v. Beard*, 86 Ind. 104.

[c] (Sup. 1885)

In an action for breach of a covenant against incumbrances, where it appeared that plaintiff had discharged a judgment on the land, and that defendant brought an action in the plaintiff's name to set aside a sale of the land on the judgment, evidence that he stated to his attorney in such action that it was the agreement that plaintiff was to take the land subject to the judgment was not admissible as *res gestæ*.—*Morehouse v. Heath*, 99 Ind. 509.

[d] (Sup. 1886)

In a suit by a wife seeking to have a trust declared in her favor in land standing in her husband's name, on the ground that it was bought with her money, evidence that, as soon as she discovered the husband's action she declared that her money paid for the land, and demanded that it be conveyed to her, which was done on the same day, is admissible as part of the *res gestæ*, and to show the consideration for the deed.—*Mitchell v. Colglazier*, 106 Ind. 464, 7 N. E. 199.

[e] (Sup. 1890)

A witness testified that plaintiff showed her a letter from defendant breaking the contract, "and asked me what she ought to do about it. \* \* \* She wanted to know what she had best do. I don't think I gave her any advice. I don't remember what she did say. She appeared to be somewhat troubled about it. She was not shedding tears, but she seemed like her mind was bothered." *Held* incompetent, as plaintiff's declaration was made in the absence

of defendant, two days after she received the letter, and regarded the contract broken, and, moreover, was coupled with no act of plaintiff indicating that she contemplated marrying defendant. The declaration was therefore no part of the *res gestæ*.—*Jones v. Layman*, 123 Ind. 569, 24 N. E. 363.

[f] (Sup. 1892)

On the trial of an issue as to whether some of the heirs of a decedent had received property from him as an advancement, declarations of deceased, made several years after the transaction took place, that the transfer of the property was intended as an absolute gift, are too remote to be admitted as part of the *res gestæ*.—*Thistlewaite v. Thistlewaite*, 31 N. E. 946, 132 Ind. 355.

[g] (Sup. 1892)

A brakeman on a flat car received an injury in a collision between such car and a detached portion of his train while making "a running switch." About two minutes after the injury, and while the brakeman was still on the car, the engineer left his engine, and walked about a car length, to where the brakeman was. *Held*, that declarations by the engineer as to the cause of the accident, where they did not refer to acts done or matters happening prior to the collision, were part of the *res gestæ*, and admissible against the company.—*Ohio & M. R. Co. v. Stein*, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733.

[h] (Sup. 1892)

A statement of the engineer at the time and place of an accident, to the effect that, if his engine had been repaired the night before, as he had directed, the accident would not have occurred, was not admissible, since it was a combination of an opinion and a narrative of the things that had passed.—*Ohio & M. Ry. Co. v. Stein*, 133 Ind. 243, 31 N. E. 180.

[i] (Sup. 1894)

Where the consideration is denied, the grantee's entries against the grantor on his books are competent, as *res gestæ*, to corroborate the grantee's assertion that the consideration was made up from such charges.—*Fleming v. Yost*, 137 Ind. 95, 36 N. E. 705.

[j] (Sup. 1903)

In an action against a street railway company for injuries to a passenger owing to the sudden starting of the car while she was getting off, it was error to permit a witness who had witnessed the accident to testify that she stated to the conductor, just after the passenger fell, that, if the car had stopped and let her off, it would not have occurred; such declaration not being *res gestæ*.—*Indianapolis St. R. Co. v. Whitaker*, 66 N. E. 433, 160 Ind. 125.

[k] (App. 1903)

In an action for assault and false imprisonment, a statement as to what had happened, made by defendant to a policeman after plain-

tiff had been released and gone home, was properly excluded.—*Golbart v. Sullivan*, 66 N. E. 188, 30 Ind. App. 428.

[l] (Sup. 1905)

In an action for injuries to one who was run down by a street car, the testimony of a witness who saw the accident as to remarks made by him to the motorman when he stopped the car was inadmissible.—*Indianapolis St. R. Co. v. Taylor*, 72 N. E. 1045, 164 Ind. 155.

[m] (App. 1905)

In an action against a street railway for injuries caused by a collision, a statement, made by the motorman to the conductor immediately after the collision, that on account of a wet rail the brakes failed him and caused the accident, was admissible, where the time occupied by the collision was very brief, and the statement was made in the presence of all concerned and under the immediate influence of the accident, so that it might be deemed to have been made spontaneously.—*Cincinnati, L. & A. Electric St. R. Co. v. Stahle*, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363.

[n] (Sup. 1907)

Where a street car superintendent placed a motorman on a car about 10 o'clock a. m., and about 4:30 o'clock p. m. the motorman caused a collision, resulting in plaintiff's injury, and the cars were run four miles to another point, where the superintendent came up while employes were stating how the accident occurred, his declaration that he should have known better than to put the motorman on the car was inadmissible as part of the *res gestæ*.—*Ft. Wayne & W. Valley Traction Co. v. Crosbie*, 169 Ind. 281, 81 N. E. 474, 13 L. R. A. (N. S.) 1214.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 351-368.

**§ 124. Acts and statements of person sick or injured.**

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 369-387.

See, also, 13 Cyc. p. 200; note, 34 Am. Rep. 479.

**§ 125. — In general.**

[a] (Sup. 1884)

Statements of a sick person as to the nature and symptoms of the illness under which he is laboring are admissible as original evidence.—*De Pew v. Robinson*, 95 Ind. 100.

[b] (Sup. 1889)

In an action by an administrator to recover damages for the negligence of defendant railroad company causing the death of his intestate, declarations of the decedent, which were made immediately after he was injured, and while he was being extricated from under the wheels of the car, are admissible as part of the *res gestæ*.—*Louisville, N. A. & C. R. Co. v.*

*Buck*, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883.

[c] (App. 1891)

In an action for the loss of services of plaintiff's minor son, whose death was alleged to have been caused by defendant's negligence, statements of the son as to the cause of the accident, and that he alone was in fault, are not admissible against plaintiff as admissions, as the right of action is personal to plaintiff, and deceased could not bind him by admissions against his interest, but are competent as part of the *res gestæ*.—*Louisville, E. & St. L. Consol. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714.

[d] (Sup. 1909)

Declarations of an injured person which are the natural outgrowth of and tend to illustrate the occurrence giving rise to litigation, made so nearly contemporaneous therewith as to be in the presence of the transaction, and under such circumstances as necessarily prevent deliberation, are admissible as a part of the *res gestæ*.—*Ft. Wayne & W. V. Traction Co. v. Roudebush*, 88 N. E. 676.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 369-371; 15 CENT. DIG. DEATH, § 81.

**§ 126. — Statements as to cause of injury.**

[a] (Sup. 1867)

In an action against a railroad for injuries to plaintiff's son, the latter's declarations, made the day following the injury, as to the cause of the accident, showing that he was acting in violation of orders, and in a way prohibited by the railroad's regulations, were not admissible as against plaintiff.—*Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371.

[b] (App. 1894)

In an action for death by wrongful act, statements by deceased as to the cause of the accident, made 10 minutes thereafter, and after he was removed to another place, are not admissible as *res gestæ*.—*Cleveland, C., C. & St. L. R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174.

[c] (App. 1907)

In an action for injuries to a passenger, resulting from his forcible ejection from a train, a witness testified that, after plaintiff fell off the train, witness went back to plaintiff, reaching him not over three or four minutes from the time plaintiff fell off, and that a couple of minutes later the conductor came back and stated that plaintiff had stepped off the train backwards, but that plaintiff denied it, and said, "You pushed me off." *Held*, that there was no reversible error in admitting such testimony.—*Pittsburgh, C., C. & St. L. R. Co. v. Haislup*, 39 Ind. App. 394, 79 N. E. 1035.

Declarations made immediately after an injury by the injured party or other person

present, asserting the circumstances of the event, are admissible as a part of the *res gestæ*.—*Id.*

[d] (Sup. 1909)

The declarations of a motorman fatally injured in a collision between cars made about a minute after the accident as he was lying in the wreckage of his car in response to an exclamation inquiring of the cause of the accident, to the effect that he should have had a clear track until a specified time was admissible as a part of the *res gestæ*.—*Ft. Wayne & W. V. Traction Co. v. Roudebush*, 88 N. E. 676.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 372-376.

**§ 127. — Statements as to and expressions of personal injury or suffering.**

Statements to physicians, see post, § 128.

[a] (Sup. 1839)

Evidence offered by plaintiff, that he complained of the injury recently after it was received, is admissible.—*Yost v. Ditch*, 5 Blackf. 184.

[b] (Sup. 1879)

In an action for personal injuries in which it was shown that plaintiff had sprained a limb and had been injured internally, complaint by plaintiff of pain caused by the injury is admissible.—*Town of Elkhart v. Ritter*, 66 Ind. 136.

[c] (Sup. 1883)

The representations of a sick or injured person, as to the nature, symptoms, and effects of the disease or injury under which he is suffering at the time, are competent evidence tending to show his actual condition.—*De Pew v. Robinson*, 95 Ind. 109.

[d] (Sup. 1884)

In an action for personal injuries, statements of plaintiff as to the character of the pain, made at the time of the injury, is admissible.—*Board of Com'rs of Porter County v. Dombke*, 94 Ind. 72.

[e] (Sup. 1885)

In an action for personal injuries, complaints and expressions of present pain on the part of the injured person are admissible in evidence.—*Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653.

[f] (Sup. 1886)

Where it becomes important to illustrate the physical or mental condition that an individual either at the time an injury is received or from thence to the time of an inquiry as to its severity, effect and nature, expressions or declarations of present existing pain or malady, or of its locality, whether made at the time the injury is received or subsequent to it, are admissible in evidence, regardless of the person to whom they are made.—*Cleveland, C.*

*& I. R. Co. v. Newell*, 3 N. E. 836, 104 Ind. 204, 54 Am. Rep. 312.

[g] (Sup. 1886)

The declarations of an injured person indicative of present pain are competent.—*Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 330, 4 N. E. 908.

[h] (Sup. 1888)

Statements describing the location and character of plaintiff's injuries, made by her to a physician the morning after the injury, are competent.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[i, j] (Sup. 1889)

Declarations of an injured person indicating existing pain and suffering and expressive of it are competent evidence, although narratives of past occurrences are not.—*Board of Com'rs of Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. 53.

[k] (App. 1892)

Evidence that, the next day after the injury, plaintiff's father saw her at her home, and was looking at her head and neck, and that she said: "Pa, don't hold my neck. It is pretty near broke,"—was but an exclamation of present pain, and not a narrative of what had previously occurred.—*Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. 805.

[l] (Sup. 1893)

It is proper to prove expressions of pain made by plaintiff at the time of the pain, though after the injury, and it is immaterial that the expressions are made in the course of a conversation.—*Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[m] (Sup. 1893)

In an action for personal injuries, evidence of plaintiff's expressions of pain between the time of the accident and the commencement of suit is admissible.—*Cleveland, C. & St. L. R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367.

[n] (Sup. 1894)

In an action for personal injuries, declarations of pain and suffering by the plaintiff after the occurrence, and up to the time of bringing the action, are admissible.—*Board of Com'rs of Jackson County v. Nichols*, 139 Ind. 611, 38 N. E. 526.

[o] (Sup. 1895)

In an action for personal injuries, plaintiff's expressions of present, existing pain, and its locality, were competent evidence.—*Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343.

[p] (App. 1895)

Statements made by a person suffering from a physical injury as to her condition and as to existing pain are admissible as original

evidence to prove the injury and pain, though not made to a medical attendant.—*Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109.

[q] (App. 1896)

In an action for personal injuries, exclamations and expressions of present suffering by plaintiff on account of the injury are admissible, though made some time thereafter.—*Island Coal Co. v. Risher*, 40 N. E. 158, 13 Ind. App. 98.

[r] (App. 1898)

In a personal injury action, evidence of declarations and complaints made by the plaintiff concerning his suffering at the time he made them is admissible.—*City of Alexandria v. Young*, 51 N. E. 100, 20 Ind. App. 672.

[s] (App. 1898)

Declarations of an injured person indicative of existing pain are competent, though made long after the injury, which was permanent.—*City of Huntington v. Burke*, 52 N. E. 415, 21 Ind. App. 655.

[t] (App. 1901)

In an action for injuries by an assault, a question was asked plaintiff's playmate as to "what complaint, if any, plaintiff ever made of any suffering at the time plaintiff was talking to witness, any of the times during the past two years"; and witness answered that plaintiff "complained about her head, and that she was not feeling well." Motions to strike out question and answer as concerning matters of opinion, and not relating to present pain and suffering, were overruled. *Held*, that there was no error, as expressions indicating pain and suffering are competent to show the extent of latent injuries.—*Treschman v. Treschman*, 61 N. E. 961, 28 Ind. App. 206.

[u] (Sup. 1903)

In an action for injuries, evidence that plaintiff complained of pain to his wife is admissible, though the complaints were not made at the time or shortly after the accident.—*Indiana R. Co. v. Maurer*, 66 N. E. 156, 160 Ind. 25.

[v] (Sup. 1904)

In an action for personal injuries it was competent to prove expressions of pain and suffering or indication of such condition by groans or cries, and that plaintiff after the injury "complained of his side."—*Indianapolis St. R. Co. v. Schmidt*, 71 N. E. 201, 163 Ind. 360.

[w] (App. 1904)

Declarations of an injured person, connected with existing suffering and expressions of it, but not an account of the manner in which he received them, may be given in evidence in an action for the injuries; and the interval of time between the injury and expression of pain goes to the weight of the testimony, and not to its admissibility. *Opinion* (1903) 68 N. E. 191,

withdrawn on rehearing.—*Southern Indiana R. Co. v. Davis*, 69 N. E. 550, 32 Ind. App. 569.

[x] (App. 1904)

In a personal injury action, plaintiff's husband was asked to state—using her language—what exclamation of pain, if any, his wife had given since the date of the accident. The witness answered, "She says, 'My back and hip hurts me.'" *Held* admissible, as an expression of present, existing pain.—*Cleveland, C. C. & St. L. R. Co. v. Carey*, 71 N. E. 244, 33 Ind. App. 275.

[y] (App. 1905)

Plaintiff in an action for personal injury may show that he complained of pain after the accident.—*Indianapolis St. R. Co. v. Haverstick*, 74 N. E. 34, 35 Ind. App. 281, 111 Am. St. Rep. 163.

[z] (App. 1909)

Complaints of plaintiff as to her ankle and hip made on the second visit of witness to plaintiff after the accident are competent in an action for the injury.—*Indianapolis & M. Rapid Transit Co. v. Walsh*, 90 N. E. 138.

[zz] (Sup. 1910)

Where the bodily or mental sufferings of a person are to be proved, the natural exclamations and expressions of such person, which are the spontaneous manifestations of pain, and naturally flow from the pain suffered at the time, are competent evidence; and hence, to prove the mental suffering of a person injured by a machine, evidence that he came running out of the room only a second or two after the injury and exclaimed "My God! what will my poor mother do?" was admissible, and was not a self-serving declaration.—*Thomas Madden, Son & Co. v. Wilcox*, 91 N. E. 933.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 377-382.

§ 128. — Statements to physicians.

[a] (Sup. 1886)

Where medical experts are ordered by the court to examine the plaintiff, and this is done upon the motion of the defendant, it would seem that what was said by the plaintiff during the course of the medical examination in answer to questions asked by the medical experts should go in evidence.—*Louisville, N. A. & C. R. Co. v. Falvey*, 3 N. E. 389, 4 N. E. 908, 104 Ind. 400.

[b] (Sup. 1889)

In an action for personal injuries, testimony of a surgeon who attended plaintiff, concerning statements made to him by plaintiff, as to the nature and location of his pain, is admissible.—*Board of Com'rs of Wabash County v. Pearson*, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325.

[c] (App. 1894)

Declarations made by a boy 10 minutes after he was run over by a street car, to the doc-

tor, while being taken away in an ambulance, as to how the accident happened, are not part of the *res gestæ*.—*Citizens' St. R. Co. of Indianapolis v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 383-387.

### (C) SIMILAR FACTS AND TRANSACTIONS.

See—

In actions for injuries at railroad crossings. RAILROADS, § 347.

From defects or obstructions in streets or highways. MUNICIPAL CORPORATIONS, § 818.

From fires set by locomotives. RAILROADS, § 481.

From negligence in general. NEGLIGENCE, § 125.

From nuisances. NUISANCE, § 49.

To animals on or near tracks. RAILROADS, § 442.

To passengers. CARRIERS, § 317.

To servants. MASTER AND SERVANT, § 270.

In actions or counterclaims for breach of warranty. SALES, § 440.

In actions to foreclose mechanic's lien. MECHANICS' LIENS, § 280.

Other offenses. CRIMINAL LAW, §§ 369-373.

To show authority of agent. PRINCIPAL AND AGENT, § 120.

Existence of agency. PRINCIPAL AND AGENT, § 20.

### § 129. Relation to issues in general.

[a] (Sup. 1854)

Where a vendee seeks to set aside a sale on the ground of fraudulent misrepresentations of the vendor, evidence of fraudulent sales to other persons, effected by similar misrepresentations, of which the vendee had no knowledge at the time of the sale to him, is inadmissible.—*Bischof v. Coffelt*, 6 Ind. 23.

[b] (Sup. 1858)

To a suit by the pledgor against the pledgee, for the value of a note deposited as security, the defense was that the pledgee had bought the note. *Held*, that evidence that the pledgor had previously offered to sell the note to a third person for much less than its face was not competent to prove a sale to the pledgee at that price.—*Depuy v. Clark*, 12 Ind. 427.

[c] (Sup. 1862)

A. gave a power of attorney to B., authorizing him to sell, assign, transfer, trade, and dispose of certain lands, either for cash or other property. B. having rented a mill taken by him in exchange to C., it was *held*, upon the issue as to his authority to so rent it, that it was competent to show that B. had acted as A.'s agent in renting other lands exchanged under the power of attorney.—*Hitchens v. Ricketts*, 17 Ind. 625.

[d] (Sup. 1862)

In an action by a physician for services, testimony by defendant that plaintiff had been his family physician, and had charged him for previous and similar services at lower rates, and that no contract was made for the services in suit, was competent as tending to establish an implied contract as to the prices to be charged for the services sued for.—*Sidener v. Fetter*, 19 Ind. 310.

[e] (Sup. 1862)

On the defense of false representations inducing defendant to execute a note, it is not competent for him to prove that the same representations were made to another, to show that they were made to him.—*Corbin v. Flack*, 19 Ind. 459.

[f] (Sup. 1863)

In an action involving the existence of a contract of partnership made by two firms, where the contract was executed on the part of one firm by one member of it only, evidence that a single member had previously made similar contracts with the approval of his firm, and letters from the other members of the firm showing such approval, are admissible to establish a presumption of the concurrence of the other partners.—*Buckingham v. Hanna*, 20 Ind. 110.

[g] (Sup. 1873)

Under a complaint in an action to recover damages for the wrongful obstruction of a water course, alleging the tort to have been committed on a particular day, evidence of similar torts previously committed was inadmissible.—*Noah v. Angle*, 63 Ind. 425.

[h] (Sup. 1882)

In order to prove fraud on the part of the buyer, consisting of his failure to disclose the real maker of a note given for the purchase price, evidence of conversations with other persons, showing his knowledge of the identity of the maker, is admissible, though it tends to prove that the buyer attempted to perpetrate similar frauds.—*Parrish v. Thurston*, 87 Ind. 437.

[i] (Sup. 1886)

Where, in an action on a note against a surety, defendant concedes that he signed one note as surety, and plaintiff's witness swears that defendant signed the note in suit on a particular date, defendant, under a plea of non est factum, may prove that on a different date he signed a different note as surety for the same person.—*Reyman v. Parker*, 106 Ind. 412, 6 N. E. 925.

[j] (App. 1893)

In an action against a railroad company for the value of hay delivered to it for shipment and alleged to have been destroyed owing to defendant's failure to furnish cars to transport it, defendant having been allowed to prove the number of cars furnished from the date of plaintiff's request therefor until the time of his loss, evidence of what cars were furnished plain-



tiff and what shipments were made on other occasions was properly excluded as immaterial, since, if the cars shown to have been furnished were sufficient, it was all that could have been required of defendant.—*Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296.

[k] (App. 1894)

On the question as to the terms of a contract for the services of a stallion, evidence of contracts made by the owner with other persons is not admissible.—*Evans v. Koons* (Ind. App.) 38 N. E. 350, 10 Ind. App. 603.

[l] (App. 1895)

On an issue as to whether defendant's wife purchased goods from plaintiff on her husband's account, or on the credit and for the use of a sanitarium company of which he was manager, plaintiff may show that, at about the same time, defendant and his wife bought goods from other persons, for the use of the sanitarium, in defendant's name and on his own credit.—*Moore v. Schrader*, 14 Ind. App. 69, 42 N. E. 490.

[m] (App. 1896)

Where decedent, prior to her death, lived with the family of her son-in-law, evidence that, while she lived with her other children, no charge was made for her maintenance, is admissible in an action against her administrator by said son-in-law to recover for board and services rendered.—*Hufford v. Neher*, 15 Ind. App. 396, 44 N. E. 61.

[n] (App. 1905)

On the issue as to the terms of a contract of employment, evidence of the terms of contracts with other employes is irrelevant.—*Featherstone Foundry & Machine Co. v. Criswell*, 75 N. E. 30, 36 Ind. App. 681.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 388-393, 395-398; 7 CENT. DIG. Bills & N. § 1736; 8 CENT. DIG. Brok. § 109.

See, also, 17 Cyc. p. 274; note, 19 L. R. A. 733.

§ 130. Exclusion as *res inter alios acta*.

[a] (Sup. 1856)

A. and 13 others were defendants in a cause. B. sued A. for his services as a lawyer in said cause. A. offered testimony to prove that one of his co-defendants had paid B. \$40, and another \$12, for his services as attorney in said cause. The court refused to admit the evidence. The jury gave a general verdict for the plaintiff for \$40, and found specially that the services in question were rendered for B. alone, and that he alone was liable to pay for them. *Held*, that the evidence was not pertinent to the case, and was therefore inadmissible.—*Fleming v. Flagg*, 8 Ind. 303.

[b] (Sup. 1867)

Where, in a suit to subject to a money judgment lands alleged to have been fraudu-

lently conveyed, it appeared that one parcel had been conveyed to a person not a party to the suit, but that the issue could be determined without affecting his interest, evidence that he had paid the full value of the tract was not admissible.—*Wood v. Ostram*, 29 Ind. 177.

[c] (Sup. 1880)

In an action against a son to recover for medical treatment of his parents alleged to have been performed at his special instance and request, evidence that third parties had furnished necessities to the parent at his request is inadmissible.—*Becker v. Gibson*, 70 Ind. 239.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 403.

See, also, 17 Cyc. pp. 274-289.

§ 131. Similarity of conditions.

[a] (Sup. 1874)

On trial of an action against a telegraph company for negligence in allowing telegraph poles to fall and suspend the wires across the highway, so that plaintiff's horse and carriage were injured, the soundness of the telegraph poles being in issue, evidence of the condition of poles 40 or 60 rods from the place of the accident is inadmissible to show the condition of the poles at the spot, where there is no evidence to show that the poles were all of one kind, put up at the same time, and equally exposed to the elements.—*Western Union Tel. Co. v. Levi*, 47 Ind. 552.

[b] (Sup. 1876)

Where, upon the trial of an action, the question in issue was whether a certain ditching machine, sold with warranty by the plaintiff to the defendant, would perform in a certain manner at a certain place as specified in the warranty, *held*, that evidence as to the manner in which it performed at a certain place in another state was competent, as tending to prove its capacity at the place specified in the warranty.—*Baber v. Rickart*, 52 Ind. 594.

[c] (App. 1898)

In an action to recover for the price of gas furnished defendant, the answer set up a counterclaim, alleging that the amount furnished was insufficient to comply with the contract. *Held* error to admit evidence of other persons receiving gas from the same main as defendant that during the time in question they had no gas at times, where it was not shown that their connections with the main were of the same character as that of defendant.—*Washington Tp. Farmers' Co-operative Fuel & Gas Light Co. v. McCormick*, 49 N. E. 1085, 19 Ind. App. 663.

[d] (App. 1900)

In an action for damages for wrongfully shutting off the gas supply to plaintiff's house, it is not error to permit a witness to answer a question regarding the supply of gas in other buildings, if an offer is made to show that those buildings were attached to the pipes by means

that would furnish as much or more gas than the appliances in plaintiff's house.—*Indiana Natural & Illuminating Gas Co. v. Anthony*, 58 N. E. 868, 26 Ind. App. 307.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 390-402.

See, also, 17 Cyc. pp. 284, 288, 289.

**§ 133. Showing intent or malice or motive.**

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 392, 394, 404, 405.

**§ 135. — Fraud.**

[a] (Sup. 1896)

In an action to set aside a conveyance as in fraud of creditors of the grantor, evidence of other conveyances or incumbrances executed by him at about the same time, the result of which was to strip him of his available property, is admissible to show his fraudulent intent.—*Hoffman v. Henderson*, 44 N. E. 629, 145 Ind. 613.

[b] (App. 1901)

In an action for fraudulent representations in procuring an application and a note for the first year's premium for a life policy, proof that the soliciting agents of the insurer made similar representations for a similar purpose to other persons living in the neighborhood, and on receiving applications and premiums delivered similar policies to other applicants, was admissible on the issue of intent.—*Hartford Life Ins. Co. v. Hope*, 40 Ind. App. 354, 81 N. E. 595, 1088.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 392, 394, 404, 405; 7 CENT. DIG. BILLS & N. § 1718; 24 CENT. DIG. FRAUD. CONV. §§ 830, 842, 861.

**§ 137. Showing knowledge.**

[a] (Sup. 1898)

In an action to cancel notes as forgeries, testimony that defendant, disguised, had tried to sell the notes in question to witness, and the admission in evidence of a forged note, which she had sold him some time before, was competent as showing defendant's purpose, and her guilty knowledge of the notes in question.—*Miller v. Dill*, 49 N. E. 272, 149 Ind. 326.

[b] (Sup. 1899)

On an issue as to the liability of a railroad company to an employé for improper treatment by a physician employed in a hospital maintained by the company, evidence of the improper treatment of another patient by such physician during the same time is admissible on the question of the company's knowledge of the physician's incompetency.—*Wabash R. Co. v. Kelley*, 52 N. E. 152, 54 N. E. 752, 153 Ind. 119.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 404, 405.

**§ 139. Showing custom or course of business.**

[a] (App. 1906)

In an action for causing death by the explosion of dynamite to break up iron machinery, though defendants contended that the work was done by an independent contractor, evidence that he prepared and exploded the charges of dynamite in the same manner as he did for other parties when he worked for them was properly excluded.—*Falender v. Blackwell*, 39 Ind. App. 121, 79 N. E. 393.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. § 415.

See, also, 17 Cyc. p. 281.

**§ 140. Showing methods of preventing injury.**

Motion to strike out, see TRIAL, § 89.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. § 407.

**§ 141. Other injuries or accidents from same or similar causes.**

In action for damage from eaves drip, see WATERS AND WATER COURSES, § 126.

In actions for injuries at railroad crossings, see RAILROADS, § 347.

In actions for injuries from defects in sewers, see MUNICIPAL CORPORATIONS, § 845.

In actions for injuries from defects in toll road, see TURNPIKES AND TOLL ROADS, § 49.

In actions for injuries from defects or obstructions in streets or highways, see MUNICIPAL CORPORATIONS, § 818.

In actions for injuries from fires set by locomotives, see RAILROADS, § 481.

In actions for injuries from negligence in general, see NEGLIGENCE, § 125.

In actions for injuries from nuisances, see NUISANCE, § 49.

In actions for injuries to animals on or near tracks, see RAILROADS, § 442.

In actions for injuries to servants, see MASTER AND SERVANT, § 270.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 406, 408-413.

See, also, 16 Cyc. pp. 288, 289; notes, 44 Am. Rep. 694, 57 Am. Rep. 912.

**§ 142. Showing value.**

[a] (Sup. 1857)

The fact that sales of patent rights have been made in another state is admissible to show the value of the patent in this state.—*Gatling v. Newell*, 9 Ind. 572.

[b] (Sup. 1881)

On an issue as to the value of corn and fodder fed by plaintiff to defendant's cattle, testimony of a witness living 12 miles distant, as to the value of such fodder in his neighborhood during the time the cattle were fed, is competent as having some tendency to prove the

value of the corn and fodder fed.—*Foster v. Ward*, 75 Ind. 594.

[c] (Sup. 1881)

On an issue as to the damage to land caused by the construction of a railroad through it, a witness who had testified as to the past demand for land in that neighborhood, which was near a city, and had stated what the intrinsic value of the land in question was, and what the damage to it by the construction of the railroad amounted to, could properly be asked how rapid had been the increase in the price of the land lying around and within two or three miles of the center of the city during the past 15 years.—*Union Railroad, Transfer & Stock-Yard Co. v. Moore*, 80 Ind. 458.

[d] (Sup. 1890)

In an action upon a policy of fire insurance, a contract made by the insured for the purchase of lumber to be cut in another state is inadmissible in evidence to show the market value of the dry lumber destroyed by the fire.—*Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 23 N. E. 1138.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 416-423.

#### (D) MATERIALITY.

As affecting liability for perjury, see PERJURY, § 11.

In criminal prosecutions, see CRIMINAL LAW, §§ 382, 384.

Of absent evidence as affecting right to continuance, see CONTINUANCE, § 23.

Striking out immaterial matter from deposition, see DEPOSITIONS, § 83.

Sufficiency and scope of objections to admission of evidence, see TRIAL, §§ 83, 84.

#### § 143. Importance in general.

[a] (Sup. 1853)

Evidence which is relevant to the issue is admissible without regard to its weight or sufficiency.—*Harbor v. Morgan*, 4 Ind. 158.

[b] (Sup. 1833)

In ejectment, the issue was whether a certain fence was the correct boundary between the S. E.  $\frac{1}{4}$  and the S. W.  $\frac{1}{4}$  of section 19 owned, respectively, by plaintiff and defendant. It appeared that the same line of fence continued south beyond their lands, and that plaintiff's ancestor, from whom he inherited, once owned the N. E.  $\frac{1}{4}$  of section 30, of which the fence extending south was apparently the western boundary. *Held*, that declarations of such ancestor that such fence in section 30 was too far west were immaterial.—*Brown v. Anderson*, 90 Ind. 93.

[c] (Sup. 1887)

In an action to recover goods obtained by fraud, it was admitted on the trial that defendant was insolvent at the time of the purchase. Defendant attempted to show what the

value of his house and lot was at that time. *Held* immaterial, as it was admitted that defendant was insolvent.—*Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385.

[d] (Sup. 1896)

When evidence tends to prove a fact, however slight the tendency is, it is admissible.—*Deal v. State*, 39 N. E. 930, 140 Ind. 354.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 424, 426-428.

#### § 144. Certainty.

[a] (Sup. 1901)

In an action by a husband for injuries to his wife, evidence that on Sundays, at the hour at which the accident happened, but few people returned to the city by the defendant's cars, and there was no crowd, is inadmissible as the term "few," as used and applied to Sunday travel on a street railroad, is indefinite.—*Indianapolis St. Ry. Co. v. Robinson*, 61 N. E. 936, 157 Ind. 414.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 430-433.

#### § 145. Remoteness.

In actions for negligence or malpractice of physicians, see PHYSICIANS AND SURGEONS, § 18.

[a] (Sup. 1876)

On trial of an issue involving the question how a turnpike road was constructed, evidence of the contracts given out by the company for the construction is incompetent, because too remote. It may be that the actual construction was not conformable to the contracts.—*Stipp v. Spring Mill & W. C. Gravel Road Co.*, 54 Ind. 16.

[b] (Sup. 1890)

In an action for personal injuries to an employé of a railroad, caused by the negligence of the engineer, where a witness testifies that he had heard the plaintiff express the opinion that the engineer would kill some one by his carelessness, and that he had heard plaintiff speak of this only once, adding, "The others talked to him," these words are properly stricken out; it not appearing what the conversation of others was about.—*Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 434.

#### § 146. Tendency to mislead or confuse.

[a] (Sup. 1882)

In a suit for medical services rendered to the adult daughter of defendant, evidence of the value of defendant's property is inadmissible.—*Small v. Smith*, 87 Ind. 186.

[b] (App. 1893)

In an action for libel in charging a female with unchastity, plaintiff, ostensibly for the purpose of controverting the testimony of

defendant as to her bad reputation for morality, testified that her father was in the army three years; that he came home from the army at the close of the war afflicted with consumption, and died from that disease. *Held*, that such testimony was likely to prejudice the jury, was irrelevant, and should have been excluded.—*Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991.

[c] (*Sup.* 1886)

Evidence that the defendant, as guardian of plaintiff, had accounted for only \$200 of a fund of \$500 which came into his possession as such guardian, was incompetent in an action to compel the defendant to convey lands which plaintiff claimed to have purchased, there being no claim that such fund was to form any part of a consideration for the lands.—*Waymire v. Waymire*, 141 Ind. 164, 40 N. E. 523.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 429.

#### § 147. Negative evidence.

Weight and conclusiveness of negative testimony, see post, § 586.

[a] (*Sup.* 1854)

In an action on a note, testimony of one of several makers that he knew of no such demand on his co-maker as that set up by the payee is competent, for what it is worth, to negative the demand.—*Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85.

[b] (*Sup.* 1858)

A mortgage bore the notarial seal and signature of S. S., but S. S. testified that to the best of his recollection he never affixed his seal to it, and that he believed himself to be the only S. S., notary, in Cincinnati. *Held*, that the fact that the secretary of state certified that there was but one S. S., notary, did not rebut the presumption in favor of the mortgage, as it did not appear that he had authority to certify as to appointments of notaries public, nor even if he had authority, as, though he might certify a copy, he could not certify as to the absence of a paper.—*Wright v. Bundy*, 11 Ind. 398, 409.

[c] (*Sup.* 1886)

On the trial of an action by a parent for the death of a child by falling into an excavation at a street crossing, where children of the vicinity were in the habit of playing, evidence of the parent that the place was not dangerous before the excavation was made, and that she had never heard of any one being drowned there before, is admissible.—*City of Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65.

[d] (*App.* 1901)

In an action by an infant against her stepmother for injuries by an assault, it was not error to refuse to permit defendant's son, who lived with the family for a few months after the injury complained of, to testify that nothing was said in his presence during such

time about his mother having trouble with plaintiff and striking plaintiff's head against a wall; such evidence not tending to negative any disputed fact essential to plaintiff's cause of action.—*Treschman v. Treschman*, 61 N. E. 961, 28 Ind. App. 206.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 435-437.

#### (E) COMPETENCY.

In criminal prosecutions, see CRIMINAL LAW, §§ 382-396.

Of absent evidence as affecting right to continuance, see CONTINUANCE, § 23.

Of evidence corroborating testimony of witness, see WITNESSES, § 414.

Of impeaching evidence, see WITNESSES, §§ 352, 374, 390-393.

Scope and sufficiency of objections to evidence on ground of incompetency, see TRIAL, §§ 81, 83, 84.

#### § 148. Nature and source of evidence in general.

[a] (*App.* 1902)

Testimony of a witness that he had seen a letter in possession of a boy, who lived with defendant, addressed to defendant, and written by plaintiff, was inadmissible, there being no other evidence that plaintiff ever wrote any letter to defendant, and defendant having denied receiving or reading such letter, and it not having been traced to him.—*Stone v. Heaton*, 63 N. E. 39, 28 Ind. App. 414.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 438.

See, also, note, 17 L. R. A. 440.

#### § 150. Results of experiments.

[a] (*Sup.* 1892)

In an action against a railway company for the death of plaintiff's intestate, it appeared that deceased was injured in January, and statements by him were introduced in evidence that at the time the injury occurred his boot froze to the rail. Defendant offered to show when the statement was made that one who heard such statement experimented on the same day, and found that the weather had the same effect on his boot. It was not shown that the conditions of the weather, etc., were the same as when deceased was injured. *Held*, that the court properly excluded such evidence.—*Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564.

[b] (*Sup.* 1892)

Where the issue is as to whether or not a car, while being pushed, at about four miles an hour, with brakes set, down a slight grade, to be coupled with another car, did jump forward, at the release of the brakes when within six or eight inches of the car with which it was to be coupled, it is error to exclude the result of an experiment made at the same place, and

under exactly similar conditions.—Chicago, St. L. & P. R. Co. v. Champion, 32 N. E. 874, 23 L. R. A. 861.

[c] (App. 1894)

A car having been "kicked" upon a down-grade side track, plaintiff came to couple it to a standing car, when the brakeman on the moving car suddenly loosed the brakes, and, as plaintiff alleged, the car sprung forward, catching plaintiff's hand between the drawbars. Defendant, to show that the car could not have so sprung forward, offered proof of a test at the same place, between similar cars, in like weather, and with the same brakeman on the moving car, which was kicked at the rate of three miles an hour from about the same place as the other. *Held*, properly refused, as not including proof whether the track and the car were practically in the same condition, or the brake was set tight or loose, or the car kicked hard or easy.—Chicago, St. L. & P. R. Co. v. Champion, 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. Rep. 357.

FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. § 439.

See, also, 17 Cyc. p. 285.

#### § 151. Testimony as to intent, motive, or condition of mind.

Declarations showing intent or motive, see post, § 269.

[a] (Sup. 1864)

Intention can only be shown by circumstances from which it may be inferred. It is not competent for a party to testify as to his own intention during a transaction to show that a conveyance is not a mortgage, but a deed.—Zimmerman v. Marchland, 23 Ind. 474.

[b] Whenever the motive, belief, or intention of any person is a material fact to be proved, direct testimony of such person, whether a party to the action or not, as to what such motive, belief, or intention was, is competent.—(Sup. 1880) Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; (1881) Bidinger v. Bishop, 76 Ind. 244, 255; (1885) Over v. Schiffing, 102 Ind. 191, 26 N. E. 91.

[c] (Sup. 1883)

Where the issue is as to the intent of a husband in procuring a conveyance to be made to his wife, he may testify that he had no intention of defrauding his creditors.—Sedgwick v. Tucker, 90 Ind. 271.

[d] (Sup. 1897)

Defendant may testify that his grantor removed a fence from the land in suit without intending to make the same a highway, where plaintiff claims that in removing the fence the grantor dedicated the land as a highway, since, where the character of an act depends on the intent with which it was done, evidence of intention is admissible.—Pittsburgh, C., C. & St. L. R. Co. v. Noftsgar, 47 N. E. 332, 148 Ind. 101.

[e] (App. 1899)

It is error, in an action on a note, to permit plaintiff to testify that he purchased it in good faith, as that is a question of fact to be determined from all the evidence.—Pope v. Branch County Sav. Bank, 54 N. E. 835, 23 Ind. App. 210.

[f] (App. 1899)

It was error to permit defendant to testify what his intention was in delivering a writing.—Colborn v. Fry, 55 N. E. 621, 23 Ind. App. 485.

[g] (Sup. 1907)

Circumstantial evidence is admissible to prove the belief and good faith of a party.—Ferguson v. Boyd, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 440; 24 CENT. DIG. Fraud. Conv. § 846.

#### § 152. Testimony as to character or reputation.

Character of decedent, in action for causing death, see DEATH, § 68.

Character of defendant in bastardy proceedings, see BASTARDS, § 61.

Character of prosecutrix in bastardy proceedings, see BASTARDS, § 59.

Character of widow, in action for wrongful death, see DEATH, § 60.

In actions for malpractice or negligence of physicians, see PHYSICIANS AND SURGEONS, § 18.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 441.

#### § 153. Excuse for failure to testify or to call witness.

Comments by counsel on failure to produce evidence or call witness, see TRIAL, § 122.

Instructions as to failure to testify or to call witness, see TRIAL, § 211.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 442.

#### § 155. Evidence admissible by reason of admission of similar evidence of adverse party.

Admission of whole documents where part are admitted, see post, § 383.

Explanation or limitation of admissions, see post, § 263.

Rebuttal of evidence of adverse party as to transactions with person since deceased or incompetent, see WITNESSES, § 177.

[a] (Sup. 1851)

In replevin of flour, plaintiff read in evidence a written contract entered into with C., whereby the latter was to manufacture within a limited time 2,000 barrels of flour, plaintiff to furnish the wheat. It appeared that afterwards he delivered the wheat to C., that the

flour was manufactured and shipped to defendant's warehouse, who gave C. warehouse receipts for the flour, and C. transferred them to D. Plaintiff then offered to prove the declarations of C. that, when he received the wheat, he stated it belonged to plaintiff, and when he shipped the flour to defendant, he said it was plaintiff's flour. *Held*, that the court having admitted proof of the declarations of defendant, and plaintiff having given in evidence the warehouse receipts and their assignment to D. to secure a loan, it was error to reject the deposition of defendant which was in relation to facts directly concerning the property in the flour.—*Ashby v. West*, 3 Ind. 170.

[b] (Sup. 1859)

Though inadmissible evidence is allowed to be introduced on one side, similar evidence is not admissible in rebuttal.—*Horne v. Williams*, 12 Ind. 324.

[c] (Sup. 1865)

One party cannot, by consenting to the admission of irrelevant evidence offered by the other, acquire the right to introduce evidence equally irrelevant.—*Shank v. State ex rel. Robinson*, 25 Ind. 207.

[cc] (Sup. 1871)

Where plaintiff has been permitted to give oral evidence of his possession and adverse title to the land in a suit to recover the same the same privilege should be accorded defendant.—*Buchanan v. Whitman*, 36 Ind. 257.

[d] (Sup. 1880)

Where one party brings out part of a transaction in evidence, the other party may bring out the rest of it, so that the jury may have the whole transaction before them.—*Becker v. Gibson*, 70 Ind. 239.

[e] (Sup. 1884)

Where, in proceedings for the opening of a public highway, an owner offered witnesses who testified that the market value of his land would not be increased by the proposed highway, and other witnesses testified that a specified number of acres would be increased in market value by reason of the establishment of the highway, an instruction authorizing the jury to consider the opinions of witnesses as to the benefits and damages to the owner by the opening of a highway was not erroneous, even if there was error in the admission of the testimony.—*Lowe v. Ryan*, 94 Ind. 450.

[ee] (Sup. 1885)

Where a remonstrator in proceedings to establish a drain first adopted the mode of proof as to the utility by taking the opinions of his witnesses, he cannot complain that the petitioners were allowed to meet the case by the same method of proof.—*Meranda v. Spurlin*, 100 Ind. 380.

[f] (Sup. 1890)

Plaintiff having introduced in chief evidence that decedent drank no intoxicating liquors, and was sober on the afternoon before the injury in the evening, cannot complain of the introduction by defendant of evidence that decedent was intoxicated on that afternoon.—*Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. 273.

[g] (Sup. 1890)

In an action for the death of plaintiff's intestate, caused by defendant's team, through the alleged negligence of the driver, defendant introduced testimony that he and his driver were careful and prudent in the management of teams, though there had been no previous evidence as to their reputation in this respect. *Held*, that plaintiff might rebut this testimony by showing the driver's reputation for intemperance.—*Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243.

[h] (App. 1891)

In an action for malicious prosecution, consisting of an application for surety of the peace, where evidence has been introduced tending to show that defendant's husband had followed plaintiff with a club, and threatened to kill him, it is competent for the husband to testify that he had no disposition to hurt the plaintiff, and that the alleged club was merely a switch with which he was driving a calf.—*Stratton v. Lockhart*, 1 Ind. App. 380, 27 N. E. 715.

[i] (App. 1894)

In an action against a railroad company for damages caused by negligent construction of a culvert, evidence of changes in that construction subsequent to the injury complained of is admissible in rebuttal of testimony for the defendant that a certain diagram, showing those changes, was a true representation of the culvert and surroundings at the time of the injury.—*Chicago & E. R. Co. v. Barnes*, 10 Ind. App. 460, 38 N. E. 428.

[j] (App. 1894)

In an action for wrongful ejection from defendant's train by a conductor, plaintiff testified that he bought his ticket at defendant's station between December 16, 1892, and April 29, 1893, and that it was a regular first-class ticket from that station to another and return, and that the conductor refused to accept it. There was evidence that plaintiff had boasted that he would pass off on the conductor a ticket, time limit of which had expired. *Held*, that the conductor could testify as to whether the ticket presented by plaintiff on April 29, 1893, was in size and shape such as was issued by defendant at its station in April, 1893, and for several months previous thereto.—*Chicago & E. R. Co. v. Ault*, 10 Ind. App. 661, 38 N. E. 492.

[k] (Sup. 1897)

Where a party has introduced incompetent declarations of a grantor relative to a deed, he cannot complain if the other party seeks to introduce declarations of the same kind.—*Ewing v. Bass*, 48 N. E. 241, 149 Ind. 1.

[l] (App. 1900)

In an action for the price of a machine, in which expert evidence was introduced as to whether or not the machine was competent to do the work it was made for, admission in evidence of the working plans of the machine, not as part of the contract, but to facilitate the evidence by explaining the construction, was proper.—*Buckeye Mfg. Co. v. Woolley Foundry & Machine Works*, 58 N. E. 1069, 26 Ind. App. 7.

In an action by the maker for the price of a machine, where it was doubtful whether certain evidence for defendant amounted to a statement that plaintiff's president had told defendant that he would warrant the machine would do the work specified in the contract, it was competent for him to testify in rebuttal that he had made no such statement.—*Id.*

Where, in an action for the price of a machine, a witness, who had used the machine, testified to defects in its working, evidence in rebuttal as to the defective character of the witness' workmanship in such operations was properly admitted as tending to show lack of competency to judge of the work of the machine.—*Id.*

[m] (App. 1902)

In an action for breach of a contract for failure to deliver lumber, where the buyer, upon cross-examination, testified fully as to receiving written orders for the purchase of lumber, it was not error to receive such orders in evidence on redirect examination.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

[n] (Sup. 1903)

A complaint in an action by a servant for personal injuries alleged that plaintiff, while working at the bottom of the shaft, was injured by the overturning of a bucket used to hoist earth, caused by the defective condition of an iron ring used with the bucket. Defendant, on a cross-examination of one of plaintiff's witnesses, inquired into the size, capacity, shape, and construction of a bucket used in another shaft. *Held*, that defendant could not object to evidence by the same witness, on re-examination, that the ring used on the other bucket was more safely constructed than the one alleged to have caused the injury.—*Brazil Block Coal Co. v. Gibson*, 66 N. E. 882, 160 Ind. 319, 98 Am. St. Rep. 281.

[o] (App. 1905)

The fact that an attorney, without objection, has asked a question and obtained an answer on a matter purely collateral to the issue, does not justify the admission of evidence in

rebuttal.—*Pichon v. Martin*, 73 N. E. 1009, 35 Ind. App. 167.

The admission of incompetent evidence of a matter within the issues, without objection, permits an opponent, over objection to introduce incompetent evidence of such matter.—*Id.*

[p] (App. 1906)

Where a part of a conversation is introduced in evidence by plaintiff, defendant has the right to introduce the remainder.—*Featherstone Foundry & Machine Co. v. Criswell*, 38 Ind. App. 681, 75 N. E. 30.

[q] (App. 1907)

Where defendant questions his own witnesses about a certain matter, he cannot complain if plaintiff questions his witnesses about the same matter.—*Indianapolis Traction & Terminal Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068.

[r] (App. 1909)

Where evidence was brought into the case by a party, he cannot complain because the adverse party is permitted to meet the evidence, or that the court finds the facts as shown by such evidence.—*Abner T. Bowen v. W. O. Eaton & Co.*, 89 N. E. 961.

Where the creditor of a contractor to construct a public work claimed a fund in the hands of public officers due under the contract, under an assignment, and the surety of the contractor claimed the same fund, and the creditor offered evidence on the theory that the surety had been fully paid for the construction of that portion of the work for which he claimed the fund, it was competent for the surety to show what application had been made of the fund allowed him, and show that he was entitled to the fund.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 445-458.

## V. BEST AND SECONDARY EVIDENCE.

In criminal prosecutions, see CRIMINAL LAW, §§ 398-404.

Order of proof, see TRIAL, § 60.

Parol evidence of conviction of witness for purpose of impeachment, see WITNESSES, § 350.

Waiver of objections to secondary evidence, see TRIAL, § 75.

### § 157. Necessity and admissibility of best evidence.

[a] Where an act of incorporation does not require that the appointment of an agent by the company should be made in writing, and it does not appear to have been so made, the appointment may be proved by parol evidence.—(Sup. 1839) *Richardson v. St. Joseph Iron Co.*, 5 Blackf. 146, 33 Am. Dec. 460; (1857) *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359.

[b] (Sup. 1843)

In ejectment to recover lands sold by a school commissioner in consequence of the nonpayment of a mortgage thereon, given to secure a loan of school funds, the commissioner's book of accounts containing charges against him for interest received is not admissible to show the payment of the interest, unless the commissioner's testimony cannot be procured.—*Williamson v. Doe ex dem. Crawford*, 7 Blackf. 12.

[c] (Sup. 1846)

In trespass de bonis asportatis, the plaintiff offered a deposition to prove that the property was his. The defendant, in order to show that the deponent was interested, offered to prove that he (the deponent) had sworn, at a former trial, that he owned an interest in the property, and had sold it to the plaintiff. *Held*, that the evidence offered by the defendant was inadmissible, since deponent himself might have been called as a witness.—*Legg v. Leyman*, 8 Blackf. 148.

[d] (Sup. 1849)

If there is no written evidence on the records of a corporation of authority given to an agent to construct certain works, such authority may be proved by parol testimony, in a suit against the corporation for injury arising from such construction.—*Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361.

[dd] (Sup. 1853)

The nonrecorded acts of directors may be proved by parol, unless otherwise provided in the charter.—*Langsdale v. Bonton*, 12 Ind. 467.

[e] (Sup. 1871)

A deposition of the register of the land office was competent to prove that title to the land in controversy was in the government, and that no sale or entry of it had been made, as it was not a record that was desired, but proof that no such record existed.—*Lacey v. Marnan*, 37 Ind. 168.

[f] (Sup. 1877)

Parol evidence is admissible to show when a chattel mortgage was left with the county recorder for record.—*Holman v. Doran*, 56 Ind. 358.

[g] (Sup. 1878)

The identity of a record book of the county commissioners may be proven by parol.—*Bate v. Sheets*, 64 Ind. 209.

[h] (Sup. 1881)

Parol testimony of township trustees is admissible to prove the employment of a physician to treat paupers, though the trustees were required to keep a record of their official proceedings in a book provided for that purpose.—*Board of Com'rs of Jay County v. Brewington*, 74 Ind. 7.

[i] (Sup. 1884)

That a coroner employed plaintiff to make a post mortem examination of an unknown child may, in an action for the post mortem fee, be shown by parol, as a coroner is not required by law to keep a record of his proceedings.—*Board of Com'rs of Jay County v. Gillum*, 92 Ind. 511.

[j] (Sup. 1885)

The fact that unsigned memoranda exist does not preclude oral testimony concerning the matter stated on the memoranda.—*Adams v. Sullivan*, 100 Ind. 8.

[k] (Sup. 1889)

Oral evidence that it was the duty of a freight conductor on defendant's road to determine the condition of brakes, etc., and that he was held responsible for their condition; also that defendant company was at the time under the management of another company, and that the latter's printed rules had been extended over defendant company,—was properly excluded, as it will be presumed that there was some written order or resolution showing such facts.—*Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67.

[l] (Sup. 1889)

Where it is not shown that a telegram was reduced to writing, either when sent or when received, there is no error in admitting parol evidence of its contents.—*Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650.

[m] (App. 1895)

Books of account, containing items for work done and materials furnished, the correctness of which was sworn to by a bookkeeper who did not see the work done or the goods delivered, and who made the entries from memoranda furnished by others, were inadmissible, where one who had personal knowledge of the doing of the work and the furnishing of the materials was present at the trial, and was not called to the stand.—*Dodge v. Morrow*, 14 Ind. App. 534, 41 N. E. 967; 43 N. E. 153.

[n] (Sup. 1901)

Where a witness had testified that there were no printed rules, of which he had knowledge, governing the operation of trains on a certain track, questions as to the "rules or custom," and "general practice and custom," governing trains on that track, were not objectionable on the ground that the rules were printed, and in that form were the "best evidence."—*Pittsburgh, C., C. & St. L. R. Co. v. Martin*, 61 N. E. 229, 157 Ind. 216.

[o] (Sup. 1908)

Under the rule requiring the best evidence, and that proof of reputation, when competent, is only permissible in case primary evidence to the same effect is not attainable, evidence, in an action for injuries to an employé, that certain parties were generally reported to be



defendant's superintendent and chief engineer, respectively, was inadmissible; it being within plaintiff's power to obtain direct evidence as to the relation of such parties to defendant, and of their authority and duties.—*Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 400-470.

See, also, 17 Cyc. p. 466.

**§ 158. Facts or transactions described in or evidenced by writing.**

[a] (Sup. 1840)

Parol evidence that a person has acted as a justice of the peace is admissible to prove him to be such officer.—*Brown v. Connelly*, 5 Blackf. 390.

[b] (Sup. 1841)

In *scire facias* against replevin bail, entered on the docket of a justice of the peace, the pleas were: (1) No execution issued against the goods of the principal; (2) non est factum. *Held*, that the issues on the plaintiff's part must be proved, not by a transcript from the justice's docket, but by producing the execution or a certified copy of it, and proving the execution of the entry of bail, as the execution of other instruments of writing is required to be proved.—*Snyder v. Norris*, 6 Blackf. 33.

[c] (Sup. 1846)

Where defendant was sued for slander for having stated that plaintiff had been convicted of a certain offense, parol evidence is inadmissible to prove the verdict in the prosecution to which defendant had referred.—*Abrams v. Smith*, 8 Blackf. 95.

Where defendant was sued for slander for having stated that plaintiff had been convicted of a certain offense, and that on a new trial granted he had been released on plea of insanity, parol evidence is inadmissible to show that there had been no new trial in the prosecution referred to by defendant.—*Id.*

[d] (Sup. 1848)

The only admissible evidence of selections of land made by the state under Act Cong. Feb. 1841, confirming to the state of Indiana lands selected by her under the provisions of Act March 2, 1827, granting the state lands for the purpose of opening a canal between the Wabash river and Lake Erie, is a certified copy of the list of such selections, furnished from the office of the secretary of the treasury of the United States, unless proof is made that such original copy is not there.—*Doe ex dem. Stauffer v. Stephenson*, 1 Ind. 115, Smith, 20.

[e] (Sup. 1862)

In an action for a breach of promise, the plaintiff may prove by parol that letters passed between the parties, without producing the letters.—*Conaway v. Shelton*, 3 Ind. 334.

[ee] (Sup. 1853)

The existence and terms of a judgment must be established by the production of the record.—*Beatty v. Gates*, 4 Ind. 154.

[f] (Sup. 1858)

The date of filing is no part of the articles of association of a railroad company filed under the general law, and therefore may be proved by parol, regardless of the statute providing for the proof of the articles.—*Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

[g] (Sup. 1859)

Parol evidence of the receipt of a judgment is inadmissible where there is a receipt in writing.—*Williams v. Jones*, 12 Ind. 561.

[gg] (Sup. 1859)

Parol testimony that in a previous suit a judgment was put in evidence is competent.—*Denny v. Moore*, 13 Ind. 418.

[h] (Sup. 1860)

2 Rev. St. § 284, p. 93, as to proof of corporate acts by records, verified by affidavit, applies to corporations out of the state.—*Andrews v. Ohio & M. R. Co.*, 14 Ind. 169.

[hh] (Sup. 1860)

In a suit against an assignor of a note, the absence of the execution against the maker, with a return of no property, must be accounted for before the justice's memorandum of its issuance, and the return thereon, can be received.—*Williams v. Case*, 14 Ind. 253.

[hhh] (Sup. 1860)

Where a sheriff justifies the taking of personal property under a writ, the writ and return must be given in evidence; or, if it has not been returned, proof must be made that the property was taken under it.—*Glascock v. Nave*, 15 Ind. 457.

[i] (Sup. 1861)

The statutory mode pointed out by 2 Rev. St. p. 93, § 284, for proving the acts of a corporation, should be followed or some legal excuse shown for not following it.—*Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

[iii] (Sup. 1861)

The plaintiff, being county treasurer, charged himself, and settled with the auditor, for certain taxes on behalf of one A. He then sued A. under 1 Rev. St. § 105, p. 131, to recover the amount. *Held*, that it was error to allow him to prove by parol that the lands on which these taxes accrued had been assessed to A., without the production of the assessment roll or tax duplicate, or any excuse for their nonproduction.—*Bright v. Markle*, 17 Ind. 308.

[j] (Sup. 1861)

A sale on execution cannot be proved by parol evidence.—*Harlan v. Harris*, 17 Ind. 328.

[jj] (Sup. 1864)

The statute (2 Gavin & H. St. p. 607, § 110) requiring the appointment of a special con-

stable by a justice of the peace to be noted on the docket of such justice, such appointment can only be proven by the record.—Benninghoof v. Finney, 22 Ind. 101.

[k] (Sup. 1864)

The fact that the court had, in a former action, awarded the custody of a child to plaintiff, could not be shown by parol testimony, the records being better evidence.—Cline v. Gibson, 23 Ind. 11.

[kk] (Sup. 1866)

Where, in a proceeding to contest an election on the ground that ballots cast for the contestor were fraudulently abstracted from the ballot box, a witness is called to prove that he cast a ballot for the contestor, if the ticket cast by the witness can be found and can be identified by him, it is the best evidence of the fact, but, if the ticket cannot be found or cannot be identified by the witness, then it is competent for him to state for whom he voted.—Wheat v. Ragsdale, 27 Ind. 191.

[l] (Sup. 1867)

In an action to recover an installment of the purchase price of land, parol evidence of the time of execution and delivery of the deed is admissible.—Davar v. Cardwell, 27 Ind. 478.

[ll] (Sup. 1873)

A deputy clerk having the papers in the case may testify as to who was engaged as attorney and the length of time the cause was on the docket, where it does not appear that he relies on a paper to enable him to testify.—Aston v. Wallace, 43 Ind. 468.

[m] (Sup. 1874)

Where the evidence of a witness, taken in writing at a former trial, has been offered in evidence, parol evidence of what the witness testified to at such trial is not admissible.—Broyles v. State ex rel. De Long, 47 Ind. 251.

[mm] (Sup. 1875)

Oral evidence may be given as to what was done to organize a gravel-road company, but not to prove the contents of the articles of association.—Miller v. Wild Cat Gravel Road Co., 52 Ind. 51.

[n] (Sup. 1876)

The fact of a sale may be proved by parol, although it was made under an execution, if its validity is not in question.—Stanley v. Sutherland, 54 Ind. 339.

[nn] (Sup. 1877)

The fact that a petition for a rehearing of a cause decided by the Supreme Court has been overruled cannot be proved by a notice of that fact given by the clerk of such court to the clerk of the court from which such cause was appealed.—Donellan v. Hardy, 57 Ind. 393.

The printed report of a decision of the supreme court, though issued by authority of law, is only secondary evidence of a judgment ren-

dered by such court, and is admissible only when the destruction of the original record has been shown.—Id.

[o] (Sup. 1878)

The appointment of trustees of a corporation may be shown by parol evidence.—Wiles v. Trustees of Philippi Church, 63 Ind. 206.

[oo] (Sup. 1879)

In an action to recover for goods sold and delivered, the quality and kind of the goods, and the fact of their delivery pursuant to a written order for their shipment, may be proved by parol evidence.—Lee v. Hills, 66 Ind. 474.

[p] (Sup. 1880)

The making out of a certified transcript of an order of the board of county commissioners allowing a claim and the delivery of the same with the account filed in the proceeding and the appeal bond to the clerk of the circuit court is a fact which may be proved by parol.—State ex rel. Zable v. Benson, 70 Ind. 481.

That an appeal was taken by a taxpayer from a decision of the county commissioners, and that a transcript of the proceedings of the commissioners was made within 20 days from the time the appeal bond was filed and delivered to the clerk of the circuit court, may be proved by parol.—Id.

[pp] (Sup. 1881)

On second action and trial, a witness cannot testify in a general way as to what theory the suit was first prosecuted upon, or upon what intimations of the court it was dismissed.—West v. Cavins, 74 Ind. 265.

[q] (Sup. 1881)

In an action on an administrator's bond to recover the amount of a judgment against the estate of his intestate, plaintiff's judgment may be read in evidence from the order book.—Pence v. Makepeace, 75 Ind. 480.

[qq] (Sup. 1881)

Parol evidence of the proceedings of the city council is not admissible, in the absence of excuse for failure to produce the record thereof.—City of Aurora v. Fox, 78 Ind. 1.

[r] (Sup. 1881)

Parol evidence is admissible to show that one was deputy auditor of a county.—Hall v. Bishop, 78 Ind. 370.

[rr] (Sup. 1881)

In a suit by a corporation for breach of contract, the secretary of plaintiff corporation may state the amount due from defendant without giving the data on which the statement was made.—Eigenman v. Rockport Building & Loan Ass'n, 79 Ind. 41.

[s] (Sup. 1883)

A decree of a foreign court cannot be proved by the parol testimony of the clerk thereof.—Anderson v. Ackerman, 88 Ind. 481.

[ss] (Sup. 1883)

A decree of a court of a sister state can only be proven by an authenticated transcript of the record thereof, and the parol evidence of the clerk of such court is not admissible to prove the rendition of a decree therein.—Teter v. Teter, 88 Ind. 494.

[t] (Sup. 1884)

In a suit to foreclose a mortgage, an offer of defendant to show a conversation between certain parties relative to a transfer of certain of the lots by defendant was properly rejected as the deed of conveyance would have been the best evidence to prove such a reconveyance, and the offered statement, if it could be said to indicate a reconveyance, did not indicate any consideration therefor.—Ellis v. Johnson, 96 Ind. 377.

[tt] (Sup. 1885)

It may be proved by parol that a justice of the peace who rendered a judgment made and filed a certificate with the clerk before the issuance of execution.—Dehority v. Wright, 101 Ind. 382.

[u] (Sup. 1886)

A county superintendent of schools being required by law (section 4428, Rev. St. 1881) to keep a record of all teachers' licenses granted, such record is the best evidence on that subject.—Elmore v. Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

[uu] (Sup. 1886)

Parol evidence is admissible to show that a certain lot in Lamasco is within the corporate limits of the city of Evansville, although there is record evidence of the fact.—McKeen v. Haskell, 108 Ind. 97, 8 N. E. 901.

[v] (Sup. 1887)

An order vacating a highway must be proved by the record, and cannot be proved by parol.—Whetton v. Clayton, 111 Ind. 360, 12 N. E. 513.

[vv] (Sup. 1887)

The acts of members of a common council of a municipal corporation in examining plans and locations for sewers, and in consultation with expert engineers, may be proved by parol.—City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686.

[w] (Sup. 1890)

Under a plea of payment in an action on a note, defendant introduced in evidence a check executed by him to plaintiff, which he testified was given and received in part payment of the note. *Held*, that testimony of plaintiff that such check was received in payment of another note, which he had thereupon surrendered to defendant, was admissible, without proof of loss of the note, or notice to produce it; the note being merely collateral to the issue.—Coonrod v. Madden, 126 Ind. 197, 25 N. E. 1102.

[ww] (Sup. 1892)

It is not error to permit witness to testify that he held a mortgage, began a suit to foreclose, and afterwards took a deed of the property, though such testimony relates to matters of record.—File v. Springel, 132 Ind. 312, 31 N. E. 1054.

[x] (Sup. 1894)

Though a deed is the best evidence as to the ownership of real estate, in the absence of objection, such ownership may be proved by parol evidence.—Uhl v. Moorhous, 37 N. E. 360, 137 Ind. 445.

[xx] (App. 1894)

The ordinance of a city establishing "fire limits" is the best evidence of what such limits are.—Miller v. City of Valparaiso, 10 Ind. App. 22, 37 N. E. 418.

[y] (App. 1895)

It is error to admit parol evidence as to who are the persons interested in a will admitted, the will being the best evidence.—McNear v. Roberson, 12 Ind. App. 87, 39 N. E. 896.

[yy] (App. 1895)

To render books of original entries admissible in evidence, it must appear that no other or better means of making the proof is obtainable, or that the transaction does not admit of more satisfactory evidence.—Dodge v. Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

[z] (App. 1909)

The official record kept by an official of the federal weather bureau is the best evidence to prove the amount of rainfall during a specified period, and the exclusion of his evidence as to the amount of rainfall during the period is proper.—City of Garrett v. Winterich, 87 N. E. 161, rehearing denied 88 N. E. 308.

[zz] (App. 1910)

A deed to a railroad of a right of way, made by two grantors who had inherited the land from the owner and occupant at the time when the road was built, contained a covenant by the grantee for a farm crossing. An action for breach of the covenant was brought by one of the grantors and by a purchaser from the other grantor, who had lived on the land from his purchase till the destruction of the crossing and the bringing of the suit. *Held* that, in the absence of any showing of adverse claim, proof of these facts sufficiently showed plaintiffs' right to sue, as against an objection that their title deeds should have been produced; proof of occupancy being proof of title as against all persons except those claiming under a superior title.—Pittsburg, C., C. & St. L. R. Co. v. Wilson, 91 N. E. 725.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 471-473, 474½-526.

See, also, 17 Cyc. p. 474.

### § 159. Fact of making or existence of writing.

[a] (App. 1903)

A witness may testify as a fact whether he ever executed a deed to a person named.—*Baltes Land, Stone & Oil Co. v. Sutton*, 69 N. E. 179, 32 Ind. App. 14.

[b] (App. 1908)

It was not error to overrule an objection to a question asked one of defendants whether she had written a letter to another defendant, the question not being directed to the contents of the instrument.—*Beach v. Huntsman*, 42 Ind. App. 205, 85 N. E. 523.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 471, 474.

### § 160. Contents of writings.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 527, 529-539.

See, also, 17 Cyc. pp. 471-512.

### § 161. — In general.

[a] (Sup. 1839)

The plaintiff cannot give evidence of the contents of a written award on which he sues, without accounting for the absence of the award.—*Burke v. Voyles*, 5 Blackf. 190.

[b] The written laws of a sister state cannot be proved by parol.—(Sup. 1840) *Gomparet v. Jernegan*, 5 Blackf. 375; (1860) *Line v. Mack*, 14 Ind. 330.

[c] Parol evidence of the contents of a written instrument is inadmissible, where the instrument itself can be produced.—(Sup. 1843) *Dumont v. McCracken*, 6 Blackf. 355; (1845) *Murray v. Buchanan*, 7 Blackf. 549; (1856) *Meek v. Spencer*, 8 Ind. 118.

[d] (Sup. 1854)

Rev. St. 1843, p. 730, § 313, providing that the existence and effect of the laws of a foreign country may be proved as facts by parol evidence, applies to the laws of the several states of the United States.—*Heberd v. Myers*, 5 Ind. 94.

[e] (Sup. 1859)

An award was pleaded, and a witness stated that a written account of claims was submitted to the arbitrators. He was not allowed to state the items thereof without accounting for the nonproduction of the writing.—*Williams v. Dewitt*, 12 Ind. 309.

[f] (Sup. 1864)

Where defendants set up certain claims, and the plaintiff alleged in defense that there had been prior transactions and receipts passed between the parties, and that the claims set up by the defendants had never before been averred, it was permissible for the plaintiff to show such facts, without producing the records, though the transactions which were referred to

had occurred in prior suits between the parties; since the fact to be proved was not the contents of the records of such suits, but the mere fact that such claims had never before been made.—*Board of Trustees of Wabash & Erie Canal v. Reinhart*, 22 Ind. 463.

[g] (Sup. 1876)

Without accounting for the absence of a writing, parol evidence of its contents is inadmissible.—*Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

[h] (App. 1907)

Oral evidence, as to what a map shows on its face, is inadmissible.—*Evansville & Princeton Traction Co. v. Broermann*, 40 Ind. App. 47, 80 N. E. 972.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 527, 529-535, 533.

See, also, 17 Cyc. p. 475.

### § 162. — Judicial acts, proceedings, and records.

[a] (Sup. 1839)

To prove that a suit has been defeated by a plea of infancy, a record of the suit should be produced.—*Doe ex dem. Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466.

[b] (Sup. 1841)

In a suit on a sheriff's bond for the escape of a debtor alleged to have been arrested on a ca. sa. by a constable, and delivered by him with a copy of the ca. sa. to the sheriff, it was *held* that parol evidence of the contents of the ca. sa., the original being lost, was admissible for the plaintiff, without having averred the loss in his declaration, or given notice to the defendant of his intention to prove the loss and contents of the ca. sa.—*Linsee v. State ex rel. Fitch*, 5 Blackf. 601.

[c] (Sup. 1860)

The justice's memorandum of a return on an execution is but secondary evidence thereof.—*Williams v. Case*, 14 Ind. 253.

[d] (Sup. 1864)

The best existing evidence of a fact must be produced to prove it; and therefore parol evidence of the contents of a record is not admissible.—*Board of Trustees of Wabash & Erie Canal v. Reinhart*, 22 Ind. 463.

[e] (Sup. 1864)

The contents of court records, showing the award of the custody of a child to plaintiff, cannot be shown by parol; the records being better evidence.—*Cline v. Gibson*, 23 Ind. 11.

[f] (Sup. 1868)

In an action for damages on account of an attorney's unskillfulness in his having taken a judgment by default upon an insufficient service of process, it was *held* that the alleged defect could only be proved by the record.—*Reilly v. Cavanaugh*, 29 Ind. 435.

## [g] (Sup. 1884)

A record of deeds made in another state cannot be proved by parol evidence of its contents.—*Hamilton v. Shoaff*, 99 Ind. 63.

## [h] (Sup. 1887)

An order vacating a highway must be proved by the record, and cannot be proved by parol.—*Whetton v. Clayton*, 111 Ind. 300, 12 N. E. 513.

## [i] (Sup. 1890)

Parol evidence of the contents of a petition in a highway case cannot be given without proof of diligent search made therefor, in the proper office, by one acquainted with the office.—*Howe v. Fleming*, 123 Ind. 262, 24 N. E. 238.

## [j] (Sup. 1893)

Testimony as to divorce proceedings brought at one time by testatrix against her husband, and her charges against him, offered to show her mental condition at that time, is not inadmissible on the ground that the pleadings in the suit are the best evidence, where it relates to her acts, conduct, and language in court, rather than to her pleadings.—*Gurley v. Park*, 135 Ind. 440, 35 N. E. 279.

## [k] (Sup. 1895)

Parol evidence is incompetent to prove the adjudications of a court of record.—*Bible v. Voris*, 141 Ind. 569, 40 N. E. 670.

## [l] (App. 1899)

It was proper to exclude testimony of admissions made by defendant in the pleadings filed in another action, since the record in such action was the best evidence by which to prove its contents.—*Colborn v. Fry*, 55 N. E. 621, 23 Ind. App. 485.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 536-545.

See, also, 17 Cyc. pp. 500-504; notes, 2 L. R. A. (N. S.) 652, 5 L. R. A. (N. S.) 938.

## § 164. — Corporate acts, proceedings, and records.

[a] The admission of parol evidence of a written subscription for stock, without any excuse for the absence of the original, and without any attempt to produce a certified copy from the books of the corporation, is error.—(Sup. 1861) *Cincinnati, P. & C. Ry. Co. v. Cochran*, 17 Ind. 516; (1862) *Cincinnati, P. & C. R. Co. v. Emrick*, 19 Ind. 289.

## [b] (App. 1898)

The constitution itself of a life insurance company is the best evidence of its provisions.—*Masons' Union Life Ins. Ass'n v. Brockman*, 50 N. E. 493, 20 Ind. App. 206.

## [c] (App. 1904)

*Burns' Rev. St. 1901*, § 474, providing that sworn copies of the acts and proceedings of corporations shall be received in evidence in

all cases where the original would be evidence, does not authorize the contents of the books of account of a building and loan association to be proved by the affidavit of the secretary, in an action by the association to foreclose a mortgage, for the purpose of showing the state of the members' account.—*Coppes v. Union Nat. Savings & Loan Ass'n*, 60 N. E. 702, 33 Ind. App. 367.

Where cross-complainant, a building and loan association, was demanding foreclosure of its mortgage against cross-defendants, the admission of an affidavit of the secretary of cross-complainant to the effect that a paper annexed thereto was a full and true copy of the original record of the account of the cross-defendant, showing all payments made on the stock and on account of the loan, to prove the state of the account between the parties as a basis for the computation to be made by the court in rendering its finding, is error; the books from which the account was copied not being before the court, and cross-defendants not having had opportunity to cross-examine affiant, or to make comparison of the copy with the original entries.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 546, 547.

See, also, 17 Cyc. pp. 505-508.

## § 165. — Conveyances, contracts, and other instruments.

## [a] (Sup. 1843)

A deposition to prove the copy of a bill of exchange, without accounting for the absence of the original, or to prove the institution of a suit and the rendition and contents of a judgment, in Ohio, was held to be inadmissible.—*Dumont v. McCracken*, 6 Blackf. 355.

## [b] (Sup. 1846)

Parol evidence is inadmissible to show the terms of a written contract, when the writing itself is in existence, and obtainable.—*Patterson v. Doe ex dem. Fisher*, 8 Blackf. 237.

## [c] (Sup. 1850)

Where a witness deposed that he was made an agent by an instrument in writing, and proceeded to state the powers conferred upon him by said instrument, which was not produced, nor its absence accounted for, it was held that the deposition was properly rejected, as parol evidence of the contents of a written instrument.—*Hotchkiss v. Dailey*, 2 Ind. 117.

## [d] (Sup. 1858)

Parol evidence of the contents of notes and checks tendered in payment for a subscription for stock is inadmissible without laying a foundation.—*Ohio Ins. Co. v. Nunemacher*, 10 Ind. 234.

## [e] (Sup. 1874)

A witness may be asked to describe a note for the purpose of identifying it, and such question will not call for the contents of the note.—*Lingenfelter v. Simon*, 40 Ind. 82.

## [f] (Sup. 1881)

An implied agreement for an extension of time of payment of a note, such as to discharge a surety thereon arising from the acceptance of a bank note in payment of interest in advance, must be shown by introducing such bank note in evidence.—*Swift v. Ratliff*, 74 Ind. 426.

Facts appearing on the face of a note in suit as that it was payable at bank, etc., should be shown by the note itself, and not by parol.—Id.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 548-555.

See, also, 17 Cyc. pp. 475-489.

## § 166. — Books of account.

[a] The contents of books of account cannot be proved by parol.—(Sup. 1844) *Wilt v. Bird*, 7 Blackf. 258; (1840) *Thompson v. Fry*, Id. 608.

## [b] (Sup. 1884)

In a suit on a county treasurer's bond, witnesses shown to be competent, and who have examined the treasurer's books, may testify to the amount of his receipts and disbursements as shown by the books.—*Rogers v. State ex rel. Grimes*, 99 Ind. 218.

## [c] (Sup. 1886)

Where account books are of such a nature as to render it difficult for the jury to arrive at correct conclusions therefrom, accountants may be allowed to testify as to the results of their examinations of them.—*Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 556, 557.

See, also, 17 Cyc. p. 480; note, 11 Am. Dec. 732.

## § 168. — Letters, telegrams, and other correspondence.

[a] Parol evidence of the contents of a letter, which is not produced or accounted for, is not admissible.—(Sup. 1836) *Hackleman v. Moat*, 4 Blackf. 164; (1858) *Coats v. Gregory*, 10 Ind. 345; (1895) *McFadden v. Ross*, 14 Ind. App. 312, 41 N. E. 607.

## [b] (Sup. 1874)

In an action against a telegraph company for damages for failure to transmit a dispatch, the original dispatch delivered to the operator must be given in evidence, or, if not, its absence must be properly accounted for, before secondary evidence thereof can be admitted.—*Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

## [c] (App. 1893)

In an action against a telegraph company for failure to transmit and deliver a message, such failure, and not the message, is the gist of the action, the fact that a certain message was delivered for transmission being a sub-

stantive fact necessary to be proved; and parol evidence of the contents of the message is primary evidence, the rule being that, when parol evidence is as near the fact testified to as the written, each is primary.—*Western Union Tel. Co. v. Cline*, 8 Ind. App. 364, 35 N. E. 564.

## [d] (App. 1901)

Secondary evidence of the contents of letters is inadmissible, when no foundation has been laid therefor.—*Jenkins v. Lutz*, 59 N. E. 288, 26 Ind. App. 150.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 558.

See, also, 17 Cyc. pp. 478, 479; note, 39 Am. Rep. 359.

## § 171. Writings collateral to issues.

## [a] (Sup. 1868)

The rule excluding parol evidence of the contents of a written instrument does not apply to a writing which is collaterally connected with the issue.—*Carter v. Pomeroy*, 30 Ind. 438.

## [b] (Sup. 1907)

In an action against a railroad company for wrongful death from an accident at a street crossing, oral evidence that the crossing was within the corporate limits of a city was admissible.—*Indianapolis Union R. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 400, 528.

See, also, 17 Cyc. p. 508.

## § 172. Admissions as to contents of writings.

## [a] (Sup. 1897)

Answers under oath to interrogatories propounded to an opposing party under Rev. St. 1894, § 362 (Rev. St. 1881, § 359), being admissions, are admissible to prove proceedings in court.—*Combs v. Union Trust Co.*, 46 N. E. 16, 146 Ind. 688.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 500.

See, also, 17 Cyc. p. 510.

## § 173. Original writing as best evidence.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 561-569.

See, also, 17 Cyc. pp. 512-517.

## § 174. — In general.

## [a] (Sup. 1877)

A duly-authenticated transcript of the order of the board of directors of a corporation, declaring an assessment on the stock, is competent evidence of such assessment.—*Van Riper v. American Cent. Ins. Co.*, 60 Ind. 123.

## [b] (Sup. 1878)

Copies of bills of lading given by a common carrier are not competent evidence to prove the delivery of goods in a suit for their value, unless the loss of the originals is established and

proof given of notice to the opposite party to produce duplicates thereof.—*State ex rel. Curtis v. Howe*, 64 Ind. 18; *McMakin v. Weston*, Id. 270.

[c] (Sup. 1890)

A private memorandum book made by plaintiff, being a copy of copies made by him from time to time of entries in certain fee books of plaintiff, is not admissible to show the amount of the fees which plaintiff claimed he had assigned to defendant.—*Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358.

[d] (Sup. 1891)

Upon a trial a paper purporting to be a copy of a lease was, under defendant's objection, read without showing the loss of the original. It appeared that only one copy was originally executed, and the parties drew off a new copy, signed it, and delivered same to plaintiff. *Held*, that the copy was properly introduced in evidence as an original paper.—*Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146.

[e] (App. 1894)

In an action to recover damages for wheat alleged to have been lost in transportation, a memorandum of the weights of the wagon loads of wheat put in to the cars was properly excluded, where the original memorandum was made by different persons, and only a copy of it was produced on the trial.—*Buck v. Pennsylvania Co.*, 38 N. E. 871, 11 Ind. App. 179.

[f] (App. 1903)

It being necessary to set out in the complaint the contract for which a reformation is sought, it is equally necessary that such contract must be proved by competent evidence, and, in the absence of a showing that it has been lost and cannot be produced, the best evidence is the contract itself.—*Webb v. Hammond*, 68 N. E. 916, 31 Ind. App. 613.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 561-564, 566-569.

See, also, 17 Cyc. p. 512.

#### § 175. — Public records or documents.

[a] (Sup. 1837)

In order to prove that a suit had been commenced before a justice of the peace, and that final judgment had been rendered and an appeal taken, the record in the possession of the justice is the best evidence, and not a copy of the transcript filed in the circuit court, certified by the circuit clerk.—*Mills v. Barnes*, 4 Blackf. 438.

[b] (Sup. 1860)

The absence of an original must be satisfactorily explained before testimony can be introduced to prove the correctness of a copy.—*Manson v. Blair*, 15 Ind. 242.

[c] (Sup. 1864)

A copy of a decree of divorce certified by the clerk of court, not purporting to be a tran-

script of the proceedings, and not showing that such steps were taken as gave the court jurisdiction of the person of defendant in the suit, nor that the matters decreed were within the relief sought, is not competent evidence.—*Cline v. Gibson*, 23 Ind. 11.

[d] (Sup. 1874)

Where an original bill of lading is in the possession and under the control of the plaintiff, it is error to admit in evidence on behalf of the plaintiff a copy; and, if admitted, and it afterwards appears that the original is in the hands of the plaintiff, the copy should be withdrawn.—*Gimbel v. Hufford*, 46 Ind. 125.

[e] (Sup. 1876)

Because it is "the original" is no ground of objection to the admission, as evidence, of the original præcipe for an execution.—*Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 561, 565, 568, 569.

#### § 176. Grounds for admission of secondary evidence.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 557, 570-599.

See, also, 17 Cyc. pp. 518-535.

#### § 177. — In general.

[a] (Sup. 1848)

If one party to a suit desires to use in evidence a bond filed by the adverse party in a former suit, and remaining on file, he should apply to the court for leave to take it from the files, and without such application he is not entitled to notify the adverse party to produce it, and to give parol evidence of its contents upon failure so to do.—*Dare v. McNutt*, 1 Ind. 148, Smith, 30.

[b] (Sup. 1859)

In order to lay a proper foundation for secondary evidence, it must be shown that the original writing has been lost, or destroyed by time, mistake, or accident, or is in the hands of the adverse party, who has had due notice to produce it on the trial.—*Anderson Bridge Co. v. Applegate*, 13 Ind. 339.

[c] When the primary evidence is out of the jurisdiction, secondary is admissible.—(Sup. 1866) *Thom v. Wilson's Ex'r*, 27 Ind. 370.

[d] (App. 1905)

Where no record is made of an order of a city council authorizing the street commissioner to make a railroad crossing, parol evidence is admissible to show the order.—*Cincinnati R. & M. R. R. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; *Same v. Troutman* (1906) 38 Ind. App. 700, 75 N. E. 277; *Same v. Patterson*, 39 Ind. App. 702, 77 N. E. 1199.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 557, 570-579.

**§ 178. — Destruction or loss of primary evidence.**

Preliminary evidence of loss or destruction, see post, § 183.

[a] The contents of a lost or destroyed record may be proved by parol.—(Sup. 1820) *Jackson ex dem. Taylor v. Cullum*, 2 Blackf. 228, 18 Am. Dec. 158; (1875) *Bate v. Sheets*, 50 Ind. 329; (1880) *Jones v. Levi*, 72 Ind. 586; (1886) *Bundy v. Cunningham*, 107 Ind. 360, 8 N. E. 174.

[b] (Sup. 1835)

If a distress warrant be proved to be lost, parol evidence of its contents, of its return, and of the proceedings of the constable under it, is admissible.—*Richardson v. Vice*, 4 Blackf. 13.

[c] (Sup. 1844)

If a promissory note sued on be torn, and a part of it lost, a copy of the entire note sworn to is admissible.—*Dean v. Speakman*, 7 Blackf. 317.

[d] (Sup. 1853)

Plaintiff having by replication to defendant's plea alleged that the defense set up therein had been pleaded by defendant in a former suit, and that the matter of the plea was determined therein, and having proved the filing of such plea in the former suit, that it had been lost or mislaid, and could not after diligent search be found, parol evidence of its contents was admissible.—*Schwartz v. Osthimer*, 4 Ind. 109.

[e] (Sup. 1859)

To prove damages, a party offered to show that by the act of the defendant he had been compelled to have a certain contract canceled, which was done by burning. *Held*, that parol proof of the contract should have been admitted.—*Draper v. Vanhorn*, 12 Ind. 352.

[f] (Sup. 1865)

Where the return of a verdict into court is shown by an entry in the order book, it may, if lost, be supplied by a copy proved by competent witnesses.—*Sanders v. Sanders*, 24 Ind. 133.

[g] (Sup. 1875)

Where the original schedule of assessment has been lost, the record thereof in the record books of the county recorder's office may be read in evidence.—*Bate v. Sheets*, 50 Ind. 329.

[h] (Sup. 1877)

The bare fact that the party offering secondary evidence of the contents of a writing voluntarily destroyed it does not preclude his proving the contents, if the circumstances of the destruction are consistent with an honest purpose.—*Rudolph v. Lane*, 57 Ind. 115.

[i] (Sup. 1878)

In an action to recover a drainage assessment, the original petition having been lost, the record thereof, upon being properly identified, and the loss of the petition having been proved,

is competent evidence.—*Bate v. Sheets*, 64 Ind. 209.

[j] (Sup. 1879)

Where the evidence showed that a lease was deposited with a third person to hold for the parties, and that defendant obtained possession of it, took it away, tore it in pieces, and rented the land to another tenant, parol evidence was held admissible to prove the contents of the lease.—*Avan v. Frey*, 69 Ind. 91.

[k] (Sup. 1881)

Parol evidence is admissible to prove the contents of a summons which is lost.—*Johnson v. State ex rel. Skinkard*, 80 Ind. 220.

[l] (Sup. 1884)

Where an instrument is lost or destroyed, its contents may be proved by secondary evidence.—*Langsdale v. Woollen*, 99 Ind. 575; *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

[m] (Sup. 1888)

Where proof of the loss of letters, and of a fruitless search for them, is made, secondary evidence of their contents is admissible.—*Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345.

[n] (Sup. 1888)

It is not error to permit a written contract to be proved by parol evidence, there being evidence that it once existed, and was destroyed by the adverse party.—*McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372.

[o] (Sup. 1893)

Where the papers in a divorce suit have been destroyed, parol testimony as to the charges made therein by plaintiff, for the purpose of showing her mental condition, is admissible.—*Gurley v. Park*, 135 Ind. 440, 35 N. E. 279.

[p] (App. 1893)

Where a party has negligently or fraudulently destroyed the primary evidence, he cannot introduce secondary evidence.—*Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

[q] (App. 1894)

Ordinarily secondary evidence of the contents of a writing cannot be given until its loss or destruction has been proved, or it appears that bona fide or diligent search has been unsuccessfully made for it where it was most likely to be found.—*Ohio Thresher & Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[r] (Sup. 1896)

When the existence of an instrument collaterally in issue is satisfactorily shown, parol evidence of its contents may be admitted on proof of probable loss.—*Lumbert v. Woodard*, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175.

[s] (App. 1903)

Where the books of a corporation, containing the records of the issuing and transferring of corporate stock, had been destroyed, parol evidence was admissible, in an action for the conversion of notes claimed to be a part



of the assets of the corporation, to show that the stock which one agreed to take, and for the payment of which he executed the notes in question, was distributed among certain of the original projectors of the corporation on the maker of the notes withdrawing from the enterprise, and that the notes were subsequently used as a part payment for a stock of merchandise purchased by the maker from defendant, a stockholder of the corporation.—*Thistlethwaite v. Pierce*, 66 N. E. 755, 30 Ind. App. 642.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 580-594; 39 CENT. DIG. Plead. § 1029; 42 CENT. DIG. Records, § 33.

See, also, 17 Cyc. pp. 518-526.

### § 179. — Possession or control of primary evidence.

[a] Where the primary evidence is in the possession, or under control, of the adverse party, who fails or refuses to produce it, secondary evidence is admissible.—(Sup. 1842) *Rawley v. Doe ex dem. Beachamp*, 6 Blackf. 143; (1855) *Smith v. Reed*, 7 Ind. 242; (1858) *Mumford v. Thomas*, 10 Ind. 167; (1883) *Duringer v. Moschino*, 93 Ind. 495; (1883) *Barkley v. Mahon*, 95 Ind. 101.

[b] (Sup. 1842)

If the defendant in ejectment refuse to produce on the trial a patent from the United States to the plaintiff's lessor for the land in controversy, the patent being in the defendant's possession, and due notice having been given him to produce it, secondary evidence of the patent would be admissible, without proof of the execution of the original, were proof of its execution otherwise necessary.—*Rawley v. Doe ex dem. Beachamp*, 6 Blackf. 143.

[c] (Sup. 1858)

The nonproduction on notice of corporate books does not justify the admission of parol evidence of a fact sought to be proved thereby.—*Madison, I. & P. R. Co. v. Whitesel*, 11 Ind. 55.

[d] (Sup. 1861)

Where the court has ordered the production of certain minutes of the board of directors and the party in whose behalf the order was made has, in addition, given written notice to the company to produce, and has demanded of the secretary a sworn copy, if they are not produced, or the sworn copy furnished, oral evidence may be given of their contents.—*Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

[e] (Super. 1873)

A written contract for building a house provided that the work should be done according to the direction and instructions of the architect; that the last payment should be due only when the building was completed, according to the plans and specifications, to the satisfaction of the owner and of the architect, and

upon the production of the certificate from the architect to that effect; that if any dispute arose in regard to the true meaning of the plans and specifications, or the agreement as to the quality of the work or materials, it should be decided by the architect, whose decision should be final. *Held* that, on the unreasonable refusal of the architect to furnish the certificate provided for in the contract, the contractor may establish his right to recover by other evidence.—*Costly v. Adams*, 1 Wils. 342.

[f] (App. 1899)

After notice to produce an original letter, and failure to do so, a copy of the letter was introduced in evidence. Later the original letter was introduced. *Held*, that the introduction of the copy was not error.—*Phenix Ins. Co. v. Jacobs*, 55 N. E. 778, 23 Ind. App. 509.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 595-599.  
See, also, 17 Cyc. pp. 527-535.

### § 180. Preliminaries to admission of secondary evidence.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 600-600.  
See, also, 17 Cyc. pp. 536-564.

### § 181. — In general.

[a] (Sup. 1835)

The contents of an instrument of writing cannot be proved by oral testimony, unless the absence of the instrument be first accounted for.—*Carlton v. Litton*, 4 Blackf. 1.

[b] (Sup. 1884)

Where it was agreed in open court that all papers relating to the case in the possession of or under the control of defendant would be produced before going to trial, and, in connection with the offer to introduce a copy of a letter, there was an offer of evidence tending to prove that it was a true copy of the letter taken by letterpress at the time the letter was written by plaintiff, and that it was addressed to defendant, the envelope bearing a return request and that it was mailed and never returned, it was proper to admit the copy in evidence.—*Duringer v. Moschino*, 93 Ind. 495.

[c] (Sup. 1889)

Evidence as to the contents of a deed is properly excluded where no foundation was laid for the introduction of secondary evidence.—*State ex rel. Lowery v. Davis*, 20 N. E. 159, 117 Ind. 307.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 600.  
See, also, 17 Cyc. p. 536.

### § 182. — Proof as to existence of primary evidence.

[a] (Sup. 1855)

In general, the contents of a written instrument cannot be proved by parol; but such evidence may be competent to show the exist-

ence of the instrument, with a view of letting in secondary evidence, in case of loss of the original or refusal of the adverse party to produce it on notice.—*Stoner v. Ellis*, 6 Ind. 152.

[b] (Sup. 1857)

In making proof of the existence and contents of a lost deed, the property conveyed, estate created, conditions annexed, and the signing, sealing, and delivering, must be proved with reasonable certainty.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

[c] (Sup. 1861)

Rev. St. 1843, c. 40, § 216, providing that pleadings denying or requiring proof of the execution of written instruments relied on and pleaded by a party shall not necessitate such proof unless verified, was continued in force by Code 1852; and hence evidence of the contents of a receipt pleaded under such circumstances was properly admitted without proving its execution.—*Forsythe v. Park*, 16 Ind. 247.

Where defendant in an action on account alleged that he had executed a note to plaintiff's assignor in payment of the claim, and that he had paid the note, it was error to allow him, after proving its loss, to give secondary evidence of its contents, without proving its execution, as he might have manufactured such note, without its ever having been in the possession of the payee.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 601-604.

See, also, 17 Cyc. p. 536.

**§ 183. — Proof as to destruction or loss of and search for primary evidence.**

[a] To admit the record of a deed in evidence, it was shown to be a true copy of the original; that, after it was recorded, one of the grantors had taken charge of it for grantee, who was an infant; that the latter's guardian had searched for it, but could not find it; and that the grantor who took charge of it, and who was dead, had stated in his lifetime that the deed was lost. Its execution was also proved by the subscribing witness, and by the magistrate before whom it was acknowledged. *Held* sufficient.—(Sup. 1839) *Rucker v. McNeely*, 5 Blackf. 123; (1843) *McNeely v. Rucker*, 6 Blackf. 391.

[b] (Sup. 1843)

A subpoena duces tecum was served three or four days before the trial, on a lessee, requiring him to produce his lease. He was sworn as a witness, and stated that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year, etc. *Held*, that the loss of the lease was not sufficiently proved to authorize the admission of

parol evidence of its contents.—*McNeely v. Rucker*, 6 Blackf. 391.

[c] (Sup. 1843)

The facts that a note was sent by mail, in a letter directed to a postmaster in another state, to have its execution proved, and that it had not been returned, do not sufficiently prove the loss of the note to authorize parol evidence of its contents.—*Depew v. Wheelan*, 6 Blackf. 485.

[d] (Sup. 1845)

The loss of the paper must be proved by the person in whose hands it was at the time of the loss, or to whose custody it is traced, if he be living.—*Murray v. Buchanan*, 7 Blackf. 549.

[e] (Sup. 1853)

A party, having proved the filing of certain pleas, and that they are lost or mislaid, and cannot, after diligent search, be found, may give parol evidence of their contents.—*Schwartz v. Osthimer*, 4 Ind. 109.

[f] (Sup. 1856)

A party to an action desired to offer a copy of a mortgage in evidence, and in his affidavit alleged that the original had been delivered to the recorder for record, and was not among his own papers. *Held*, that it was to be inferred that the mortgage remained in the recorder's office, and the affidavit was insufficient.—*Plant v. Crane*, 7 Ind. 486.

[g] (Sup. 1856)

Secondary evidence of the contents of a writing will not be admitted, unless it is proved that a bona fide and diligent search has been unsuccessfully made for the lost instrument in the place where it was most likely to be found.—*Meek v. Spencer*, 8 Ind. 118.

[h] (Sup. 1857)

In an action to recover the amount of a note alleged to have been left with defendant for collection, the defendant offered to prove that the plaintiff had written him instructions not to attempt to collect the note of the maker, but to exchange it for the note of another person named, if he could, which he had done. This proof he offered to make by proving the contents of the letters of instruction, having first clearly shown that he had deposited the letters with another to be kept during his absence from home, and that while so on deposit they had been accidentally destroyed. The court refused to permit the proof to be made. It did not appear that the proof was objected to or rejected on the ground of irrelevancy, but rather for want of sufficient proof of loss. *Held*, that the evidence should have been admitted.—*Little v. Franklin*, 9 Ind. 216.

[i] (Sup. 1859)

Where a witness testified that a certain petition to the city council for improvements was in the city clerk's office, and the clerk testified that he could not find it after a thorough search in his office, it was *held* that a copy was

competent evidence.—*Little v. City of Indianapolis*, 13 Ind. 364.

[j] (Sup. 1859)

The affidavit of one who has held a promissory note that he has lost it, and made diligent search, but cannot find it, is sufficient to allow proof of its contents.—*Cleveland v. Worrrell*, 13 Ind. 545.

[k] (Sup. 1861)

On appeal from a justice's judgment in a suit on a note, evidence was offered that the original note was filed in the clerk's office of the appellate court, and the clerk testified that after diligent search he could not find it. *Held*, that this was sufficient ground for the introduction of a copy of the note, which the justice swore to be a correct transcript of the original.—*Carter v. Edwards*, 16 Ind. 238.

[l] (Sup. 1861)

Where the secretary of a railroad company, in response to a demand for a copy of a written contract of subscription, shown to have been in the possession of the company, answers that it has been lost, it is to be presumed, from the character and ordinary duties of the officer who made the admission of its loss, that he was the custodian of such writings, and therefore his admission was competent evidence against his employer.—*Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

Proof of the answer of the agent of a railway company, in whose custody a contract of subscription properly belonged, that such paper has been lost, is prima facie evidence sufficient to entitle the demanding party to give oral proof of the contents of the paper, in a suit against the company.—*Id.*

[m] (Sup. 1862)

An affidavit that the requisite transcript of a court of conciliation has been at a former trial of the cause filed with the papers, and cannot now be found among them, establishes its loss sufficiently to warrant the admission of parol evidence of its contents.—*Steel v. Williams*, 18 Ind. 161.

[n] (Sup. 1881)

Where a witness testified that he had received a letter from defendant together with two notes, that the notes had been burned, and that the letter was in his coat which had been stolen, and that he had not been able to recover either the coat or the letter, he was entitled to introduce secondary evidence of its contents.—*Peffley v. Noland*, 80 Ind. 164.

[o] (Sup. 1884)

In an action for breach of a written warranty, evidence that, some time before suit, the paper had been intrusted to a lawyer to bring suit on; that afterwards he and plaintiff had made thorough search in his office for the warranty, but could not find it; and that plaintiff did not now know where the lawyer resided, but had written to him without receiving an

answer,—is sufficient evidence of the loss of the paper to permit secondary evidence of its contents.—*Johnston Harvester Co. v. Bartley*, 94 Ind. 131.

[p] (Sup. 1886)

Proof that a letter which had been filed in the clerk's office as part of the evidence in the case has been searched for, and cannot be found, is sufficient to establish its loss, and parol testimony may be introduced to show the contents, where such contents are relevant and material.—*McComas v. Haas*, 107 Ind. 512, 8 N. E. 579.

[q] (Sup. 1888)

True copies are proper evidence for defendant, where the preliminary proof shows that the originals were in the possession of plaintiff's attorney for the purpose of preparing a bill of exceptions, on appeal from a verdict in a former trial of the same cause, and the failure to produce the originals at the second trial is not accounted for by plaintiff; it being fair to presume from the evidence that the originals were lost by the plaintiff's attorney.—*McCormick Harvesting Mach. Co. v. Gray*, 114 Ind. 340, 16 N. E. 787.

[r] (Sup. 1889)

The record of patents in the recorder's office not being required, evidence of a search for it there, and failure to find it, is inadmissible.—*Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749.

[s] (Sup. 1890)

Parol evidence of a written assignment of a judgment is inadmissible without showing the loss of the instrument or proof of search for it in the proper place.—*Coffing v. Carnahan*, 23 N. E. 855, 122 Ind. 427.

[t] (App. 1892)

Evidence that one had had possession of a written contract for the sale of goods; had deposited it in a certain place; that "he had looked for" but "had not found it"; and that he "might have looked it over" in some way,—is not sufficient, in the absence of anything further, to allow parol evidence as to its contents.—*Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856.

[u] (App. 1894)

Where plaintiff testified that he wrote a letter to defendant, but not what he did with it, and defendant, called in behalf of plaintiff, testified that he did not think he received it, and had not looked where it would be if he had it, and no notice to produce was served, it was error to admit secondary evidence of its contents.—*Newton v. Donnelly*, 9 Ind. App. 359, 36 N. E. 769.

Where plaintiff testified that he gave a telegram received by him to G., that he had searched for it, and thought he had not destroyed it, but did not state the result of his search, or that he had searched where he kept such papers, and on cross-examination admitted

that he did not know he gave it to G., it was error to admit secondary evidence of its contents.—*Id.*

[v] (App. 1901)

Where the complaint in an action on an attachment bond avers that "the same is lost or is in the possession of the defendant," proof that the bond is lost conforms to the complaint, and justifies secondary evidence.—*Barnett v. Lucas*, 61 N. E. 683, 27 Ind. App. 441.

[w] (App. 1908)

It was error to receive testimony as to the contents of a written option, where such testimony was not on a collateral matter, but was material to the issues, and where there was no showing that the writing could not be produced and introduced in evidence.—*University of Notre Dame Du Lac v. Winkler Bros. Mfg. Co.*, 42 Ind. App. 44, 84 N. E. 991.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 605-637.

See, also, 17 Cyc. pp. 540-555.

**§ 185. — Notice to produce primary evidence.**

[a] (Sup. 1824)

Notice to produce a paper may be given to the attorney of the party on record, although such party be but a nominal party. Notice to the real party himself is not necessary, where the suit is prosecuted for his benefit.—*Lagow v. Patterson*, 1 Blackf. 327.

[b] (Sup. 1839)

Secondary evidence of a document not in possession of the party offering such evidence is not admissible, without notice to the adverse party to produce the document.—*Rucker v. McNeely*, 5 Blackf. 123; *State ex rel. Kinnison v. Lockwood*, *Id.* 144.

[c] (Sup. 1840)

There is no necessity to give notice to the opposite party, in order to authorize the introduction of parol evidence of the contents of an instrument proved to be lost.—*McCreary v. Hood*, 5 Blackf. 316.

[d] (Sup. 1859)

Where the receipt of a judgment is upon a separate paper and has been delivered to the opposite party in the suit, notice must be given to him to produce it on the trial, and on his failure to do so the contents of it may be proved by parol.—*Williams v. Jones*, 12 Ind. 561.

[e] (Sup. 1861)

In an action against a corporation on a written subscription to stock which had passed into its possession, the objection that secondary evidence of its contents cannot be admitted because demand on its secretary for copies thereof had not been duly made in the manner required by 2 Rev. St. p. 93, § 284, in that the demandant was not authorized to administer oaths, and tendered no copy fee, cannot be urged, where the secretary, on demand, answered that he would not furnish copies except on

the order of the president or attorney.—*Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

[f] (Sup. 1862)

The plaintiff in a suit on a policy of insurance may read a copy of the notice of disaster, retained by him at the time he forwarded the original to defendant's secretary, without having notified the defendant to produce the original notice at the trial.—*Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352.

[g] (App. 1894)

If it be claimed that a writing is in the possession of an opposite party, parol evidence of its contents cannot be made until it is shown that notice has been served on such party to produce the same a reasonable time before the trial, and that he failed to do so.—*Ohio Thresher & Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[h] (App. 1894)

A witness may testify to the contents of a letter written him by defendant, after proof of its loss, though defendant was not notified to produce it, as provided by Rev. St. 1894, § 486 (Rev. St. 1881, § 478), there being no necessity for such notice, as the letter is not in defendant's possession.—*Continental Ins. Co. of New York v. Chew*, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

[i] (App. 1902)

A copy of a letter properly addressed and stamped and mailed at a post office is admissible in evidence, where the person to whom the letter was addressed had been ordered by the court to produce the original, which was not done, though the notice to produce the original was insufficient; it appearing that the original could not be found, and that further search would fail to discover it.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 642-660; 28

CENT. DIG. Insurance, § 1701.

See, also, 17 Cyc. pp. 556-564.

**§ 186. Character and degrees of secondary evidence.**

[a] (Sup. 1836)

The rule of law that the best evidence which the nature of the case admits must be produced applies as well to secondary as to primary evidence.—*Coman v. State ex rel. Armstrong*, 4 Blackf. 241.

If an original paper be lost, its counterpart, if one exist, is the best evidence of its contents; and inability to produce such counterpart must be shown, before a copy can be introduced.—*Id.*

[b] (Sup. 1838)

A copy of the record of a patent for United States land, from the general land office, under the signature of the commissioner and the seal of the office, is admissible in evi-

dence if the original patent be lost or destroyed.—*Smith v. Mosier*, 5 Blackf. 51.

[c] The record of a conveyance, shown to be a true copy, is admissible evidence for the grantee; satisfactory proof having been given of the loss of the original, and its execution duly proved.—(Sup. 1839) *Rucker v. McNeely*, 5 Blackf. 123; (1843) *McNeely v. Rucker*, 6 Blackf. 391.

[d] (Sup. 1842)

In case the defendant in ejectment refuses to produce the patent to plaintiff's lessor from the United States for the land in question, a copy, whether in the record book of the county or not, proved by a witness on the trial to be a true copy, or a certified copy from the records of the General Land Office, may be given in evidence.—*Rawley v. Doe ex dem. Beachamp*, 6 Blackf. 143.

[e] (Sup. 1844)

In an action against a bank to recover back the excess of interest paid on a usurious contract, the plaintiff offered in evidence a copy of so much of the discount book of the bank as showed the usury complained of, the original not being produced on notice. The clerk of the bank, who had made the copy on the plaintiff's application, testified that, having made it in a hurry, he could not testify to its accuracy. *Held*, that the copy was legal evidence.—*State Bank v. Ensminger*, 7 Blackf. 105.

[f] (Sup. 1847)

A copy of the record of a patent for United States land (such copy being certified by the commissioner of the general land office, under the seal of his office) is admissible evidence, if the absence of the original be sufficiently accounted for.—*Stephenson v. Doe ex dem. Wait*, 8 Blackf. 508, 46 Am. Dec. 489.

[g] (Sup. 1858)

As a general rule, there are no degrees in secondary evidence.—*Carpenter v. Dame*, 10 Ind. 125.

[h] (Sup. 1865)

A duly-authenticated transcript of a judicial record, in the absence of the original, is the highest evidence of the contents thereof, and secondary evidence is not admissible without proof of the destruction or nonexistence of the record.—*Jenkins v. Parkhill*, 25 Ind. 473.

[i] (Sup. 1868)

Where the minutes of a corporate meeting are lost, it is competent to prove by parol what was done. The fact that the clerk kept a separate memorandum of the transactions, which was preserved, does not exclude the parol evidence.—*Dix v. Akers*, 30 Ind. 431.

[j] (Sup. 1880)

A sworn copy of a record constitutes a well-recognized species of secondary evidence, ranking next to a duly attested copy.—*Jones v. Levi*, 72 Ind. 586.

[k] (App. 1901)

In an action on a lost attachment bond, where a copy is produced and certified by one of the witnesses the copy may be read in evidence, or witness may testify from recollection refreshed by it.—*Barnett v. Lucas*, 61 N. E. 683, 27 Ind. App. 441.

[l] (App. 1902)

The original contract having been lost, and after proper foundation plaintiff having testified as to its contents, the subsequent admission of what a witness testified was an exact copy of the contract made by him before the original was made, and which did not differ from the contract as testified to, was not error.—*Hagey v. Schroeder*, 65 N. E. 598, 30 Ind. App. 151.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 661-673.

See, also, 17 Cyc. p. 565.

### § 187. Determination of question of admissibility.

[a] (Sup. 1857)

Where the existence of a writing is established, testimony of the party who ought to have the custody of it touching its loss, with evidence of the search made for it, is addressed to the court, in determining the admissibility of secondary evidence of its contents.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

[b] (Sup. 1886)

Much latitude is allowable in the admission of parol evidence to supply what has been lost by the destruction of records, and where it appears that the finding is right upon all the evidence, and no harm was done by the extreme latitude allowed in the admission of such evidence, it will not be sufficient cause for reversal.—*McCullough v. Davis*, 108 Ind. 202, 9 N. E. 276.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 674, 675.

## VI. DEMONSTRATIVE EVIDENCE.

Evidence of personal resemblance in bastardy proceedings, see **BASTARDS**, § 63.

In criminal prosecutions, see **CRIMINAL LAW**, § 404.

Physical examination in action for malpractice or negligence of physicians, see **PHYSICIANS AND SURGEONS**, § 18.

Physical examination of injured person on assessment of damages, see **DAMAGES**, § 206.

Physical examination of party, see **DISCOVERY**, § 78.

### § 188. Exhibition of person or object in general.

[a] (App. 1909)

Inanimate objects can only be introduced in evidence by exhibiting them to the jury.—

Morgantown Mfg. Co. v. Hicks, 43 Ind. App. 32, 86 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 676.

See, also, 17 Cyc. p. 290; note, 68 Am. St. Rep. 242.

## § 192. Wounds and other injuries.

[a] (Sup. 1885)

Plaintiff, in suit for damages for an injury to his hand, may show his hand to the jury.—Indiana Car Co. v. Parker, 100 Ind. 181.

[b] (Sup. 1888)

In an action for personal injuries against a railroad, plaintiff exhibited to the jury the injured part. *Held*, that it was not error.—Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[c] (Sup. 1893)

Where, in an action against a street-railway company for personal injuries, there is evidence that an incurable disease of the hip joint and curvature of the spine resulted from the injury, it is proper for a physician to exhibit plaintiff to the jury, and to place him in different attitudes, in order to enable them to determine the extent of his disability. *Louisville, N. A. & C. R. Co. v. Wood*, 14 N. E. 572, 16 N. E. 197, 113 Ind. 544, followed.—*Citizens' St. R. Co. of Indianapolis v. Willoebey*, 134 Ind. 563, 33 N. E. 627.

[d] (App. 1896)

In an action for damages resulting from a physician's alleged negligent treatment of a wounded thumb, a witness may examine the thumb in the presence of the jury, and exhibit it and describe its condition.—*Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. 16.

[e] (Sup. 1903)

In an action against a physician for negligence in treating an injury to a woman's knee, it was not error for the court to refuse defendant's request that a physician testifying as a witness for defendant be allowed to examine plaintiff's knee in the presence of the jury, that he might testify as to its condition at that time.—*Aspy v. Botkins*, 66 N. E. 462, 160 Ind. 170.

[f] (Sup. 1907)

In an action for injuries to a servant, it was not error for the court to permit plaintiff to exhibit his injured foot to the jury, and to testify that it was stiff at the ankle joint, and by movements show the effects of the injury on his ability to use it.—*Pittsburgh, C., C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 677.

See, also, 17 Cyc. p. 295.

## § 196. Writings submitted for comparison.

Comparison of handwriting by experts, see post, §§ 561-566.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 681-682.

See, also, 17 Cyc. pp. 293, 294.

## § 197. — In general.

[a] (Sup. 1867)

Signatures proved or admitted to be in the party's handwriting cannot be given in evidence to the jury to enable them to determine, by a comparison with the disputed signature, whether it be genuine or not.—*Shank v. Butsch*, 28 Ind. 19.

[b] (Sup. 1870)

Where the genuineness of handwriting is in issue and other writings admitted to be genuine are already in the case, the jury may, with or without the aid of experts, make a comparison, but, if they are not papers in the case, the only evidence competent to go to the jury is that of the witnesses.—*Chance v. Indianapolis & W. Gravel Co.*, 32 Ind. 472.

[c] (Sup. 1874)

On an issue as to whether a signature is genuine, papers having no connection with the cause, though conceded to be genuine, ought not to be submitted to the jury for comparison with the signature alleged to be forged, though it is proper to submit the signature in question to the jury.—*Huston v. Schindler*, 46 Ind. 38.

[d] (Sup. 1890)

On an issue as to the genuineness of defendant's signature to the bonds sued on, plaintiff's witnesses produced letters which they testified had been received from defendant, but the signatures thereto were not admitted to be genuine. *Held* that such letters were properly excluded.—*White S. M. Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 681, 681½.

See, also, 17 Cyc. p. 293.

## § 198. — Reproduction and enlargement.

[a] (Sup. 1890)

A photograph of an enlarged microscopic copy of the disputed signature to the bond was properly excluded when not offered for comparison with such an enlarged copy of a genuine signature.—*White S. M. Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 682.

## VII. ADMISSIONS.

As to contents of writings, see ante, § 172.

By defendant in bastardy proceedings, see **BASTARDS**, § 60.

By witnesses, competency for purpose of showing interest or bias, see **WITNESSES**, § 374.

Competency of witnesses to testify to admissions by person since deceased or incompetent, see **WITNESSES**, § 163.

Express admissions in suit on note for amount of award, see **ARBITRATION AND AWARD**, § 83.

Ground of estoppel in pais, see **ESTOPPEL**, § 88. In criminal prosecutions, see **CRIMINAL LAW**, §§ 405-410.

Instructions as to weight and effect of admissions, see **TRIAL**, § 235.

Instructions as to weight and effect of admissions as invasion of province of jury, see **TRIAL**, § 194.

Officer's return on execution as evidence against him, see **EXECUTION**, § 343.

Relevancy of evidence of statements and conduct of parties, see ante, § 110.

### (A) NATURE, FORM, AND INCIDENTS IN GENERAL.

#### § 200. Nature and grounds for admission in general.

[a] (Sup. 1871)

The admissions or confessions of a party to the record are competent evidence.—*Denman v. McMahon*, 37 Ind. 241.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 684-686.

See, also, 16 Cyc. p. 933.

#### § 201. Subject-matter.

[a] (Sup. 1882)

A contradictory statement of a party who is a witness concerning an irrelevant fact is not admissible in evidence against him as an admission.—*Zonker v. Cowan*, 84 Ind. 395.

[b] (Sup. 1890)

In an action for slander in charging plaintiff with unchaste conduct, it is proper to prove declarations of defendant tending to show that he had such knowledge of plaintiff's character and conduct as apprised him that the charges were unfounded.—*Miller v. Cook*, 124 Ind. 101, 24 N. E. 577.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 687; 47 CENT. DIG. Trusts, § 132.

#### § 202. Interest of party and relation of admission thereto.

[a] (Sup. 1880)

Where notice to remove fences is given to the occupant of land in proceedings for the establishment of a highway to which he is made a party, his admissions as to matters connected therewith are those of a principal.—*Porter v. Stout*, 73 Ind. 3.

[b] (App. 1907)

Parties may be called as witnesses to a transaction, and they may be impeached by proof of inconsistent statements; but such statements cannot be introduced in the form of admissions.—*Zimmerman v. Beatson*, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 693-696; 39 CENT. DIG. Paymt. § 205.

See, also, 16 Cyc. pp. 940, 965-967.

#### § 203. Capacity of person making admission, and voluntary character thereof.

[a] (Sup. 1846)

If, pending a suit against husband and wife, the husband die, and the suit proceed against the wife alone, her admissions of the debt, made during coverture, are evidence against her.—*Lasselle v. Brown*, 8 Blackf. 221.

[b] (Sup. 1875)

In a suit by a married woman to recover the possession of her separate realty conveyed to defendant by herself and husband, on the ground that she was an infant and a feme covert at the time of such conveyance, and that she gave defendant written notice of her disaffirmance of the conveyance within 3½ years after attaining majority, her acts and declarations after reaching majority and before her disaffirmance of the contract, tending to prove a ratification of such conveyance, are admissible in evidence.—*Scranton v. Stewart*, 52 Ind. 68.

[c] (App. 1902)

The mere fact that a party to an action is under guardianship as being insane does not in all cases authorize the exclusion of his admissions against interest, without reference to his actual physical condition.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 688-692.

See, also, 16 Cyc. p. 942.

#### § 205. Mode of making and form in general.

[a] (Sup. 1874)

Testimony of an admission by defendant that he was willing to pay the claim sued on if he had not been sued on it is inadmissible.—*Brooks v. Riding*, 46 Ind. 15.

[b] (Sup. 1881)

In a suit to recover personal property, the sworn tax list, in which defendant made no claim for the property, is admissible against him.—*Lefever v. Johnson*, 79 Ind. 554.

[c] (Sup. 1883)

In an action for injuries caused by a defective driveway leading to defendants' warehouse, evidence that one of the defendants, in a conversation with witness, said that if he had been there the thing would not have hap-

pened, because he would have known that he could not drive in there with that kind of a load, was competent, as an admission that the driveway was defective.—*Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205.

[d] (Sup. 1894)

Where, in a suit to set aside a conveyance on the ground that the same is fraudulent against the grantor's creditors, it was shown that the grantee assumed that the grantor owed him prior to the conveyance, and that he received the deed to discharge a pre-existing debt, a statement contained in the assessment list can be looked to to ascertain what personal property or claims the grantee owned at the time; the jury having the right to believe that the grantee was assessed upon all of his property.—*Milburn v. Phillips*, 34 N. E. 983, 36 N. E. 360, 136 Ind. 680.

[e] (Sup. 1905)

Plaintiff's schedules of personal property filed with the township assessor, and verified by her affidavit, which contained no statement of her ownership of the note sued on, was admissible to support an allegation that she did not own the note at the time such schedules were made.—*Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 699-706.

See, also, 16 Cyc. pp. 939-964.

§ 206. Judicial admissions.

Admissibility to impeach witness, see WITNESSES, § 393.

Estoppel by judicial records in general, see ESTOPPEL, § 2.

Explanation or limitation, see post, § 263.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 707-744.

See, also, 16 Cyc. pp. 964-976.

§ 207. — In general.

[a] (Sup. 1881)

Admissions made simply for the purposes of a particular trial cannot be used against the party upon another and different trial.—*McKinney v. Town of Salem*, 77 Ind. 213.

[b] (Sup. 1881)

Reports made by an administrator containing admissions and declarations are competent evidence against him in an action on his bond, though such reports had never been acted upon by the court.—*Beal v. State ex rel. Beal*, 77 Ind. 231.

[c] (App. 1895)

The incidental statement of counsel in opening the case, of a fact as he expected to prove it, is not an admission of such fact, so as to relieve the opposite party of the burden of proof if that fact is relied on by him.—*Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470.

[d] (Sup. 1904)

Though a landowner's motion in arrest of judgment in a suit to recover an assessment for benefits for the construction of a public drain, on the ground that the description of his lands in the report of the commissioner was too indefinite to sustain a judgment, presented no issue which such landowner was authorized to tender, it nevertheless amounted to an admission that there was a defect or error in the description, so that a decision denying the motion in arrest did not amount to a finding that the description was either correct or sufficient.—*Ager v. State ex rel. Heaston*, 70 N. E. 808, 162 Ind. 538.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 707-712.

See, also, 16 Cyc. p. 964.

§ 208. — Pleadings.

Estoppel by pleadings, see ESTOPPEL, § 3.

[a] (Sup. 1846)

An answer in chancery is competent evidence against the party in an action at law.—*McNutt v. Dare*, 8 Blackf. 35.

[aa] (Sup. 1859)

The answer of a guardian ad litem is not evidence against his ward in other suits.—*Hiatt v. Brooks*, 11 Ind. 508.

[b] (Sup. 1870)

In an action for goods sold, a schedule of property verified by plaintiff in an action by a third person against the plaintiff, wherein he failed to set out the alleged claim against defendant, is admissible as an admission by plaintiff.—*Springer v. Drosch*, 32 Ind. 486, 2 Am. Rep. 356.

[c] (Sup. 1879)

In a contest of a will, one of several legatees, taking separately under the will, filed, and then withdrew, a pleading admitting fraud. At the trial the contestants offered the pleading in evidence. *Held*, not admissible.—*Hayes v. Burkam*, 67 Ind. 359.

[d] (Sup. 1881)

In foreclosure by an assignee of notes secured by mortgage, and not governed by the law merchant, A., who had been joined as a defendant, made answer that he had purchased the mortgaged land without notice of the assignment of the notes, under attachment proceedings against the payee of the notes, in which the maker was garnished. *Held*, that the record of said attachment and garnishment proceedings was competent.—*Sharts v. Awalt*, 73 Ind. 304.

[e] (Sup. 1884)

A pleading made on the first trial, but withdrawn on the second, is competent as an admission.—*Boots v. Canine*, 94 Ind. 408.

[f] (Sup. 1886)

When two paragraphs of a complaint state different causes of action, and the court or-



ders them separated and docketed as separate actions, the pleadings of the one, showing a suit to foreclose an equity of redemption, may be admitted in the action to recover possession, as evidence to show the different kinds of claims made by plaintiff under the same instrument.—*Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5.

[g] (Sup. 1887)

Plaintiff withdrew the second paragraph of his complaint, and the defendant afterwards offered it in evidence. *Held*, that it was competent to go to the jury, subject to the right of the plaintiff to explain or contradict the admissions contained in it.—*Baltimore, O. & C. R. Co. v. Evarts*, 112 Ind. 533, 14 N. E. 369.

[h] (Sup. 1896)

In a suit to enjoin a town from opening a street across plaintiff's land, defendant set up certain condemnation proceedings and alleged payment to plaintiff of a sum awarded to him as damages, to which defense plaintiff replied that he had accepted such amount, and had agreed to give possession of the land on a condition which had not been performed. The decree enjoined the opening of the street until compliance with said condition. In a subsequent action in trespass by plaintiff against the town marshal defendant set up the condemnation proceedings, the payment of damages to plaintiff, and compliance with the condition on which it was received. *Held*, that the pleadings and decree in the injunction suit were admissible as an admission by plaintiff of the receipt of the money, and of the condition on which he accepted it.—*Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 713-725.

See, also, 16 Cyc. pp. 967-971.

§ 209. — Stipulations and agreed statements.

[a] (Sup. 1867)

Where, previous to the second trial of a cause, the plaintiff's counsel gave notice that an admission relative to certain facts made upon the former trial would not again be made, and the defendant's counsel having again offered the admission, objection was made, and it was shown that the admission had been made by the attorney, without the knowledge of his client, for the purpose of delay at the former trial, it was *held* that the admission could not again be received in evidence, having been limited to a special occasion.—*Hays v. Hynds*, 28 Ind. 531.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 726-728.

See, also, 16 Cyc. p. 973.

§ 210. — Petitions, affidavits, and depositions.

Admissibility of depositions to impeach witness, see WITNESSES, § 393.

[a] (Sup. 1854)

The affidavit of an agent of the party procuring it, and on which he has obtained a continuance, may be read at the trial, as evidence of the admissions of such party.—*Trustees of Wabash & E. Canal v. Bledsoe*, 5 Ind. 133.

[b] (Sup. 1877)

An *ex parte* affidavit and a suppressed deposition are incompetent on the final trial of a cause.—*Houston v. Bruner*, 59 Ind. 25.

[c] (Sup. 1893)

In an action against a railroad company for personal injuries caused by falling into an unguarded pit, in order to prove notice of the existence of the pit it was reversible error to admit in evidence an affidavit made by defendant on a motion for a change of venue, though there was also circumstantial evidence of notice. *McCabe, J.*, dissenting.—*Ohio & M. Ry. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 729-737.

See, also, 16 Cyc. pp. 974-976.

§ 211. — Testimony.

Admissibility of former testimony to impeach witness, see WITNESSES, § 393.

[a] (Sup. 1833)

The admissions of a party examined under oath on a trial before a justice cannot be proved in the circuit court on appeal; the party being in court on the trial of the appeal, and not there examined.—*Carter v. Buckner*, 3 Blackf. 314.

[b] (Sup. 1834)

Defendant against whom judgment had been rendered by a justice appealed to the circuit court. The transcript not being filed in time, the appeal was dismissed, and appellant sued the justice for his neglect. *Held*, that plaintiff might prove admissions, made on the trial of the original suit, by plaintiff there, tending to show that there was no foundation for that suit.—*Ingram v. Plasket*, 3 Blackf. 450.

[c] (Sup. 1836)

If a defendant, in testifying as a witness, state that he has no knowledge of a part of the plaintiff's claim, this is not an acknowledgment of the correctness of the claim, and plaintiff cannot recover for that part without further proof.—*Claypool v. Miller*, 4 Blackf. 163.

[d] (Sup. 1847)

Suit was commenced by A. before a justice of the peace, and taken by appeal to the circuit court. *Held*, that on the trial, on appeal, the defendant might prove admissions which had been made by the plaintiff as a witness in a previous suit in the circuit court, brought by one B. against the defendant.—*McKinzie v. Reneau*, 8 Blackf. 411.

[e] (Sup. 1861)

Admissions of a party examined under oath, made in a trial before a justice of the peace, cannot be proved in a trial on appeal, when the party is present in court on the appeal trial, and is not examined at, or is only examined after, the refusal of the court to admit the offered proof.—*Carter v. Edwards*, 16 Ind. 238.

[f] (Sup. 1876)

The testimony of a party is to go to the jury as evidence, not as an admission of facts.—*Matthews v. Story*, 54 Ind. 417.

[g] (Sup. 1890)

The record of an action between the defendant and a third person for the same property, in which action the present plaintiff testified that the property belonged to such third person, is admissible in evidence in defense.—*Jones v. Dipert*, 123 Ind. 594, 23 N. E. 944.

[h] (App. 1902)

In an action for slander in charging forgery of a check, it was not error to admit evidence of defendant's testimony, in another action between the parties, denying giving the check.—*Ruble v. Bunting*, 68 N. E. 1041, 31 Ind. App. 654.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 738-744.

See, also, 16 Cyc. p. 976.

## § 212. Offers of compromise or settlement.

Explanation or limitation, see post, § 203.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 745-753.

See, also, 16 Cyc. pp. 946-952.

## § 213. — In general.

[a] (Sup. 1844)

An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting in itself a point yielded for the sake of peace, and not because it was just and true, is not competent evidence against the party making it. Aliter with regard to an independent fact admitted to be true, but not constituting such yielded point.—*Wilt v. Bird*, 7 Blackf. 258.

[b] (Sup. 1844)

The admissions of defendant made to avoid litigation are not legal evidence.—*Kinsey v. Grimes*, 7 Blackf. 290.

[c] (Sup. 1857)

Where, before suit was threatened, the parties met almost for the sole purpose of a mutual ascertainment of facts, and such admissions of facts as were made were made because of their truth, and not because of the desire to compromise, such admissions are admissible.—*Cates v. Kellogg*, 9 Ind. 506.

[d] (Sup. 1878)

An unaccepted offer by way of compromise is not evidence against the party making it.—*Board of Com'rs of Jennings County v. Verbag*, 63 Ind. 107; *Dailey v. Coons*, 64 Ind. 545.

[e] (Sup. 1884)

The fact that an admission which was not made to effect a compromise was made in the course of a negotiation for a compromise does not render it inadmissible in evidence.—*Watson v. Crowsore*, 93 Ind. 220.

[f] (Sup. 1884)

On a plea of the general issue in a suit by a turnpike company against an adjoining landowner for so constructing his fence across a stream as to obstruct the water, thereby destroying the company's bridge, it is error to exclude evidence offered by such owner that his fence was properly built so as to avoid injury to the bridge as far as possible; but evidence of an offer by him to reconstruct or repair the bridge is not admissible.—*Stevens v. Lafayette & C. Gravel Road Co.*, 99 Ind. 392.

[g] (Sup. 1888)

An admission by defendant that he uttered slanderous words of plaintiff, although made in a conversation relating to a compromise, is admissible, if not made for the purpose of securing a compromise.—*Binford v. Young*, 115 Ind. 174, 16 N. E. 142.

[h] (Sup. 1888)

In an action by a servant for injuries received through the negligence of his master a letter written by the servant to the master, constituting an offer of compromise, was inadmissible.—*Louisville, N. A. & C. R. Co. v. Wright*, 16 N. E. 145, 17 N. E. 584, 115 Ind. 378, 7 Am. St. Rep. 432.

[i] (App. 1891)

In an action on an account, plaintiff testified that defendant offered to give him a horse, estimated by defendant at \$100, for the account, and \$20 to boot. Defendant objected to the evidence on the ground that it was simply an offer to compromise. *Held* competent, since a party cannot render an admission incompetent by testifying that he intended to bring about a compromise, unless there was in fact an honest controversy between the parties, and negotiations pending or proposed to settle it without litigation.—*Hood v. Tyner*, 3 Ind. App. 51, 28 N. E. 1033.

[j] (App. 1892)

In an action by an attorney for services rendered, it is admissible to ask defendant if, on a certain occasion, he did not state that he would pay plaintiff what he "owed," on certain conditions, notwithstanding defendant has testified generally that any offer of payment he made was for the purpose of avoiding litigation, and not because he was indebted, since a party cannot render an admission incompetent by testifying that he intended it to bring about

a compromise, unless there was in fact an honest controversy between the parties, and a treaty pending or proposed to settle it without litigation.—*Steeg v. Walls*, 4 Ind. App. 18, 30 N. E. 312.

[k] (App. 1900)

Evidence of statements made by a contractor to a property owner in regard to the completion of a street improvement after final estimate by the city engineer was properly excluded in a proceeding to collect a special assessment for such improvement, where such statements were made in connection with negotiations for a compromise and settlement of the contractor's claim against such owner's property for his portion of the assessment.—*Fralich v. Barlow*, 58 N. E. 271, 25 Ind. App. 383.

[l] (App. 1903)

In an action to restrain a tenant from committing waste, it was error to admit in evidence a letter written by defendant to plaintiff, stating that he was sure that they could "fix up the wood deal," that he was waiting to get an itemized list of what he had sold, and that he would pay over all that he had received therefor; such letter having been written to avoid litigation, and containing no independent admissions of fact.—*Halstead v. Coen*, 67 N. E. 957, 31 Ind. App. 302.

[m] (App. 1905)

An offer to compromise a disputed claim is not admissible as an admission of indebtedness.—*Schnull v. Cuddy*, 36 Ind. App. 262, 74 N. E. 1030.

[n] (App. 1906)

Evidence of a conversation of witness with a party to an action is not rendered inadmissible by the fact that it was for the purpose of compromising a suit brought and tried before the action at bar.—*McCrum v. McCrum*, 76 N. E. 415, 36 Ind. App. 636.

[o] (App. 1905)

An offer made by the landowner for the purpose of agreeing on the compensation to be paid for a railroad right of way is not evidence against him as an admission; there having been a failure to agree, resulting in condemnation proceedings.—*Indianapolis Northern Traction Co. v. Dunn*, 76 N. E. 269, 37 Ind. App. 248.

[p] (App. 1909)

Letters written between the parties solely to effect a compromise, and containing no admission of an independent fact as a fact, were inadmissible.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 745-751, 753.

See, also, 16 Cyc. p. 946.

§ 215. Statements in writing.

Books of account, see post, § 354.

Writings as hearsay, see post, § 318.

[a, b] (Sup. 1878)

In an action to recover the purchase price of land conveyed to defendant, a letter identified as addressed to plaintiff, and referring to the land in controversy, and offering plaintiff a certain sum therefor, is admissible as an admission of the sum to be paid.—*Huston v. Stewart*, 64 Ind. 388.

[c] (Sup. 1881)

In an action to set aside, as fraudulent, a conveyance by a husband to his wife, the wife's sworn statements to the assessor as to her separate property are admissible to show her ability or inability to pay for the real estate conveyed to her.—*Sherman v. Hogland*, 73 Ind. 472.

[d] (Sup. 1881)

In an action on an administrator's bond, his reports filed, though not acted upon, are evidence as admissions against him.—*Beal v. State ex rel. Beal*, 77 Ind. 231.

[e] (Sup. 1881)

In a suit to set aside a conveyance of realty for the purpose of defrauding creditors, original assessment lists from another state made out and sworn to by two of the defendants are admissible in evidence.—*Hall v. Bishop*, 78 Ind. 370.

[f] (Sup. 1881)

In an action for damages for fraud in the sale by defendant to plaintiff of a patent right, plaintiff alleged that defendant represented that he had a contract with one M. to furnish to him and his vendee of the patent certain bolts necessary for the construction of the article, at one cent a pound. Held that, the evidence as to the cost of the bolts being conflicting, a letter offered by defendant, which was written by plaintiff to a purchaser from him, in which plaintiff stated that he did not furnish the purchaser with bolts as agreed because the foundry at which they were to be made had stopped work, was admissible.—*Peffley v. Noland*, 80 Ind. 164.

[g] (Sup. 1885)

Recitals in reports of appraisers chosen, by an agent appointed to negotiate loans, to place a value on property on which loans are asked, constitute no evidence of the truth of the facts stated, but may be considered in determining whether the agent acted in good faith.—*Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

[h] (Sup. 1886)

Tax lists, although sworn to by the taxpayer, are not competent to prove admissions as to the value of the property described therein.—*Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571.

[i] A tax list returned by the judgment debtor to the assessor, under oath, shortly before the proceeding, is admissible to show the property claimed by him at that time.—(Sup. 1888) *Towns v. Smith*, 115 Ind. 480, 16 N. E. 811; (1890)

Comstock v. Grindle, 121 Ind. 459, 23 N. E. 494.

[j] (App. 1891)

In an action for goods sold and delivered, letters written by defendants to third persons which tend to explain their conduct in regard to the goods are admissible as against the writers.—Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103.

[k] (Sup. 1893)

In an action involving the value of land, the tax duplicate is not admissible as a declaration made by the taxpayer, since such duplicate is not a copy of the original list made by him, nor is it a record made by him or at his direction.—Swaim v. Swaim, 134 Ind. 596, 33 N. E. 792.

Tax receipts are not admissible against a taxpayer as admissions of value.—Id.

[l] (Sup. 1896)

On an issue as to a testator's sanity, an instrument executed by a contestant of the will, acknowledging the receipt of certain land in full consideration of further claims on the estate, is not admissible, where it did not appear that there was necessity for showing the relations between testator and contestant before the execution of the will.—Bower v. Bower, 142 Ind. 194, 41 N. E. 523.

[m] (App. 1895)

In an action on an insurance policy, the sworn tax list rendered by insured is inadmissible in evidence to contradict the insured's testimony as to the value of the property, it being an admission for a special purpose.—German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 30 N. E. 534.

[n] (App. 1905)

A contract limiting a carrier's liability for carriage of live stock is admissible in evidence in an action against such carrier for injuries to the stock, as such contract is in the nature of an admission.—Chicago, I. & L. R. Co. v. Hare, 36 Ind. App. 422, 75 N. E. 867.

[o] (App. 1908)

An assessment list made in April, 1903, under Burns' Ann. St. 1901, vol. 3, § 8458 (Acts 1891, p. 217, c. 99, § 53), which requires an affidavit as follows: "I further swear that I have, to the best of my knowledge and judgment, valued said property at its true cash value, by which I mean the usual selling price," etc.—is admissible in an action against a carrier for injuries to a racing mare while loading her into a car in August, 1903, as an admission by plaintiff to contradict his testimony as to the value of the animal.—Indiana Union Traction Co. v. Benadum, 42 Ind. App. 121, 83 N. E. 261.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 754-759.

See, also, 16 Cyc. pp. 943-946.

## § 216. Oral statements.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 760, 761.

See, also, 16 Cyc. p. 942.

## § 217. — In general.

[a] (Sup. 1884)

Statements of plaintiff that his claim was "settled" are admissible to prove payment.—Applegate v. Baxley, 93 Ind. 147.

[b] (Sup. 1906)

On the issue of fraud in the representations made by the applicant for life insurance, evidence of the acts and declarations of the insured closely related to the transaction out of which the policy of insurance originated is admissible.—Houghton v. Aetna Life Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

Statement made by insured in the latter part of December, 1898, as to his suffering from the effects of a severe surgical operation recently performed on him, was admissible in evidence in an action on the policy of insurance, where it is shown that the contract of insurance was not fully executed by delivery of the policy until February 7, 1899.—Id.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 760; 30 CENT.

DIG. PAYMT. § 205.

See, also, 16 Cyc. p. 942.

## § 218. — Relating to matters of record or in writing.

[a] (Sup. 1833)

D. and K., having bought lands and built mills in partnership, executed a written agreement, stating that D. had bought K.'s interest in the mills and land adjoining them, and was to pay him for the same \$500. In a suit by K. against D. on this agreement, D. demanded, by way of set-off, a certain sum of money which he alleged he had advanced K. in building the mills. Held, that K. might introduce a witness to prove in opposition to D.'s demand that D. had acknowledged, after the date of the written agreement, that the money mentioned in that agreement was to be over and above the expenses of building the mills.—Dickson v. Kelsey, 3 Blackf. 180.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 761.

See, also, 16 Cyc. p. 942.

## § 219. Acts or conduct.

[a] (Sup. 1887)

In an action for contribution, where plaintiff as surety on a note alleged the existence of a contract of co-suretyship between himself and one claiming to be merely an indorser, evidence that the alleged co-surety, after the execution of the note, had entered into an agreement with the maker whereby the latter was to pay him a certain sum each week, under which agreement he had received a stated amount, while

not competent for the purpose of charging such alleged co-surety with the money received, in the absence of an allegation on that subject, was competent as an admission by conduct.—*Knopf v. Morel*, 13 N. E. 51, 111 Ind. 570.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 762-770.

See, also, 16 Cyc. pp. 952-954.

## § 220. Acquiescence or silence.

[a] (Sup. 1858)

Evidence of a party's silence as to a duebill in his possession, at a settlement in which the money given for the duebill and other parts of the transaction were included, is admissible to show that the holder claimed nothing on the duebill.—*Thomas v. White*, 11 Ind. 132.

[b] (Sup. 1871)

Where a statement is made in the hearing of a party to a suit in regard to the facts affecting his rights, and he makes a reply wholly or partially admitting their truth, the declarations and reply are both admissible against him as an admission.—*Pierce v. Goldsberry*, 35 Ind. 317.

Where a statement is made in the hearing of the party to a suit in regard to facts affecting his rights, calling for a reply, and he is in a situation where he could hear the statement, and is possessed of knowledge regarding it, and is able to reply, if he so desired, which he failed to do, such statement is admissible against him as evidence of the tacit admission of the facts.—Id.

Where a statement is made in the hearing of one in regard to facts affecting his rights, and he makes no reply, and the statement is made under circumstances which would naturally call for a reply, the statement is admissible as a tacit admission of the facts.—Id.

[c] (Sup. 1874)

The fact that a party has remained silent when an adversary testified to certain facts prejudicial to him at a former trial does not raise a presumption of acquiescence, so as to render evidence of such silence competent as evidence of an admission.—*Broyles v. State ex rel. De Long*, 47 Ind. 251.

[d] (Sup. 1875)

In a suit upon a promissory note given for the services of an attorney in defending the maker on a charge of homicide, the latter introduced evidence that he was an infant when the note was given. *Held*, that it was competent for the plaintiff to prove that, on the trial of the defendant on the charge of homicide, no plea or defense was made by him on the ground that he was a minor.—*Benson v. McFadden*, 50 Ind. 431.

[e] (Sup. 1880)

Declarations made by defendant's intestate, while testifying in a judicial proceeding, to the effect that no contract existed between himself and the plaintiff, were not admissible against

the latter in his action based on a contract made with such decedent, though plaintiff was present when such declarations were made, and remained silent, since he was not at liberty to interrupt the proceedings.—*Howard v. Howard*, 69 Ind. 592.

[f] (Sup. 1881)

In an action for seduction, an implied admission by defendant of the truth of plaintiff's testimony before a justice in a bastardy proceeding instituted against him, resulting from his failure to deny her statements as a witness when made in his presence, was properly excluded.—*Johnson v. Holliday*, 79 Ind. 151.

The mere silence of a party in a court when charged with an offense is not admissible against him.—Id.

[g] (Sup. 1882)

It appeared that the trouble had occurred at a trial before a justice, and there was evidence that after the combat one of plaintiff's assailants again took the witness stand, and stated to plaintiff's attorney that he was ready to go on with the trial, whereupon the attorney answered, "You and your crowd have nearly killed [plaintiff], and we cannot go on with the trial," to which no response was made. *Held*, that the fact that defendants made no reply to such remark was admissible as showing an admission by defendants of the assault.—*Puett v. Beard*, 86 Ind. 104.

Where defendant, a party to an action, while testifying, left the witness' chair and assaulted the other party to the suit, and on resuming his seat stated to counsel who was cross-examining him "We are ready to go on with the trial," to which the attorney answered, "You and your crowd have nearly killed B., and we cannot go on with the trial. You have disabled him so that we can't try the case now"—the colloquy was admissible as showing a tacit admission by defendant of his commission of the assault, the proceedings before the court, having been terminated by the conduct of defendant.—Id.

[h] (Sup. 1882)

In a suit on a note, the execution of which was in issue, a letter, received by the defendant from the plaintiff, informing him of the loss of the note, to which defendant made no reply, although not admissible to establish defendant's liability to pay the note, was nevertheless competent to show the surrounding circumstances of the case.—*Hayes v. Morgan*, 87 Ind. 231.

[i] (Sup. 1884)

An inference that the township trustees acquiesced in the result of an election of a county superintendent of public schools, as erroneously announced by one of them who acted as teller, is not raised by the mere fact that they declared the person so announced to have received a majority of votes to have been duly elected, and thereupon adjourned without objection to the announcement, where they all sup-

posed at the time that the announcement was of the correct result.—*State ex rel. Nebeker v. Sutton*, 99 Ind. 300.

[j] (Sup. 1886)

The declarations of a grantor tending to show that a deed had never been delivered, made in the presence of the grantee, and not denied, are admissible.—*Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726.

[k] (Sup. 1894)

Remarks made by plaintiff's brother in his presence directly after the accident, as to its cause, which were not challenged by him, are competent as admissions.—*Springer v. Byram*, 137 Ind. 15, 36 N. E. 301, 23 L. R. A. 244, 45 Am. St. Rep. 150.

[l] (App. 1896)

In order that one may be regarded as admitting or acquiescing by his silence in statements made by another, they must appear to have been such and made under circumstances such as call for a response from him, and they must have been made within his hearing.—*Leach v. Dickerson*, 42 N. E. 1031, 14 Ind. App. 375.

[m] (Sup. 1897)

Where a son conveyed all his property to his father in trust for himself during life, remainder to his legal representatives, and his father reconveyed it to him, declarations of the son, made as a part of the negotiations leading up to the execution of the deed of reconveyance, as to the understanding between the father and son, and which were communicated to the trustee, who did not deny them, were competent to show why the property was reconveyed.—*Ewing v. Bass*, 48 N. E. 241, 149 Ind. 1.

[n] (Sup. 1898)

Evidence that witness had conversed several times with plaintiff about certain notes, and that plaintiff had not denied that he executed them, is not admissible under the rule that silence, when one is required to speak, may be shown, where witness did not disclose the character or extent of the conversations.—*Miller v. Dill*, 49 N. E. 272, 149 Ind. 326.

[o] (Sup. 1901)

Where a lessee of a water right sends a check to the lessor in payment of rent, accompanied by a letter stating that it is not an admission that the lessee has received all the water contracted for, but that a large portion thereof has been diverted, and that the lessor will be held responsible therefor, and the latter receives the check and does not deny such statements, the lessee may introduce such letter in an action against the lessor.—*St. Joseph Hydraulic Co. v. Globe Tissue-Paper Co.*, 59 N. E. 995, 156 Ind. 665.

[p] (App. 1901)

If statements were made in the presence and hearing of a person affecting his rights, and under such circumstances as called for a

reply, what he said, or if he failed to say anything, may be proved as in the nature of an admission.—*Masons' Union Life Ins. Ass'n v. Brockman*, 59 N. E. 401, 26 Ind. App. 182.

FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 771-785.

See, also, 16 Cyc. pp. 956-962.

(B) BY PARTIES OR OTHERS INTERESTED IN EVENT.

By party in justice's court on oath, as evidence in appellate court, see JUSTICES OF THE PEACE, § 175.

§ 221. Parties of record.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 786-812; 47

CENT. DIG. Trusts, § 132; 49 CENT.

DIG. Wills, § 410.

See, also, 16 Cyc. pp. 977-984.

§ 222. — In general.

[a] (Sup. 1836)

The acknowledgments of the principal obligor in a bond may be proved, to affect his own liability, although there are sureties joined in the suit with him.—*Hackleman v. Moat*, 4 Blackf. 104.

[b] (Sup. 1839)

In an action of debt against A. and B. on a promissory note, alleged in the declaration to have been made by the defendants, A. made default, and B. pleaded nil debet under oath. *Held*, on the trial of the issue with B., that the plaintiff might prove the partnership of the defendants at the date of the note, and A.'s subsequent admissions respecting the execution of the note.—*Ensminger v. Marvin*, 5 Blackf. 210.

[c] (Sup. 1866)

In a suit upon two bonds given by an administrator, the second having been given upon the application of the sureties on the first to be discharged, the sureties upon the second bond offered to prove the declarations of the administrator, made at the time of executing the second bond, as to when the defalcation sued for occurred. *Held*, that the evidence was not competent.—*Lane v. State ex rel. Harmon's Adm'r*, 27 Ind. 108.

[d] (Sup. 1871)

In an action on a note against two joint makers, one of whom defaulted and the other pleaded a special defense alleging liability as surety only, a letter by the defaulting maker, written to plaintiff, is inadmissible as evidence against such other defendant.—*Pierce v. Goldsberry*, 35 Ind. 317.

[e] (Sup. 1871)

In an action by an attorney for his services, he may testify as a witness to admissions made by defendants as to the amount realized by his successful defense of the action in which

they employed him.—*McNiel v. Davidson*, 37 Ind. 336.

[f] (**Sup.** 1891)

In an action to rescind a contract on the ground of fraudulent representations, the conveyance of land made by plaintiffs pursuant to the contract having been made to one of defendants, the admissions of another defendant were properly admissible.—*Ross v. Hobson*, 26 N. E. 775, 131 Ind. 166.

[g] (**App.** 1891)

In an action against several defendants for malicious prosecution, statements made by one of them, in the absence of his codefendants, and after the plaintiff's acquittal in the criminal prosecution, to the effect that his own testimony therein was false, and that he was hired to testify, are admissible against himself only, and not against his co-defendants.—*Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487.

[h] (**App.** 1893)

In an action for maliciously prosecuting plaintiff for trespass, plaintiff's declarations that one of the defendants is entitled to the possession, alleged to have been made during the pendency of an ejectment suit by plaintiff against defendants, and terminated by a judgment in his favor, are not admissible, since their effect would be to impeach the judgment.—*Keesling v. Doyle*, 8 Ind. App. 43, 35 N. E. 126.

[i] (**App.** 1893)

On the issue of fraud in the final settlement of a guardian, testimony as to statements by him concerning the amount of the ward's estate, or what he expected it to be, are admissible to show its amount, and also to show that heavy charges against the ward for board, made just before close of the guardianship, were an afterthought, and were not intended when the ward was living with him as a member of his family.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

[j] (**Sup.** 1894)

The fact that several actions are consolidated, and the evidence is only heard once, and then is applied by the court to the several cases, does not make it proper to apply evidence of admissions against interest by a party to one of the actions to any action except that in which the person making the admissions was herself a party.—*Gaar, Scott & Co. v. Shaffer*, 139 Ind. 191, 38 N. E. 811.

[k] (**App.** 1894)

In an action by a guardian to recover certain logs alleged to have been cut from land in which plaintiff's ward owned a remainder, the admission by a defendant that he had purchased the logs was competent as against all the defendants; it not appearing that defendants asked to have the consideration of it limited as an admission against the defendant alone.—*Smith v. Meiser*, 38 N. E. 1092, 11 Ind. App. 468.

In suit by a remainder-man against a tenant for life for cutting timber growing on the inheritance, evidence that a mill owner, a codefendant, admitted that he had purchased the timber, is admissible against the mill owner, though the other defendants were not present.—*Id.*

[l] (**Sup.** 1895)

In an action on an assigned claim, the answer of plaintiff's assignor, who was a defendant, admitting the assignment, was not admissible for any purpose against its codefendant.—*Indianapolis, D. & W. R. Co. v. Center Tp.* 40 N. E. 134, 143 Ind. 63.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 786-800, 803-808; 39 CENT. DIG. Paymt. §§ 12, 205; 47 CENT. DIG. Trusts, § 132; 49 CENT. DIG. Wills, § 410.  
See, also, 16 Cyc. p. 977.

**§ 224. Real party in interest.**

[a] (**App.** 1902)

Admissions against interest of a party under guardianship were competent in an action against him and his guardian to charge his estate, they being the admissions of the real party in interest.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 814.  
See, also, 16 Cyc. p. 984.

**§ 226. Joint interest.**

[a] (**Sup.** 1858)

If parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is in general, in the absence of fraud, evidence against all. They stand in this respect in a relation to each other similar to that of existing partners.—*Chapel v. Washburn*, 11 Ind. 393.

[b] (**Sup.** 1879)

Where one of several devisees taking separately under a will, in a contest thereon, filed a pleading admitting the fraud alleged, which she subsequently withdrew, it was not admissible against her, since the other devisees could not be bound thereby, and its admission without affecting their interest was impossible.—*Hayes v. Burkam*, 67 Ind. 359.

[c] (**Sup.** 1884)

Where the whole will is attacked on the ground of want of mental capacity of testator, admissions of one legatee, who is also a contestee, are not admissible against the validity of the will.—*Shorb v. Brubaker*, 94 Ind. 165.

[d] (**Sup.** 1898)

An admission of one of several contestees of a will that the testator was of unsound mind is inadmissible in an action to revoke the will on the ground of testator's incapacity.—*Roller v. Kling*, 49 N. E. 948, 150 Ind. 159.

## [e] (Sup. 1910)

Admissions of one joint owner of land sought to be condemned for an electric railroad right of way made in the absence of other owners are incompetent.—*Indianapolis & C. Traction Co. v. Wiles*, 91 N. E. 161.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 815-821; 49 CENT. DIG. Wills, §§ 135, 410.

See, also, 16 Cyc. pp. 979-983.

## § 227. Persons suing or defending in different character or capacity.

## [a] (Sup. 1877)

On the trial of a proceeding supplementary to execution by a creditor against his debtor and a bank alleged to have funds of the latter on deposit, the answer of such bank, under the oath of its president, filed in the cause, is not evidence against the debtor.—*O'Brien v. Flinders*, 58 Ind. 22.

## [b] (Sup. 1879)

Where, in an action on a note by the administrator of an estate against another, both in person and as administrator of another estate, a witness testifies that plaintiff's decedent had released the defendant personally from a certain other note, and that the note sued upon was mentioned in the same connection, plaintiff was entitled to show that such defendant, after the plaintiff's decedent's death, admitted the validity of both notes, and said that he would pay them.—*Carter v. Zenblin*, 68 Ind. 436.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 801, 802.

See, also, 16 Cyc. pp. 983, 984.

## (C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

## § 229. Privies and former owners in general.

## [a] (Sup. 1837)

In ejectment by the purchaser of land sold on execution against the defendant's grantee, the grantee's admissions, made subsequently to the judgment, tending to invalidate the defendant's deed to him, are inadmissible as evidence for the defendant.—*Doe ex dem. Maxwell v. Moore*, 4 Blackf. 445, 30 Am. Dec. 666.

## [b] (Sup. 1878)

The declarations of a person in possession of lands are competent evidence against himself and all persons claiming under him, for the purpose of showing the character of his possession and by what title he claims.—*Steeple v. Downing*, 60 Ind. 478.

## [c] (Sup. 1882)

In an action for divorce, alimony, and setting aside of an alleged fraudulent conveyance of the husband's property, where there was evidence tending to show that the fraudulent scheme extended to the marriage and desertion of plaintiff, and that the conveyance was but

one step in the execution of the fraudulent design, a charge that the declarations of the husband, made after the execution of the conveyance, could not be considered as evidence against his grantee, was properly refused.—*Bishop v. Redmond*, 83 Ind. 157.

## [d] (Sup. 1883)

In an action by a widow to recover for the death of her minor son, caused, as she alleged, by his being put to dangerous work in which he was not skilled, declarations by the deceased that he was skilled in such labor are not admissible against her.—*Pennsylvania Co. v. Long*, 94 Ind. 250.

## [e] (App. 1891)

In an action for the loss of services of plaintiff's minor son, whose death was alleged to have been caused by defendant's negligence, statements of the son as to the cause of the accident, and that he alone was in fault, are not admissible against plaintiff as admissions, as the right of action is personal to plaintiff, and deceased could not bind him by admissions against his interest, but are competent as part of the *res gestæ*.—*Louisville, E. & St. L. Consol. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714.

## [f] (Sup. 1892)

Where personal property was levied on under execution as the property of the judgment debtor, and plaintiff, claiming the property, brought an action to determine the title thereto, and offered evidence tending to establish a purchase of such property more than a year before the rendition of the judgment, it was reversible error to permit a witness to testify that the judgment debtor had claimed the property until about the time the cause was tried, such judgment debtor not being a party to the action, and the statements not being made in plaintiff's presence, and not being statements in disparagement of his title.—*Somers v. Somers*, 85 Ind. 599.

[g] In an action for the death of plaintiff's minor, who was killed while in defendant's employ, admissions of deceased, after the accident, that he alone was in fault, could not bind plaintiff.—(App. 1893) *Louisville, E. & St. L. Consol. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646, affirming (1891) 2 Ind. App. 427, 28 N. E. 714.

## [h] (Sup. 1895)

When by the succession of title, a party to a suit is so far in privity with another that he could be affected by his acts, then he can be affected by his admissions only when they are made during the latter's interest in the subject-matter of the suit, for then only can he ingraft them upon the interests so that they will follow it into the hands of his successor.—*Robbins v. Spencer*, 38 N. E. 522, 40 N. E. 263, 140 Ind. 483.

## [i] (Sup. 1896)

Declarations of a person in possession of land cannot be used against those claiming un-



der him to destroy his record title.—*Smith v. McClain*, 45 N. E. 41, 146 Ind. 77.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 822-834.

See, also, 16 Cyc. p. 985.

**§ 230. Grantors, vendors, or mortgagors of real property.**

Declarations as to boundaries, see post, § 274.

Declarations of conspirators, see post, § 253.

Self-serving declarations, see post, § 271.

**[a] (Sup. 1846)**

A voluntary conveyance of real estate cannot be impeached by proof of the verbal or written declarations of the grantor, made subsequently to its execution.—*Paine v. Doe ex dem. Griffin*, 7 Blackf. 485.

**[b] (Sup. 1857)**

The declarations of a vendor, after he has parted with his interest in and the possession of the property, are inadmissible to impeach the title of his vendee, in the absence of proof of fraud or collusion.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

**[c] (Sup. 1874)**

The declarations of a grantor of real property to his grantee concerning the delivery of a deed of conveyance by him to third persons of the same property, made long after the conveyance purported to have been made to such third persons, are not admissible as evidence against such third persons.—*Burkholder v. Casad*, 47 Ind. 418.

**[d] (Sup. 1876)**

Where, after the death of a father who, during his lifetime, conveyed lands to two of his sons, such lands are claimed by the other heirs and widow to have been conveyed as advancements, a conversation with the father, several months after the conveyances, respecting the alleged advancements, is inadmissible in evidence against the sons, unless it occurred so soon after the conveyances as to become a part of the *res gestæ*.—*Harness v. Harness*, 49 Ind. 384.

**[e] (Sup. 1876)**

In an action by a creditor to set aside a conveyance as fraudulent, declarations of the grantor made subsequently to the execution of the deed are inadmissible against the grantee.—*Garner v. Graves*, 54 Ind. 188.

**[f] (Sup. 1878)**

In an action by a material man against the owner of a house and his grantor, declarations by the grantor, at the time of procuring the materials, that he was then of full age, though he was in fact an infant, and the title was then in him, are inadmissible as against his grantee.—*Price v. Jennings*, 62 Ind. 111.

**[g] (Sup. 1879)**

A vendee of land is bound by the admissions as to boundary made by the vendor before the conveyance.—*Mull v. Orme*, 67 Ind. 95.

**[h] (Sup. 1881)**

It is improper to admit the statements of a grantor tending to impeach his grantee's title, though the party introducing the evidence promises to connect the grantee with knowledge of the fact, since in case of a conspiracy between the parties to the deed to defraud third persons the conspiracy must be first proved before the declarations of either of the conspirators are admissible.—*Kennedy v. Divine*, 77 Ind. 490.

**[hh] (Sup. 1881)**

A grantor's admissions, prior to the execution of an alleged fraudulent conveyance, are admissible against him.—*Hall v. Bishop*, 78 Ind. 370.

**[i] (Sup. 1881)**

The admissions or declarations of a grantor or former owner of land are not admissible, as against those claiming under him, when made after he has conveyed the land.—*Stribling v. Brougher*, 79 Ind. 328.

**[j] (Sup. 1884)**

In an action to set aside a conveyance for fraud, declarations of the debtor made after the conveyance were competent evidence to show his intent.—*Hogan v. Robinson*, 94 Ind. 138.

**[k] (Sup. 1884)**

Declarations by a grantor disparaging his title, made after the grant and not in the presence of the grantee, are not admissible against the grantee.—*McSweeney v. McMillen*, 96 Ind. 298.

**[l] (Sup. 1884)**

A grantor, after conveyance, remained in possession, made improvements, and insured them. On the question of whether his deed, absolute in form, was intended as a mortgage, *held*, that his declarations made in connection with the improvements and insurance were admissible.—*Creighton v. Hoppis*, 99 Ind. 369.

**[m] (Sup. 1886)**

On an issue as to whether deceased executed a deed of certain property, reserving therein a life estate to herself, declarations made by her after the alleged date of the deed, while in possession of the property, and in the absence of defendants, as to the character of possession, are inadmissible.—*Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263.

**[n] (Sup. 1898)**

In a suit to set aside a conveyance made when the grantor is insolvent, declarations of the grantor, made subsequently to the conveyance, are admissible in evidence against the grantor but not the grantee.—*Vansickle v. Shenk*, 50 N. E. 381, 150 Ind. 413.

**[o] (App. 1901)**

In an action to set aside a conveyance in fraud of creditors, evidence as to declarations of the grantor made subsequent to the conveyance, and in the absence of the grantee, was properly excluded, in the absence of any

showing of a conspiracy to defraud the plaintiff.—*Skellely v. Vail*, 60 N. E. 961, 27 Ind. App. 87.

[p] (App. 1907)

The declarations of a grantor made after he has parted with his title are inadmissible to impeach the title of one claiming under him.—*Jonas v. Hirshburg*, 40 Ind. App. 88, 70 N. E. 1058.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 835-851.

See, also, 16 Cyc. pp. 986-989, 997-999.

§ 231. Sellers or mortgagors of chattels.

Declarations of conspirators, see post, § 253.

[a] (Sup. 1858)

Ordinarily declarations of one who is not a party to the suit, and who might be made a witness, are not admissible in evidence; but in a suit for the recovery of personal property such declarations of a vendor, made while in the possession of the property sold, and before the sale, as would be evidence against himself, are also admissible against his vendee.—*King v. Wilkins*, 11 Ind. 347.

[b] (Sup. 1861)

Suit by A. against B. and C. to recover the value of hogs alleged to have been wrongfully taken by them, and converted to their use. B. answered that the property described at the time it was taken by him was in the possession of C., to whom the same had been sold and delivered by C., and that C. sold and delivered the property to him. C. answered that he had contracted with A. for the purchase of the hogs, which were to be delivered to him on the payment of the price but that he never paid such price, and never had the possession of said hogs, nor any right to the possession thereof, and never directed or authorized any one to convert the same. *Held* that, as B. claimed to derive title from C., the declarations of the latter by his answer or otherwise were not admissible to impeach the title of B., since the declarations of a vendor made after he has parted with his title are not admissible to affect any one claiming under him.—*Kieth v. Kerr*, 17 Ind. 284.

[c] (Sup. 1862)

The plaintiff in a replevin suit may show that before the sale of the property to the defendant the vendor stated that it was not his, and gave this as a reason for refusing to trade.—*Bunberry v. Brett*, 18 Ind. 343.

[d] (Sup. 1875)

In an action by A. against B. to recover possession of certain personal property bought by A. from C., the defendant was permitted, over objection, to introduce in evidence an instrument written by C. after the sale, directed to D., from whom C. had bought the property, stating that it had been bought by C. for B., with B.'s money, and ordering D. to deliver it

to B.; and C. testified, over A.'s objection, that he had orally admitted at different times to B. and D. that the property was bought by him with money received from B., and belonged to B. *Held* that, as A. could not be bound by the order of C. to D. to deliver the property to B., and the written and oral admissions made by C. after his sale to A. could not affect A.'s right, the evidence was inadmissible.—*Campbell v. Coon*, 51 Ind. 76.

[e] (Sup. 1883)

Where defendant in replevin claimed under purchase from a third person, the latter's declarations while in possession are admissible against defendant.—*Kuhns v. Gates*, 92 Ind. 66.

[f] (Sup. 1888)

In replevin for a mare purchased by the person in possession from the administrator of the decedent, where plaintiff claims the mare by virtue of a gift from the decedent, declarations made by decedent while in possession of the mare, in derogation of his title, are admissible, not only against him, but against one claiming title under him after such declarations.—*Durham v. Shannon*, 116 Ind. 403, 19 N. E. 190, 9 Am. St. Rep. 860.

[g] (Sup. 1891)

Declarations of a mortgagor of chattels against his title, made before execution of the mortgage, are admissible as against the mortgagee.—*Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 835-839, 852-859.

See, also, 16 Cyc. pp. 991-993; note, 42 Am. Dec. 80.

§ 232. Bankrupts and assignors for benefit of creditors.

[a] (Sup. 1846)

In replevin by the assignee of a bankrupt, the defendant may give in evidence the statements of the bankrupt, made before his application for the benefit of the bankrupt law, to prove the property to be in a stranger.—*Compton v. Fleming*, 8 Blackf. 153.

[b] (Sup. 1849)

Where an assignor and his assignee under an assignment purporting to be for the benefit of creditors seemed to have a common purpose to defraud, a statement made by the assignor, after assignment, that he did not mean to pay certain of his creditors, was admissible as evidence tending to show fraud, in an action against the assignee to test the validity of such assignment.—*Caldwell v. Williams*, 1 Ind. 405.

[c] (Sup. 1849)

Where the assignor of property for the benefit of creditors remains in possession of it, his declarations made while in such possession are admissible to show that the assignment was fraudulent as to creditors.—*Caldwell v. Rose*, Smith, 190.

**[d] (Sup. 1861)**

Admissions and declarations of an assignor of property for the benefit of creditors made subsequent to the assignment are not binding upon the assignees.—*Wynne v. Glidewell*, 17 Ind. 446.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 860-865.

See, also, 16 Cyc. p. 994.

**§ 235. Former holders of bills or notes.**

[a] Admissions made by a person after he has parted with his interest in a bond or note cannot be given in evidence in prejudice of the assignee or indorsee.—(Sup. 1839) *Fleming v. Newman*, 5 Blackf. 220; (1843) *Lister v. Boker*, 6 Blackf. 439; (1886) *Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

**[b] (Sup. 1844)**

A., an indorsee of a sealed note, indorsed it in blank to B., who delivered it to C. without indorsement, and C. in like manner sold it to D. D., having written over A.'s name an indorsement to himself, sued A. as indorser. Held that, as B. was a competent witness for A., his declarations, while he held the note, as to the amount he paid for it, were inadmissible.—*Lynn v. Jeter*, 7 Blackf. 300.

**[c] (Sup. 1852)**

Where a promissory note overdue has been assigned, whether negotiable by the law merchant or not, the admissions of the assignor before assignment are admissible in evidence against the assignee.—*Blount v. Riley*, 3 Ind. 471.

Admissions of a payee of a note, assigned after it became due, that it had been paid, if made before assignment, are admissible in evidence against the assignee.—*Id.*

**[d] (Sup. 1854)**

The declarations of the assignor of a non-negotiable note to the effect that the note was given to compound a crime, if made before the assignment, were admissible in a suit thereon by the assignee against the maker.—*Abbott v. Muir*, 5 Ind. 444.

**[e] (Sup. 1855)**

In the case of commercial paper, negotiated before due, the declarations of the payee are inadmissible to impeach the consideration.—*Stoner v. Ellis*, 6 Ind. 152.

**[f] (Sup. 1884)**

The admissions of the owner of a non-negotiable note, made while he is still the holder of the note, are admissible in evidence against his assignee.—*Shade v. Creviston*, 93 Ind. 591.

**[g] (Sup. 1892)**

In an action on a note by the administrator of the payee, the latter's brother filed a cross complaint, alleging that the note had been indorsed to himself by the deceased in his lifetime, and the issue was as to the ownership of such note. Held, that declarations made by

deceased, not in his brother's presence, several years after the indorsement was made, that he still had the notes in his possession, that he had had trouble with his brother, and that the indorsement was made by him to evade paying taxes, were self-serving, and not admissible in evidence.—*Schmidt v. Packard*, 31 N. E. 944, 132 Ind. 398.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 873-875; 7

CENT. DIG. Bills & N. §§ 1789-1790½.

See, also, 16 Cyc. pp. 995, 996.

**§ 236. Testators and intestates.**

Competency of witnesses to testify as to admissions by person since deceased, see WITNESSES, § 163.

**[a] (Sup. 1863)**

In an action by an administrator on a note payable to his intestate, who at its date was a married woman, if failure of consideration or other defense is pleaded by the makers, the admissions of the payee of the note, while living, if they tended directly to benefit or injure herself, and only collaterally affected her husband, would be competent evidence for the defendants.—*Bevins v. Cline's Adm'r*, 21 Ind. 37.

**[b] (Sup. 1874)**

In a suit against heirs for the recovery of real estate, where the statute of limitations is pleaded, it is competent to prove the admissions of the ancestor that he held the same as tenant of the plaintiff, and not as owner, and the plaintiff is a competent witness to prove such admissions.—*Vanduyne v. Hepner*, 45 Ind. 589.

**[c] (Sup. 1881)**

In suit by an administratrix for money loaned by the intestate to defendant, the latter may show declarations and admissions of the intestate as to the amount due him from defendant.—*Slade v. Leonard*, 75 Ind. 171.

**[d] (Sup. 1884)**

In partition, declarations by an ancestor of one of the parties that the ancestor had no title are admissible against that party.—*McSweeney v. McMillen*, 96 Ind. 298.

**[e] (Sup. 1886)**

The admissions of a decedent are competent in an action against his representatives as such, no matter to whom they were made.—*Clouser v. Ruckman*, 104 Ind. 588, 4 N. E. 202.

**[f] (Sup. 1887)**

Where, in an action to quiet title, the plaintiffs claim under an alleged advancement, and do not confine their evidence to any definite or particular contract, but rely on admissions made by their ancestor to various persons, at various times covering an entire year, evidence for the defense, of a conversation had within that time, in which the ancestor made different statements, is admissible; no conveyance to the plaintiffs before such conversation

being shown.—*Joyce v. Hamilton*, 111 Ind. 163, 12 N. E. 294.

[g] (Sup. 1893)

In an action to contest a will on the ground of unsoundness of mind and undue influence, declarations of the devisee and son of the testatrix to whom she had devised the bulk of her property that his mother was not of sound mind, and was incompetent to make a will, was properly admitted, though such devisee was dead, where all those who had an interest in the estate of the testatrix were parties to the suit; for, if the devisee were living and made a party, his declarations against his interest would have been competent, and they were equally competent against his sole heir, made a party in his stead and representing all his interest.—*Wallis v. Luhring*, 34 N. E. 231, 134 Ind. 447.

And so, also, was the declaration of the devisee, before the making of the will, that testatrix had "got to make a will," and he was "going to have all the property, or raise hell."—*Id.*

Evidence, in an action to contest the validity of a will, that a deceased devisee admitted that testatrix was not of sound mind is admissible, though his administrator is not a party; his widow and sole heir being a party, and no other party being prejudiced by the admission.—*Id.*

[h] (App. 1893)

In an action for services as nurse of decedent, evidence of declarations made by decedent to plaintiff, and promising her her husband's share of the estate, was admissible to prove that neither plaintiff nor decedent regarded her services as gratuitous.—*Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456.

[i] In an action for the death of plaintiff's minor who was killed while in defendant's employ, admissions of deceased after the accident, or declarations against interest, could not bind plaintiff.—(1893) *Louisville, E. & St. L. Consol. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646, affirming (1891) 2 Ind. App. 427, 28 N. E. 714.

[j] (App. 1894)

Declarations of the deceased employer are competent to prove contract of employment.—*Kettry v. Thumma*, 9 Ind. App. 498, 36 N. E. 919.

[k] (Sup. 1905)

In partition, evidence of declarations by plaintiff's husband, since deceased, who, with others, was a devisee of the land subject to the payment of debts of the testator, concerning indebtedness against the land which the widow had agreed to pay under an alleged contract by which the heirs agreed to surrender their interests in the land to her, was admissible.—*O'Brien v. Knotts*, 75 N. E. 594, 165 Ind. 308.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 876-882; 15 CENT. DIG. Death, § 81.

See, also, 16 Cyc. pp. 990, 996.

#### (D) BY AGENTS OR OTHER REPRESENTATIVES.

Admissibility of declarations of general attorney of county in action against county, see COUNTIES, § 223.

Order of proof, see TRIAL, § 60.

#### § 238. Authority at time of admission.

[a] (App. 1895)

A statement by a contractor's son, while working for his father, in the latter's absence, that the time for filing a mechanic's lien for certain work had expired, does not bind the father, where the son was not authorized by him to make the statement.—*Alexandria Bldg. Co. v. McHugh*, 12 Ind. App. 282, 39 N. E. 877, 40 N. E. 80.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 883.

See, also, 16 Cyc. p. 1010.

#### § 240. Agents or employés.

Admissions as to agency or authority, see PRINCIPAL AND AGENT, §§ 22, 122.

As part of res gestæ, see ante, §§ 120-128.

Preliminary evidence of agency or authority, see post, § 258.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 887-915.

See, also, 16 Cyc. pp. 1003-1037.

#### § 241. — In general.

[a] Declarations of an agent, to bind a principal, must be made at the very time he is doing an act he is authorized to do, and must be concerning the act he is then doing.—(Sup. 1865) *Hynds v. Hays*, 25 Ind. 31; (1873) *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; (1873) *Rathel v. Brady*, 44 Ind. 412.

[b] (Sup. 1881)

The declarations of an agent, made within the scope of his agency and while the transaction is pending, are admissible against his principal.—*Crowder v. Reed*, 80 Ind. 1.

[c] Declarations of an agent while engaged in performing an act within the scope of his authority are evidence against his principal.—(Sup. 1882) *Pavey v. Wintrode*, 87 Ind. 379; (1883) *Burns v. Thompson*, 91 Ind. 146.

[d] (Sup. 1883)

Conversations of defendant's authorized agent, at the time of making the contract sued on, concerning it, are admissible for plaintiff.—*Louisville, N. A. & C. R. Co. v. Henly*, 88 Ind. 535.

[e] (Sup. 1884)

The declarations of an agent as to matters outside of his agency are not admissible against the principal.—*Baker v. Carr*, 100 Ind. 330.

[f] (Sup. 1892)

The declarations of an agent are not admissible against the principal unless they were made while the agent was conducting some transaction for the principal, or in an action where the agent's act is part of the *res gestæ*.—*Ohio & M. R. Co. v. Stein*, 31 N. E. 180, 32 N. E. 831, 133 Ind. 243, 19 L. R. A. 733.

[g] (App. 1906)

In an action for death alleged to have been caused by explosions of dynamite in breaking machinery, evidence of a conversation between a witness and the person employed by defendants to break the machinery as to how decedent received his injury was properly excluded.—*Falender v. Blackwell*, 39 Ind. App. 121, 70 N. E. 393.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 887-892.

See, also, 16 Cyc. pp. 1003-1011.

### § 242. — Scope and extent of agency or employment.

[a] (Sup. 1865)

In an action against a railway company on account of injuries received by the plaintiff's wagon and horses from collision with the defendant's cars, it was *held* that statements made at the time by the servant who was driving the plaintiff's wagon, as to the cause of the accident, were admissible in evidence against the plaintiff.—*Toledo & W. Ry. Co. v. Goddard*, 25 Ind. 185.

[b] (Sup. 1866)

Where a contract for the erection of a building provided that the work should be done under the control and superintendence of an architect employed by the owner, the declarations of the architect, made while in the performance of his duty under the contract, were admissible in evidence on behalf of the contractors in an action against them for breach of the contract.—*Hudspeth v. Allen*, 26 Ind. 165.

[c] (Sup. 1883)

The purchaser of land subject to a mining lease which had been erroneously recorded claimed that he had no notice of its true terms. *Held*, that conversations with his agent during the negotiations and acts of both parties afterwards were admissible to show notice and to construe ambiguities in the lease.—*Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

[d] (Sup. 1883)

In an action against a principal, declarations made or letters written, either by the principal or his agent, in reference to the matter in controversy, are admissible in favor of plaintiff.—*Wells v. Morrison*, 91 Ind. 51.

[e] (Sup. 1887)

Declarations of a timekeeper, in the line of his employment and while engaged therein, were admissible in evidence against his principal in an action against it on a contract for the use of certain machinery and the services of engineers.—*Pennsylvania Co. v. Nations*, 12 N. E. 309, 111 Ind. 203.

[f] (Sup. 1889)

The declarations of one whom the testimony showed was the agent of defendant in weighing and receiving corn purchased, regarding its quality and the probability of its being accepted by defendant, were properly admitted in a suit for refusing to accept the corn.—*Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141.

[g] (Sup. 1899)

Workmen employed to construct a plant for machinery by the vendor are not agents of such vendor in the sense that they may bind him by their statements concerning the merits of the machinery.—*Smith v. Barber*, 53 N. E. 1014, 153 Ind. 322.

[h] (App. 1902)

Where the evidence is undisputed that the mortgagee told the mortgagor that he would send a certain notary to fix up the mortgage with the mortgagor and his wife, and that whatever they and the notary did was all right, evidence of statements made by such notary to the wife as to the mortgage while fixing it up are admissible against the mortgagee.—*Krohn v. Anderson*, 64 N. E. 621, 29 Ind. App. 379.

[i] (App. 1909)

Admissions of payment by a general agent to be admissible against his principal must be made while he is actually transacting for his principal the business to which the declarations relate, or be so closely connected with the business being transacted as to make them part of the *res gestæ*.—*Blanchard-Carlisle Co. v. Garritson*, 43 Ind. App. 303, 87 N. E. 151.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 893-907.

See, also, 16 Cyc. pp. 1013-1016.

### § 243. — Admissions before or after transaction or event.

[a] Admissions made by an agent after the fact or transaction to which they relate, and unconnected with any act of agency, are inadmissible as evidence against the principal.—(Sup. 1869) *Bennett v. Holmes*, 32 Ind. 108; (1875) *Pittsburg, C. & St. L. R. Co. v. Theobald*, 51 Ind. 246.

[b] (Sup. 1874)

Admission of an agent as to the amount due his principal, made after the termination of the agency, is inadmissible in an action against the agent's surety, who agreed to pay the principal all moneys he should advance to the agent for which the latter did not account.—*Dickinson v. Colter*, 45 Ind. 445.

## [c] (Sup. 1874)

On an issue as to whether a certain sum of money delivered by a person to his son-in-law, who gave his note therefor, was a loan to the son-in-law or an advancement to his wife, who was a daughter of the payee of the note, since deceased, testimony of a witness that, after the making of the note and receipt of the money by the son-in-law, the latter told the witness that, when he got the money, he took it directly home and handed it to his wife, and said, "There is your money," is not admissible, on the ground that he was acting as agent of his wife, but was merely a recital of what had previously been done.—*Vandivere v. Dollins*, 49 Ind. 216.

## [d] (Sup. 1886)

While it is a general rule that an agent cannot bind his principal by statements regarding a past transaction, it is otherwise where such statements are part of the *res gestæ*.—*United States Exp. Co. v. Rawson*, 106 Ind. 215, 6 N. E. 337.

## [e] (Sup. 1890)

The fact that an agent is fully authorized to consummate a transaction does not authorize the admission of his declarations narrating a past transaction with reference thereto.—*Cleveland, C. & I. Ry. Co. v. Closser*, 26 N. E. 159, 126 Ind. 348, 9 L. R. A. 754, 22 Am. St. Rep. 593.

## [f] (App. 1897)

Evidence of statements made by employes of defendants, after an accident alleged to have occurred through negligence on the part of defendants, though inadmissible for the purpose of proving such negligence, was properly admitted, as tending to show that defendants had knowledge of the conditions then existing.—*Hopkins v. Boyd*, 47 N. E. 480, 18 Ind. App. 63.

## [g] (App. 1905)

Where, in an action for injuries to a servant, there was evidence that B. was a vice principal, evidence as to a conversation between plaintiff and B. on the occasion of plaintiff being put to work on a machine by which he was injured was admissible.—*Flickner v. Lambert*, 74 N. E. 263, 36 Ind. App. 524.

## [h] (Sup. 1908)

A trustee under a trust deed or mortgage, as an agent, is not empowered to admit the rights of his principal away by his references to a past transaction.—*First Nat. Bank of Peoria v. Farmers & Merchants Nat. Bank of Wabash*, 171 Ind. 323, 86 N. E. 417.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 908-915.

## § 244. Corporate officers or agents.

As part of *res gestæ*, see ante, §§ 120-123.

## [a] (Sup. 1859)

In an action against a corporation, the declarations of an agent of the corporation, who was not such by original appointment, but by the recognition of his acts while in the performance of them, if within the scope of his agency, are admissible.—*Toledo, W. & W. R. Co. v. Fisher*, 13 Ind. 258.

## [b] (Sup. 1861)

Where demand was made upon the secretary of a railroad company for an original or certified copy of a subscription paper proved to have been in possession of the company, it was held that, the presumption being that he was the custodian of such papers, his answer that it was lost was admissible as competent evidence of this fact against his employer.—*Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

## [c] (Sup. 1868)

Declarations of one who assumes to settle claims against a corporation for damages for killing stock are not admissible against the company, without proof that he was authorized to make such settlements. The fact that he is known as general agent of the company is not sufficient.—*Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83.

## [d] (Sup. 1870)

A railroad train, running at a high rate of speed at the place where it crossed a carriage road, ran over and killed a person who was crossing the track at the time. Held, that the admissions of the fireman, made as soon as the train was stopped, as to the rate of speed at which the train was going at the time the collision occurred, were not admissible in evidence in an action against the company.—*Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201.

## [e] (Sup. 1871)

The declarations of an agent of an insurance company, made at the time of making the contract, and relating thereto, are admissible in evidence against the company, in a suit on a premium note given for a policy of insurance, to prove the want or failure of consideration, or to show what was the real consideration, or that the execution of the note had been obtained by fraud.—*Heller v. Crawford*, 37 Ind. 279.

## [f] (Sup. 1874)

In an action against a foreign insurance company to recover money paid as a premium on a void policy, the declarations of the agent, made after the transaction, stating that he was the agent of the defendant; that as such agent he had not, at the time the policy was issued, filed the certificate with the county auditor as required by the statute, but that afterwards one was filed; and that he was the general agent of the company, and as such countersigned the policy,—were inadmissible as evi-

This Digest is compiled on the Key-Number System. For explanation, see page iii.

dence against the insurance company.—*Union Cent. Life Ins. Co. v. Thomas*, 46 Ind. 44.

[g] (*Sup.* 1874)

It is not error to admit in evidence the declarations of the agent of an insurance company against his principal, in reference to the subject-matter in controversy, where there is evidence tending to prove that such declarations were within the scope of his agency.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

[h] (*Sup.* 1875)

The declarations or admissions of an agent or employé concerning the infliction of a personal injury upon a passenger on a railway train, made the same night, but after the injury, are not admissible against the railroad company.—*Pittsburgh, C. & St. L. R. Co. v. Theobald*, 51 Ind. 246.

[i, j] (*Sup.* 1881)

Where a brakeman negligently or willfully drenched a passenger with water, he could not, after the act was done, make a declaration which would be competent evidence against the carrier.—*Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19.

[k] (*Sup.* 1883)

In an action by a corporator to restrain the illegal appropriation of corporate property by the other corporators, declarations of a chief executive officer denying plaintiff's interest in the corporation are evidence against the other defendants.—*Tipton Fire Co. v. Barnheisel*, 92 Ind. 88.

[l] (*Sup.* 1885)

In an action for damages by one illegally arrested by an agent employed by a corporation to detect and arrest offenders against its property, plaintiff may give in evidence declarations of the agent made at the time of the arrest.—*Pennsylvania Co. v. Weddle*, 100 Ind. 138.

[m] (*Sup.* 1885)

In an action against the guarantors on a bank cashier's bond for a defalcation, admissions of the president to third persons that for a year before the defalcation occurred the cashier was drinking to excess and neglecting his business, and that if the directors knew it he feared the cashier would be discharged, are inadmissible against the bank; not being made while the president was transacting business of the bank.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

Where it was sought to show that the officers of a bank had knowledge that their cashier was of intemperate habits, it was not competent to prove it by admissions by an agent of the bank made after the facts and transactions had occurred, as declarations of an agent are admissible only when made while actually engaged in transacting business of the principal to which the declarations relate.—*Id.*

[n] (*Sup.* 1887)

In an action against a railway company for injuries to a traveler in a collision on a

highway crossing, a witness who saw the collision and heard a conversation between plaintiff and the engineer of the train a few minutes after it occurred may testify with respect to such conversation; the statements to the plaintiff and his answers being in the nature of admissions.—*Grand Rapids & I. R. Co. v. Diller*, 9 N. E. 710, 110 Ind. 223.

[o] (*Sup.* 1887)

In an action against a railroad company for compensation for services under a contract at a specified sum per day, there being a dispute as to the time, the admission of testimony of one of the plaintiffs that the company's foreman and time-keeper told him the number of days spent in the work, and the amount due under the agreement, specifying each, is not error, where the bill of exceptions fails to show under what circumstances or in what connection the conversation was had.—*Pennsylvania Co. v. Nations*, 111 Ind. 203, 12 N. E. 309.

[p] (*Sup.* 1889)

A declaration by a corporation's general agent relative to a contract executed by another agent of the corporation, made subsequent to its execution, is binding on the corporation.—*Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

[q] (*Sup.* 1889)

Where an agent is invested by a corporation with general authority to adjust claims against it, his declarations, made while acting within the scope of his employment, are competent evidence against the principal.—*Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. Rep. 315.

[r] (*Sup.* 1890)

An agreement for rebates from a carrier was made with an agent whose authority respecting contracts for freight was of wide scope. The claim for the rebates was presented to him, and communications concerning it were made to him, and he conducted the negotiations by correspondence with his principal, and by interviews with the shipper. In an action to recover the rebates the latter was allowed to testify that, while the claim was pending, the agent said to him that the company had made the contract and would have to pay the claim. *Held*, that there was no error in the ruling.—*Cleveland, C., C. & I. Ry. Co. v. Closer*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

[s] (*Sup.* 1891)

In an action against a railroad company for breach of a contract to transport cattle, evidence of conversations between plaintiff and defendant's agent are admissible to show that a written contract for transportation was abandoned, and the shipment made under a subsequent parol contract.—*Toledo, St. L. & K. C. R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773.

[t] (*Sup.* 1892)

Where a manufacturing company which was negotiating to remove its plant to another

town agreed with the inhabitants to take an invoice showing its financial condition within a reasonable time, as tending to show what would be a reasonable time, it was competent to prove what was said by the directors of the company as to when it would be practicable and convenient to make the invoice.—*Ft. Wayne Electric Light Co. v. Miller*, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804.

[u] (Sup. 1892)

In an action against a corporation for the negligent killing of plaintiff's intestate while at work unloading a coal car standing on a switch constructed by defendant at a heavy grade into its quarry, the special verdict stated that at the time of the accident defendant's superintendent ordered the foreman to load certain stone into a designated car; that such car was started down grade, coming into collision with two other heavily loaded cars; that these two cars were thrown against the car on which plaintiff's intestate was at work; and that there was nothing to prevent the superintendent, who was present, from observing all that was done. *Held*, that the special verdict sufficiently showed that the superintendent had charge of the quarry and connected business, and that he occupied the position of a master, and not a mere fellow servant.—*Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

[v] (Sup. 1893)

Admissions and declarations made by the general solicitor of a railroad company as to matters outside of his department do not bind the company unless he is shown to have had authority as to such matters.—*Ohio & M. Rty. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20.

[w] (Sup. 1895)

In an action by a shipper for damages for defendant railroad company's failure to furnish cars, statements made to plaintiff by the officers and agents of defendant in relation to furnishing cars were admissible in evidence.—*Chicago, St. L. & P. R. R. Co. v. Wolcott*, 39 N. E. 451, 141 Ind. 267, 50 Am. St. Rep. 320.

[x] (Sup. 1899)

A statement by one who employed plaintiff on behalf of defendant railroad company, and who kept his time, made to plaintiff before he was paid, to the effect that the rules required a deduction from his wages each month for the maintenance of a hospital, is admissible as a declaration of defendant.—*Wabash R. Co. v. Kelley*, 52 N. E. 152, 54 N. E. 752, 153 Ind. 119.

[y] (App. 1909)

That one is secretary and treasurer of a corporation does not make his admission of payment evidence against his principal.—*Blanchard-Carlisle Co. v. Garritson*, 43 Ind. App. 303, 87 N. E. 151.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 916-936.

See, also, 16 Cyc. pp. 1016, 1019-1024.

§ 245. Public officers or agents.

[a] (Sup. 1876)

Declarations of the general attorney of a county that the county would pay a certain debt are not admissible in a suit upon the claim against such county.—*Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

[b] (Sup. 1885)

In an action against a county for services rendered by a physician in caring for a sick person at the request of a township trustee, the declarations of the trustee are admissible in evidence.—*Washburn v. Board of Com'rs of Shelby County*, 3 N. E. 757, 104 Ind. 321, 54 Am. Rep. 332.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 937-944.

See, also, 16 Cyc. p. 1024.

§ 246. Attorneys.

Authority of attorney to make admissions binding client, see ATTORNEY AND CLIENT, § 86.

[a] (Sup. 1876)

In an action to recover one-half of the costs of a suit brought in the name of plaintiff and defendant, conversations between defendant and the attorney of plaintiff, had in the absence of plaintiff, after defendant had learned of the pendency of the suit, in which he agreed to allow the suit to be continued in his name, but without any responsibility on his part for costs and expenses, are admissible.—*Blessing v. Dodds*, 53 Ind. 95.

On the trial of an action by A. against B. to recover one-half of the costs and expenses incurred in a suit theretofore prosecuted in their joint names and paid by A., the question in controversy being whether B. was a real party in interest in said joint action, and therefore liable for one-half the costs and expenses thereof, or whether he had no interest therein, and it was commenced without his knowledge or consent, and he afterwards agreed that it might be prosecuted in his name with that of A. for the sole benefit of A., and without responsibility on his part, as between him and A., for said costs and expenses, it was competent for B. to give in evidence a conversation had in the absence of A. between B. and an attorney of A. in said joint action, who had been instructed by A. to procure the signature of B. to an appeal bond for the purpose of appealing said joint action to the Supreme Court, for the purpose of showing that B. signed said appeal bond upon a similar condition and agreement.—*Id.*

[b] (Sup. 1893)

In an action against a railroad company for damages arising from personal injuries caused by falling into an excavation adjoining defendant's track, it is error to admit the declarations and admissions of the general solicitor of defendant respecting the question of notice, in the absence of evidence that he was invested with authority concerning the use and occupa-



tion of the street in which the excavation was made.—*Ohio & M. R. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20.

In an action against a railroad company for personal injuries caused by falling into an unguarded pit adjoining defendant's track, evidence of admissions of defendant's solicitor respecting notice of the existence of the pit, in the absence of evidence that he had authority to make them, is inadmissible, and is not rendered harmless by the fact that there was also circumstantial evidence of notice. *McCabe, J.*, dissenting.—*Id.*

[c] (*App.* 1893)

Declarations of an attorney, whom it is alleged represented defendant in former proceedings, are not competent to prove his attorneyship, nor to show defendant's appearance in such proceedings.—*Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

[d] (*App.* 1900)

In an action by a court stenographer to recover for services rendered at the request of an attorney in transcribing evidence for a client, evidence of a conversation between defendant's attorney and plaintiff respecting such services was not inadmissible because it occurred in the absence of defendant, since the attorney had authority to bind his client for such services.—*Miller v. Palmer*, 58 N. E. 213, 25 Ind. App. 357, 81 Am. St. Rep. 107.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 945-949.

See, also, 16 Cyc. p. 1024.

#### § 247. Persons referred to for information.

[a] (*Sup.* 1859)

On a question of equitable title to land,—a right to enforce an alleged agreement to convey,—a witness testified that after the time of the alleged agreement he went to the house of the vendor and vendee, and, having told the alleged vendee that he came to buy the land, was told to "go see" the vendor "about it." *Held*, that this did not allow the declarations of the alleged vendor as to the ownership between these two parties to be proved, since it did not appear that the witness was referred for information on that point.—*Barnard v. Macy*, 11 Ind. 536.

[b] (*Sup.* 1885)

A master having directed another to his servants for information or directions, the statements of the latter are admissible against the master.—*Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91.

[c] (*App.* 1896)

In an action by a married woman for slander, based on statements by defendant that plaintiff had been criminally intimate with a certain man, evidence of a statement made by plaintiff's husband to a witness, that plaintiff had confessed such intimacy to him, is not admissible, where such statement was not made in

the presence of the wife, though she had referred the witness to her husband for an explanation of why she was crying at the time about which the witness had inquired; it not appearing that such reference had any connection with the subject of the confession or with the conduct of the wife, and it not being shown when the statement showed the confession to have been made.—*Robertson v. Hamilton*, 45 N. E. 46, 16 Ind. App. 328, 59 Am. St. Rep. 319.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 950-952.

See, also, 16 Cyc. p. 1018.

#### § 248. Husband or wife.

[a] (*Sup.* 1842)

In a suit against husband and wife for a debt due by the wife *dum sola*, the plaintiff cannot prove admissions made by the wife after her marriage respecting the debt.—*Brown v. Lasselle*, 6 Blackf. 147, 38 Am. Dec. 135.

[b] (*Sup.* 1846)

In a suit against husband and wife for a debt contracted by the wife while sole, the admissions of the latter, made during coverture, are not admissible evidence.—*Lasselle v. Brown*, 8 Blackf. 221.

[c] (*Sup.* 1846)

If a husband has either expressly or impliedly made his wife his agent, her declarations in regard to matters within the scope of her authority are admissible evidence against him.—*Casteel v. Casteel*, 8 Blackf. 240, 44 Am. Dec. 763.

[d] (*Sup.* 1863)

If husband and wife are jointly prosecuted in a civil action for the tort of the wife, in the alleged burning by her of a mill, it is competent for the plaintiff to prove, that, within a short period before and just preceding the burning, the wife was heard to threaten that "she would burn it; that she would put a torch to it; that it should not stand much longer; that the old rattletrap should be burned up," etc.—*Ball v. Bennett*, 21 Ind. 427, 83 Am. Dec. 356.

[e] (*Sup.* 1873)

In an action for unlawful knowledge of plaintiff's wife, a letter written by defendant's wife to plaintiff's wife, not shown to have been written by defendant's authority, is inadmissible as against him.—*Underwood v. Linton*, 44 Ind. 72.

[f] (*Sup.* 1878)

In the contest of a will on grounds of mental incapacity of the testator, the declarations of a wife of one of the defendants as to testator being of unsound mind were not admissible against defendants, as she had no interest, or authority to bind them; and it was immaterial that on the death of her husband, subsequent to the making of the declarations, she was made a party defendant.—*Coryell v. Stone*, 62 Ind. 307.

[g] (Sup. 1879)

In an action to recover from a railroad company for the burning of a house through sparks from a defect in the locomotive, flying through the open window of an unoccupied upper room, declarations of the plaintiff's husband as to the origin of the fire, are not admissible against her without proof of his agency.—*Louisville, N. A. & C. R. Co. v. Richardson*, 68 Ind. 43, 32 Am. Rep. 94.

[h] (Sup. 1880)

A husband's declarations are admissible in evidence in a joint action against him and his wife, although they are not made in her presence.—*Brucker v. Kelsey*, 72 Ind. 51.

[i] (Sup. 1880)

Statements relating to the accident, made by the husband of plaintiff, suing a city for personal injuries caused by a defective gutter crossing, to a clerk of a law firm, in plaintiff's absence, are inadmissible in evidence as against her, if the husband was not acting as her agent.—*City of Indianapolis v. Scott*, 72 Ind. 196.

[j] (Sup. 1884)

In an action by a wife to recover her personality levied on to satisfy an execution against her husband, the tax list, in which he had listed the property as his own, was not proper evidence against her.—*Stanfield v. Stiltz*, 93 Ind. 249.

[k] (Sup. 1885)

In an action to foreclose a mortgage given by a wife to secure her husband's debt, prior statements of the husband in her absence, made on a former trial between strangers respecting the property covered by the mortgage, are not competent evidence against her.—*Allen v. Davis*, 101 Ind. 187.

[l] (Sup. 1886)

The fact that a husband is a party defendant to a suit by his wife to enforce a lien for taxes paid under a void tax deed does not render inadmissible evidence of an agreement made by him as her agent with the holder of the legal title, by which she was to receive the rents and profits, and out of them repay sums paid by her for the tax deed and other taxes.—*Harless v. Harless*, 144 Ind. 196, 41 N. E. 592.

[m] (App. 1910)

A wife being the agent of her husband by force of circumstances and not by appointment, her admissions and statements outside of the authority conferred by such forced agency are not admissible in evidence against the husband.—*Conner v. Martin*, 92 N. E. 3.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 953-964; 26 CENT. DIG. HUS. & W. § 139.

See, also, 16 Cyc. p. 1028.

#### § 249. Partners and joint contractors.

Declaration of partner to prove partnership, see PARTNERSHIP, §§ 45-49:

Power of partner to bind firm in general, see PARTNERSHIP, § 152.

[a] (Sup. 1829)

In an action of assumpsit by partners for work and labor, *held*, that evidence of the statements of one of the partners, made after the dissolution of the partnership, so far as they tended to show a new contract destroying the partnership claim, and giving to each partner a separate demand for his part of the debt, was not admissible, but that the statements of such partner, so far as they showed a payment made to himself, might be proved.—*Lefavour v. Yandes*, 2 Blackf. 240.

[b] (Sup. 1830)

The admission of one partner as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is not binding on the other partners.—*Yandes v. Lefavour*, 2 Blackf. 371.

[c] (Sup. 1834)

The admissions of a partner, made after a dissolution of the partnership, and not relating to the previous business of the firm, are not admissible in evidence to charge the other partners.—*Taylor v. Hillyer*, 3 Blackf. 433, 26 Am. Dec. 430.

[d] (Sup. 1843)

A., being in partnership with B., collected a sum of money in his individual capacity for C., and afterwards executed to the latter a note in the name of the firm for the amount. In a suit against the firm on the note, the plaintiff offered to prove that A., during the existence of the firm, had declared that said money had been used by himself and partner in the business of the partnership. *Held*, that the evidence was inadmissible.—*Hickman v. Reineking*, 6 Blackf. 387.

[e] (Sup. 1850)

The admissions of one partner, made at the time of the payment to him of a debt due to the partners, and at a time subsequent to a dissolution, are admissible against the other partners, as the admissions of an agent relative to an act within the scope of his authority, made at the time when such act was done, are admissible in evidence to bind his principal.—*Kirk v. Hiatt*, 2 Ind. 322.

[f] (Sup. 1879)

In an action on a note alleged to have been executed by a copartnership, evidence of what one of the firm, since deceased, said at the time of the execution of the note as to the purpose of the note, is admissible in evidence, where the evidence tends to establish the existence of the copartnership.—*Dodds v. Rogers*, 68 Ind. 110.

[g] (Sup. 1885)

The declarations of one of two partners, physicians, as to the propriety of a course of treatment given by the other to a patient, are not admissible as against the latter, in an action for malpractice, when made in his absence, and after the employment had ceased.—*Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

The declarations of one partner are admissible in proper cases against the firm, on the ground that in such cases the law implies an agency on the part of the one to bind the firm in transactions relating to its business. In order that such declarations may be admitted, they must have been made in the course of the partnership business, and with respect to a transaction pertaining to its business.—*Id.*

[h] (**App.** 1898)

Declarations of a partner in negotiating a partnership loan, which was afterwards made, in furtherance of the partnership business, are admissible against the firm.—*Britton v. Britton*, 49 N. E. 1076, 19 Ind. App. 638.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 965-975; 38

CENT. DIG. Partners. § 630.

See, also, 16 Cyc. pp. 1031-1034.

### § 250. Principal or surety.

[a] (**Sup.** 1829)

A. entered into partnership with B. in the business of tanning, and C. bound himself, in a covenant to B., for A.'s conduct as a partner for a certain time. *Held* that, in an action by B. against C. on the covenant, the admissions of A., made after the expiration of the stipulated time, were not admissible as evidence against C.—*Hotchkiss v. Lyon*, 2 Blackf. 222.

[b] (**Sup.** 1829)

Admissions or declarations of a principal are not admissible as evidence against a surety, unless such admissions or declarations form a part of the transaction in which the principal, as such, is engaged.—*Shelby v. Governor*, 2 Blackf. 289.

A sheriff's acknowledgment that he collected money on an order of sale cannot be proved to sustain an action for the money against the sheriff's surety, unless the acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money.—*Id.*

[c] (**Sup.** 1846)

The admission of certain facts by the principal obligor, in which facts he and his sureties were jointly interested, is admissible evidence against them all.—*Parker v. State ex rel. Town*, 8 Blackf. 292.

[d] (**Sup.** 1858)

An admission by a surety in the absence of the principal is good against both, in the absence of collusion.—*Chapel v. Washburn*, 11 Ind. 393.

[e] (**Sup.** 1874)

Statements or representations made by the principal maker of a promissory note, to one whom he procures to sign the note in blank as surety, in reference to the subsequent signing of the note by a third person as surety, made in the absence and without the authority of such third person, are not admissible in evidence against such third person on a question

of suretyship.—*Keegan v. Carpenter*, 47 Ind. 597.

[f] (**Sup.** 1881)

The declarations of a principal, made subsequent to the act to which they relate, and not as a part of the *res gestæ*, are not competent evidence against his surety.—*Bocard v. State ex rel. Stevens*, 79 Ind. 270.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 976-982.

See, also, 16 Cyc. p. 1034.

### § 251. Trustee or beneficiary.

[a] (**Sup.** 1854)

An administrator's acknowledgments or admissions cannot bind the heirs.—*Jennings v. Kee*, 5 Ind. 257.

[b] (**Sup.** 1874)

Admissions by a former administrator that payment of the claim had been made to him are competent evidence, though not conclusive, against the administrator *de bonis non*.—*Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735.

[c] (**App.** 1902)

The office of a guardian being analogous to that of an agent, his declarations to a third person, while acting in the interest of the ward, that plaintiff will be paid for services rendered for the ward, are admissible, in an action for such services against a subsequent guardian, to charge the ward's estate.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

[d] (**App.** 1906)

In an action by an administrator for money alleged to have been left by decedent and converted by defendants, children of the decedent were not such parties in interest that statements made by them constituted admissions affecting the administrator's right of recovery.—*Zimmerman v. Beatson*, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165.

[e] (**Sup.** 1908)

A trustee under a trust deed or mortgage is not authorized to make an admission in derogation of the trust, since as trustee he has but a technical interest, and the real and beneficial interest is in the *cestui que trust*.—*First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank of Wabash*, 171 Ind. 323, 86 N. E. 417.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 983-988.

See, also, 16 Cyc. pp. 1036, 1037.

### § 252. Insured or beneficiary.

[a] (**Sup.** 1884)

A. acquired a life policy in a mutual benefit society, payable, on his death, to B. or to such other person as he might designate. *Held*, in an action by the beneficiary to recover the benefit, that the society could not introduce A.'s admissions to show that the policy had lapsed.—*Supreme Lodge Knights of Pythias of the World v. Schmidt*, 98 Ind. 374.

[b] (*Sup.* 1885)

The declarations of the insured, made some time before the application, and not part of the res gestæ of acts or facts showing disease, are incompetent against the beneficiary.—*Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

[c] (*App.* 1898)

In an action on a policy of a company paying losses by assessments on its members, the insured's declarations that he regarded his policy canceled, and that he had withdrawn from the company, are immaterial.—*Patrons' Mutual Aid Soc. of Vermillion County v. Hall*, 49 N. E. 279, 19 Ind. App. 118.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 989-993; 28

CENT. DIG. Insurance, § 2005.

See, also, 16 Cyc. pp. 1016, 1017.

#### § 253. Conspirators and persons acting together.

In criminal prosecutions, see CRIMINAL LAW, §§ 422-427.

Preliminary evidence as to existence of conspiracy, see post, § 260.

[a] (*Sup.* 1849)

Where there is a common purpose between the assignor and the assignee for benefit of creditors to defraud, the declarations of the assignor, made after the deed, are admissible to prove the fraud.—*Caldwell v. Williams*, 1 Ind. 405.

[b] (*Sup.* 1869)

Admissions and declarations by a person who pays the purchase money, made after the conveyance, are not admissible in evidence against the grantee, though a conspiracy between them to defraud be shown.—*Hubble v. Osborn*, 31 Ind. 249.

[c] (*Sup.* 1875)

Where, in an action of replevin, declarations of the plaintiff's vendor, the attachment defendant, made after the sale, were introduced in evidence without proper objection and exception, held not error to instruct the jury that such evidence might be considered by them in determining the validity and good faith of the sale, if they found that there was a conspiracy between the plaintiff and his vendor to defraud the creditors of the latter.—*Wiler v. Manley*, 51 Ind. 169.

[d] When there is a conspiracy between vendor and vendee to defraud creditors, declarations by either, made before the accomplishment of the fraudulent purpose, are admissible against both, though made after the transfer of the property.—(*Sup.* 1877) *Tedrowe v. Esher*, 56 Ind. 443; (*1881*) *Sherman v. Hogland*, 73 Ind. 472; (*1882*) *Bishop v. Redmond*, 83 Ind. 157; (*1887*) *Hunsinger v. Hofer*, 110 Ind. 390,

11 N. E. 463; (*1894*) *Benjamin v. McElwaine-Richards Co.*, 10 Ind. App. 76, 37 N. E. 362.

[e] (*Sup.* 1880)

Where a conspiracy between two persons to defraud a third person is fairly shown by other evidence in the case, evidence of an admission of one defendant in the absence of the other is admissible against the latter.—*Smith v. Freeman*, 71 Ind. 85.

[f] (*Sup.* 1881)

Declarations by each of two persons engaged in the furtherance of a common design to defraud a third party are evidence against the other, though made in the latter's absence.—*Hogue v. McClintock*, 76 Ind. 205.

[g] (*Sup.* 1882)

Where persons confederate together to effect a fraudulent conveyance, declarations of one of the confederates, made before the conveyance is accomplished, are admissible against the others in an action to set aside the conveyance.—*Barkley v. Tapp*, 87 Ind. 25.

[h] (*Sup.* 1884)

Where a grantor and grantee conspired to defraud third persons, declarations by the grantor impeaching the title, made after conveyance, are admissible.—*Daniels v. McGinnis*, 97 Ind. 549.

[i] (*App.* 1891)

A conspiracy to procure an indictment and conviction upon a charge of arson cannot be established by the acts or declarations of one of the alleged conspirators made after trial and acquittal.—*Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 994-1002.

See, also, 16 Cyc. pp. 1025-1028.

#### (E) PROOF AND EFFECT.

Effect of admissions on trial as relieving adverse party from necessity of offering proof, see TRIAL, § 36.

#### § 254. Laying foundation for impeachment of testimony of party.

[a] (*App.* 1902)

Admissions by defendant, the maker of a note, that he signed the note, and that it was all right, and evidence that he silently acquiesced in a statement made in his presence that the amount of the note was owed by him to the owner, when it was his duty to speak and tell the truth, were not in the nature of impeaching evidence, for which a foundation must be laid, but were relevant in the first instance.—*Pritchett v. Sheridan*, 63 N. E. 865, 29 Ind. App. 81.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 1004.

**§ 255. Preliminary evidence.**

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1003, 1005-1012.

See, also, 16 Cyc. p. 1037.

**§ 256. — In general.**

[a] (Sup. 1865)

A certified copy of an affidavit filed in the supreme court on a motion to reinstate a case which had been dismissed was given in evidence against affiant in the action in the lower court. *Held*, that it was inadmissible, because not connected with the case on trial by other evidence.—*Thom v. Wilson's Ex'r*, 24 Ind. 323.

[b] (Sup. 1871)

Where, in an action on a promissory note, defendant set up that it was given in consideration for the manufacture by plaintiff of certain fanning mills for defendant, and that the same were not made in accordance with the contract, and plaintiff gave evidence of acceptance by defendant of the machines, and the subsequent execution of the note in suit, sufficient foundation was laid for the admission in evidence of declarations of defendant's agent, on receiving the machines, to the effect "that he was satisfied, and that they were a smooth, nice job."—*Hunter v. Leavitt*, 36 Ind. 141.

[c] (App. 1894)

In an action on a claim against a decedent's estate, it was not error to refuse to admit in evidence a tax assessment list where the proof preliminary to the introduction of the assessment sheet showed that it was not the claimant's, and that she did not sign it; for, if she did not make it either personally or through some one authorized to act for her, it was not competent as evidence against her.—*Bartlett v. Burden*, 39 N. E. 175, 11 Ind. App. 419.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1003, 1005.

**§ 257. — Identity of title or interest.**

[a] (Sup. 1862)

Proof that A. agreed to keep B. in stock, and admitted himself liable for such stock as B. got after a certain date, is not sufficient evidence of a unity of interest to make the admission of B. bind A.—*Wonderly v. Booth*, 19 Ind. 169.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 1008.

**§ 258. — Existence and extent of agency or authority.**

[a] (Sup. 1864)

The declarations of an agent are evidence, except so far as they assert his agency; and, if such declarations are admitted before proof of his agency, the irregularity is cured by sub-

sequent proof of that fact.—*Trustees of Wabash & E. Canal v. Bledsoe*, 5 Ind. 133.

[b] (Sup. 1859)

Where declarations of an agent are erroneously admitted before proof of the agency, subsequent proof of the agency is error.—*Toledo, W. & W. R. Co. v. Fisher*, 13 Ind. 258.

[c] (Sup. 1871)

In an action on a contract, evidence of acts by an alleged agent is inadmissible for the purpose of binding the principal without proof that at the time the agent was acting for his principal.—*Hunter v. Leavitt*, 36 Ind. 141.

[d] The acts or declarations of a person who assumes to act as the agent of another are not admissible evidence against his supposed principal, without some independent proof of his authority or agency.—(Sup. 1874) *Coon v. Gurley*, 49 Ind. 199; (1876) *Breckenridge v. McAfee*, 54 Ind. 141.

[e] (Sup. 1877)

Proof that one had charge of live stock at the time of a sale thereof does not raise such a presumption of agency as to render competent his statements as to the quality and condition thereof, on trial of an action for the price by the vendor's administrator.—*Applegate v. Moffitt*, 60 Ind. 104.

[f] (App. 1892)

Evidence that a husband acted openly as his wife's agent, under circumstances implying a knowledge by the wife of the acts, establishes a prima facie agency, and authorizes the admission of evidence of the husband's declarations.—*Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1006, 1007;  
26 CENT. DIG. Hus. & W. § 846.**§ 260. — Existence of conspiracy or common purpose.**

[a] Statements made by a grantor, after he has parted with his title, tending to impeach his grantee's title, are inadmissible, except when a conspiracy to defraud the grantor's creditors has been shown to exist.—(Sup. 1859) *Ewing v. Gray*, 12 Ind. 64; (1881) *Kennedy v. Divine*, 77 Ind. 490.

[b] (Sup. 1885)

Proof of acts, declarations, and representations of an alleged conspirator is not evidence against absent parties, until there has been proof of a conspiracy; but when that is established such declarations, etc., become competent against all persons connected with the conspiracy, if in furtherance of that object.—*Wolfe v. Pugh*, 101 Ind. 293.

[c] (Sup. 1885)

The declarations of one of two persons engaged in a conspiracy to defraud another are admissible against both of the conspirators;

and this is true although there is no direct evidence proving the conspiracy, provided there is circumstantial evidence tending to prove it.—*Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70, 3 N. E. 633.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. EVID. §§ 1010-1012.

### § 262. Mode and requisites of proof of admissions.

[a] (App. 1892)

As the Code requires each paragraph of an answer to be sufficient in itself, there is no error in admitting in evidence against the pleader, as an admission, a single paragraph of an answer filed in a former action between the same parties.—*Kentucky & I. Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. 802.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. EVID. §§ 1019-1021.  
See, also, 16 Cyc. p. 1037.

### § 263. Explanation or limitation.

[a] (Sup. 1846)

Where the admission of a person is offered in evidence, the whole of such admission must be given.—*McNutt v. Dare*, 8 Blackf. 35.

[b] (Sup. 1875)

When a conversation is given in evidence, the opposing party is entitled to have all that was then said in relation to the same matter given in evidence; but, where a conversation about a given matter is introduced in evidence, the door is not thereby opened for the introduction of what was said in relation to a different matter, although in the same conversation.—*Miller v. Wildcat Gravel Road Co.*, 52 Ind. 51.

[c] (Sup. 1881)

In suit for goods sold and delivered, plaintiff having introduced evidence tending to show that defendant had given authority to a third party to buy goods to carry on defendant's business, it was competent to show what directions such agent gave about the shipment of the goods at the time he ordered them of plaintiff.—*Locke v. Falk*, 76 Ind. 520.

[d] (Sup. 1881)

Where one party proves a conversation between the other party and a third person, the other party may show by other witnesses what the third person said to him in that conversation.—*Crowder v. Reed*, 80 Ind. 1.

[e] (Sup. 1886)

In a suit by an administrator to collect a promissory note, and foreclose a mortgage, executed to his decedent, the defense being that by subsequent agreement the note was to be paid and was paid by the defendant's keeping and supporting the decedent during his natural life, declarations of the decedent, shortly before his death, and subsequent to the alleged agreement, that he was holding the mortgage against the defendant, but feared he would

cheat him out of it, are inadmissible to rebut evidence of declarations by him admitting the agreement relied on in defense.—*Brown v. Kenyon*, 108 Ind. 283, 9 N. E. 283.

[f] (Sup. 1887)

Where admissions are contained in a conversation, the questions and responses of both persons engaged in the conversation should be given to the jury.—*Grand Rapids & I. R. Co. v. Diller*, 110 Ind. 223, 9 N. E. 710.

[g] (App. 1893)

Where, in an action to enforce a mechanic's lien, defendant, to sustain an allegation in his cross complaint that the work was done under a contract of partnership, introduced witnesses who testified that plaintiff, out of court, had stated that the contract was one of partnership, it is reversible error to permit plaintiff to show by a witness that he (plaintiff) had said, in the absence of defendant, that it was not a contract of partnership.—*Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. 675.

[h] (App. 1894)

While ordinarily it is not proper to allow a party to testify to his understanding as to what his liability is under a contract, it is not error to permit such a witness to explain how he came to write a letter previously introduced in evidence by the other party.—*John A. Tolman Co. v. McClure*, 37 N. E. 289, 10 Ind. App. 28.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. EVID. §§ 1022-1027.

### § 264. Construction.

[a] (Sup. 1858)

A declaration that a party has lost his claim against a firm by taking the note of a member thereof, who afterwards became insolvent, is a mere inference from facts, and not an admission of an express agreement to that effect. So held in an action against the firm to recover the price of the goods sold to the partnership, for which the individual partner's note was given.—*Tyner v. Stoops*, 11 Ind. 22, 71 Am. Dec. 341.

[b] (Sup. 1879)

An offer by a purchaser of a certain article at sheriff's sale to a purchaser thereof at a subsequent constable's sale to trade with him for the article, while the same was in the latter purchaser's possession, cannot be construed into an implied admission of title in the latter, the evidence not disclosing B.'s motive in making the offer.—*Sharp v. McBride*, 69 Ind. 396.

[c] (Sup. 1881)

An admission on a trial that a transcript of judgment offered in evidence is valid is not an admission that the judgment is also valid.—*Lockwood v. Dill*, 74 Ind. 56.

[d] (Sup. 1908)

A statement by the trustee under a trust deed or mortgage, in a conversation with the

representative of attachment creditors, in response to a reference by such representative to the attachment suit and seizure thereunder, a fact which it was suggested to the trustee that he knew, "Yes, and when we took our trust deed we thought we were getting a good title and would only be subject to judgments of record," did not amount to an admission by the trustee that he had notice of the attachment lien when the mortgage was taken.—*First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank of Wabash*, 171 Ind. 323, 86 N. E. 417.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 1028.

See, also, 16 Cyc. p. 1042.

§ 265. **Conclusiveness and effect.**

In actions for divorce, see DIVORCE, § 125.

[a] (Sup. 1857)

Admissions made in court for the purposes of the trial are conclusive; but others, proved to have been made during the pendency of the suit, are not only not conclusive, but generally weak evidence, except admissions held conclusive on grounds of public policy.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

[b] (Sup. 1860)

Admissions are to be received by the jury with great caution, and particularly where the witness can only give part of the admissions.—*Chandler v. Schoonover*, 14 Ind. 324.

[c] (Sup. 1860)

Any admission that the other party was not liable on an item of account, canvassed and disallowed on a settlement, which might be implied from a failure to insist upon it, may be shown to have been made in ignorance or by mistake, and thus to be without force as a bar.—*Bright v. Coffman*, 15 Ind. 371, 77 Am. Dec. 590.

[d] (Sup. 1871)

Admissions are not regarded as the strongest and most satisfactory evidence.—*Denman v. McMahon*, 37 Ind. 241.

[e] (Sup. 1874)

Imperfection of memory is not the only informative circumstance to be considered in weighing the force of verbal admissions.—*McMullen v. Clark*, 49 Ind. 77.

[ee] (Sup. 1877)

A minor, with his father's consent purchased of the corporation by which he was employed certain shares of its stock, receiving a certificate therefor, and executing to his employer his note. According to an agreement between the minor and the employer, in which the father acquiesced, he received a weekly credit of a certain sum on the note, which credit was deducted from the earnings. Before he attained majority, and before the note was wholly paid, he tendered the certificate back to the corporation, and demanded the return of his note, and that the sums credited thereon should be paid

him. *Held*, that proof of the credits allowed on the note was prima facie evidence of the value of the minor's services.—*Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

[f] (Sup. 1878)

Under 2 Rev. St. p. 186, § 372, requiring judgment on the pleadings in favor of a party, although the verdict is against him, if, in an action for a money judgment, the answer admits the plaintiff's right to a judgment for any sum, the defendant cannot give evidence to the contrary, nor the plaintiff introduce the answer in evidence.—*New Albany & V. Plank Road Co. v. Stallcup*, 62 Ind. 345.

[g] (Sup. 1881)

The declarations of a witness, not a party, though admissible to discredit his testimony, cannot be regarded as otherwise affecting any issue in the case.—*Davis v. Hardy*, 76 Ind. 272.

[h] (Sup. 1883)

Where admissions of a party are clearly proved and are consistent with the other events and circumstances of the case, unless in some way disproved or contradicted, they should not be disregarded by the jury.—*State ex rel. Board of Com'rs of Scott County v. Wilson*, 90 Ind. 114.

[i] (Sup. 1884)

A pleading made on the first trial, but withdrawn on the second, though competent as an admission, is not conclusive.—*Boots v. Canine*, 94 Ind. 408.

[j] (Sup. 1886)

It is error to instruct the jury that oral admissions are to be received with great caution, because a witness may not have correctly understood them or correctly repeated them.—*Zenor v. Johnson*, 107 Ind. 69, 7 N. E. 751.

[k] (Sup. 1888)

In a previous trial the complaint and demand were for \$2,000, but the judgment was set aside for want of jurisdiction, and the recovery in the present action was for \$3,114. *Held* that, while the complaint and judgment in the first suit constituted a strong admission, they were not conclusive that plaintiff's services were not worth the amount of the recovery.—*Louisville, N. A. & C. R. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611.

[l] (App. 1893)

In an action against a railroad company for loss of services of plaintiff's minor son, it appeared that deceased went under an engine to tighten a boiler plug which was leaking, and was so scalded that he died. Three witnesses testified that immediately after the accident, while deceased was suffering intensely, he said: "Nobody is to blame for this but myself. I turned the plug the wrong way." *Held*, that such evidence was not conclusive as to deceased's negligence, and a judgment for plaintiff was not contrary to law, where there was other evidence that deceased was free from fault.—*Louisville, E. & St. L. Consolidated R. Co.*

v. Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

[m] (*Sup.* 1897)

A party introducing in evidence a withdrawn pleading of his adversary is not bound thereby, but may disprove any of its averments.—*Cleveland, C., C. & St. L. R. Co. v. Gray*, 46 N. E. 675, 148 Ind. 206.

[n] (*App.* 1909)

Admissions by a husband after marriage of an antenuptial contract, wherein it was agreed he should not share in his wife's property, were competent as original evidence not only that it was made, but that it was still in force.—*Unger v. Mellinger*, 43 Ind. App. 524, 88 N. E. 74.

[o] (*App.* 1910)

Where the uncontroverted evidence showed that plaintiff had never stated to her attorneys any fact warranting the averments in the complaint, drawn and filed by the attorney, and that the party on hearing the complaint read repudiated it, and an amended complaint was filed on which the cause was tried, averments of the original complaint, introduced in evidence by the adverse party, could not, standing alone, prove the facts averred.—*Baldwin v. Siddons*, 92 N. E. 349, denying rehearing 90 N. E. 1055.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1020-1050;  
24 CENT. DIG. Gifts, § 96.

See, also, 16 Cyc. pp. 1045-1050.

### VIII. DECLARATIONS.

As evidence of resulting trust, see TRUSTS, § 89.

As part of *res gestæ*, see ante, §§ 118-128.

As showing domicile, see DOMICILE, § 9.

By agent as to his authority, see PRINCIPAL AND AGENT, §§ 22, 122.

By defendant in bastardy proceedings, see BASTARDS, § 60.

By grantors in fraud of creditors, see FRAUDULENT CONVEYANCES, § 286.

By grantors or former owners as constituting admissions by grantees and subsequent owners, see ante, §§ 220-236.

By husband against wife in prosecution of husband and wife, see WITNESSES, § 52.

By partners to prove partnership, see PARTNERSHIP, §§ 46, 49.

By prosecutrix in bastardy proceedings, see BASTARDS, § 58.

By testator as affecting construction of will, see WILLS, § 487.

By testator as showing mistake, fraud, or duress in execution of will, see WILLS, § 165.

By testator, as showing testamentary capacity, see WILLS, § 54.

By testator as to execution or revocation of will, see WILLS, § 297.

By wife to husband in presence of third person as affected by rule excluding statements of wife in suit by or against husband, see WITNESSES, § 52.

By witnesses, competency for purpose of showing interest or bias, see WITNESSES, § 374.

Failure to deny statements of others as admissions by party present, see ante, § 220.

In criminal prosecutions, see CRIMINAL LAW, §§ 411-413, 415-417.

Relevancy of evidence of statements and conduct of parties, see ante, § 110.

Sufficiency and scope of objections to admission of declarations in evidence, see TRIAL, § 87.

### (A) NATURE, FORM, AND INCIDENTS IN GENERAL.

#### § 266. Nature and grounds for admission in general.

[a] (*Sup.* 1869)

Dying declarations can be admitted as evidence only in a certain class of criminal cases.—*Duling v. Johnson*, 32 Ind. 155.

[b] (*Sup.* 1871)

Declarations of decedent made long after supposed payments or advancements to his children cannot be proved for the purpose of establishing the fact that such payments or advancements were made.—*Hamlyn v. Nesbit*, 37 Ind. 284.

[c] (*Sup.* 1882)

Where, in an action for work and labor, a letter from plaintiff to a third person claiming pay from him was read in evidence by defendant, *held* that, on plaintiff's testifying that the letter was written at the dictation of defendant, the reply of the third person, denying his liability, was admissible.—*Gibson v. Lacy*, 87 Ind. 202.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1051, 1052,  
1054-1056, 1058-1060; 50 CENT. DIG.  
Witn. § 130.

See, also, 16 Cyc. p. 1146.

#### § 268. Statements showing physical or mental condition.

By testator on issue of testamentary capacity, see WILLS, § 54.

[a] (*Sup.* 1903)

As tests of the mental capacity of one at the time she made a voluntary conveyance of land to her son by her second husband, with knowledge that he would at once convey it to such husband, her statements made at that time, in connection with those made by her when said husband previously conveyed it to her without consideration, are admissible.—*Thorne v. Cosand*, 67 N. E. 257, 160 Ind. 566.

[b] (*Sup.* 1906)

In an action for personal injuries, plaintiff's attending physician testified that on the night of the accident he was called, and, being asked to describe plaintiff's condition, stated that he found her in bed, and that she told him that she had an injured ankle. *Held*, that it was proper to overrule a motion to strike the



answer as to what plaintiff said, as the declaration was evidently but introductory to the witness' treatment of the case and made to one competent to judge as to its truth or falsity.—*Indiana Union Traction Co. v. Jacobs*, 78 N. E. 325, 167 Ind. 85.

[c] (App. 1906)

In an action for personal injuries, statements of the injured party to a physician as to his then existing physical condition may be given in evidence by the physician.—*Indianapolis & M. R. T. Co. v. Reeder*, 76 N. E. 816, 37 Ind. App. 262.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1061, 1062.

See, also, 13 Cyc. p. 201; 16 Cyc. pp. 1160–1165, 1180–1188.

**§ 269. Statements showing intent, motive, or nature of act.**

Advancement, see DESCENT AND DISTRIBUTION, § 116.

Self-serving declarations, see post, § 271.

[a] (Sup. 1869)

Evidence of an intent being admissible to show whether anything given a child was intended as a gift or advancement, declarations of intent made by a parent during the execution of a settlement of property among his children was competent.—*Duling v. Johnson*, 32 Ind. 155.

[b] (Sup. 1890)

Declarations of a landowner are admissible in evidence to prove his intention to dedicate his land to the public.—*Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96.

[c] (App. 1893)

Where the right to the possession of land is in litigation, a conversation had by one of the parties as to his intention to rent such land for another year is not admissible.—*Keesling v. Doyle*, 35 N. E. 126, 8 Ind. App. 43.

[d] (App. 1898)

In an action to recover a piano, defendant claimed that plaintiff had given it to her. When the alleged gift was made by plaintiff, he was seeking a divorce from his wife. *Held*, that defendant's testimony that plaintiff expressed his love for her at the time was admissible, as showing the relation between the parties at the time.—*Fredericks v. Sault*, 49 N. E. 909, 19 Ind. App. 604.

[e] (Sup. 1907)

In an action to declare a deed a mortgage and for an accounting, evidence by one of the defendants, whose good faith in the matter had been attacked, that at the time of his purchase of an interest in the transaction the mortgagee informed him that the mortgagor's agent had represented to him at the time of the execution of the deed and collateral agreement to reconvey, that the collateral agreement would only permit the mortgagor to repurchase was compe-

tent, though possession of the land was not taken until four years after his purchase of such interest, to show his belief as to the nature of his title.—*Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1063–1067; 24

CENT. DIG. Gifts, §§ 91, 153; 47 CENT.

DIG. Trusts, § 132; 49 CENT. DIG.

Wills, § 410.

See, also, 16 Cyc. pp. 1175, 1184–1188.

**§ 271. Self-serving declarations in general.**

As part of *res gestæ*, see ante, §§ 124–128.

As to boundaries, see post, § 274.

Books of account, see post, § 354.

By person in possession or control as to title to or possession of property, see post, § 273.

In criminal prosecutions, see CRIMINAL LAW, § 413.

Officers return on execution as evidence in his favor, see EXECUTION, § 343.

[a] (Sup. 1854)

A party's declarations in his own favor are not admissible.—*Scobey v. Armington*, 5 Ind. 514.

[b] (Sup. 1855)

On the trial of a proceeding in attachment the defendants will not be allowed to give evidence of declarations made by themselves when the sheriff executed the writ.—*Church v. Drummond*, 7 Ind. 17.

[c] (Sup. 1856)

A partner cannot, by evidence of declarations of his copartner, affect the rights of third persons dealing with the firm.—*Bird v. Lanius*, 7 Ind. 615.

[d] (Sup. 1862)

In an action against a railroad for the value of a lost trunk, the *ex parte* affidavit of plaintiff is not competent to prove the contents of the trunk.—*Indiana Cent. Ry. Co. v. Gulick*, 19 Ind. 83.

[e] (Sup. 1864)

The declarations of a party to a suit, made when the other party is not present, are not competent evidence in his own behalf.—*Zimmerman v. Marchland*, 23 Ind. 474.

[f] (Sup. 1865)

In an action for damages caused by the sinking of a flatboat while it was being towed by the defendants' steamboat, evidence of the statements of one of the defendants to a stranger in regard to the liability of the steamboat in such cases is inadmissible in behalf of the defendants.—*Neal v. Scott*, 25 Ind. 440.

[g] (Sup. 1867)

The declarations of the holder of a bill of exchange that it had not been paid cannot be given in evidence by his assignee against the maker, indorser, or acceptor to prove such fact of nonpayment.—*Hays v. Hynds*, 28 Ind. 531.

[h] (*Sup.* 1870)

The declarations of an agent are not admissible in evidence in favor of his principal, either before or after the death of the agent.—*Hall v. Hall*, 34 Ind. 314.

[i] (*Sup.* 1871)

In a suit against partners or joint contractors, declarations made by one defendant to another as to the terms of the contract, in the absence of plaintiff, are inadmissible in evidence for defendants.—*Graham v. Henderson*, 35 Ind. 195.

[j] (*Super.* 1873)

On the issue as to the revocation of a contract between one of the parties to a suit and a third person, a competent witness may testify as to what was said and done by the parties to the contract with reference to its rescission, although the other party to the suit was not present at the time.—*Leas v. Grubbs*, Wils. 301.

[k] (*Sup.* 1877)

Where it is alleged that a person apparently an indorser on a promissory note is in fact a surety, evidence of a conversation between such person and the maker of the note, had in the absence of a cosurety, in relation to the liability to be incurred by such indorser, is inadmissible to show, as against the surety, that indorser's liability was not a cosurety's.—*Nurre v. Chittenden*, 56 Ind. 462.

[l] (*Sup.* 1878)

In an action for false imprisonment brought against codefendants, any agreement, understanding, or relation between defendants cannot be given in evidence in their favor or in favor of either of them.—*Stewart v. Maddox*, 63 Ind. 51.

[m] (*Sup.* 1881)

The title to personal property being in dispute, plaintiff proved that in 1877 he listed the same for taxation in his own name, and that defendant made no return thereof, the respective schedules being put in evidence. Defendant then proved by the assessor that plaintiff made no return of the property in 1878, and offered to put in his own return for that year, and thereby show that the property was listed for taxation against him in that year. *Held*, that the return was properly rejected.—*Schenck v. Sithoff*, 75 Ind. 485.

[n] (*Sup.* 1881)

A surety cannot testify as to what his principal told him, in the absence of the payees, was the intent with which he signed a note.—*Ricketts v. Harvey*, 78 Ind. 152.

[o] (*Sup.* 1882)

In defense of a claim against a decedent's estate, his declarations cannot be shown if they were made in his own favor.—*Bristor v. Bristor*, 82 Ind. 276.

[oo] (*Sup.* 1883)

In an action on a note executed by a decedent, payable out of his estate after death,

his declarations in reference to the note, made after its execution, in the absence of the payee, are not admissible against the payee.—*Harcourt v. Harcourt*, 89 Ind. 104.

[p] (*Sup.* 1883)

Declarations of a guardian, made to his attorney when preparing his reports, are not admissible on behalf of his sureties in an action on the guardian's bond.—*Williams v. State ex rel. Roberts*, 89 Ind. 570.

[pp] (*Sup.* 1884)

Conversations between a town treasurer and the sureties on his bond, prior to its approval, and without the knowledge of the officers charged with its acceptance, are not admissible for the sureties against the obligee.—*Harvey v. State ex rel. Town of Monticello*, 94 Ind. 159.

[q] (*Sup.* 1885)

Statements by a grantor sued by the grantee for a breach of a covenant against incumbrances, made in the grantee's absence, at the time of his employing an attorney to remove an outstanding incumbrance, are inadmissible as evidence to rebut the presumption arising from the fact of his employing such attorney.—*Morehouse v. Heath*, 99 Ind. 509.

[qq] (*Sup.* 1885)

In an action against a husband and wife to set a conveyance to the wife aside, as fraudulent, statements of the husband that he was owner of the land did not prevent the wife from asserting the ownership, as such statements only went to affect the husband's credibility as a witness.—*Bremmerman v. Jennings*, 101 Ind. 253.

[r] (*Sup.* 1886)

Statements of one of the parties to a transaction not made in the presence of the other are not binding on such other.—*Olvey v. Jackson*, 4 N. E. 149, 106 Ind. 286.

[rr] (*Sup.* 1886)

As a general rule, declarations of a decedent in his own favor, made in the absence of the other party, are incompetent in behalf of the administrator, but an exception exists where they accompany and give character to an act of the decedent proper to be given in evidence.—*Brown v. Kenyon*, 108 Ind. 283, 9 N. E. 283.

[s] (*Sup.* 1887)

In an action against a board of county commissioners, where the contract sued on requires the official action of the board of commissioners, the declarations of one member, not sitting in session with his associates, are not competent in favor of the county.—*Board of Com'rs of Franklin County v. Bunting*, 111 Ind. 143, 12 N. E. 151.

[ss] (*Sup.* 1888)

An affidavit in support of a motion for a continuance, which had been overruled, cannot be introduced in evidence by the party making

it.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[t] (*Sup.* 1890)

A witness for the plaintiff in an action for slander testified as to a conversation which he had with the defendant, giving the month in which the conversation occurred, and the defendant testified that he had no conversation with him at that time, and offered to testify that he did have at another time, and offered to state what that conversation was. *Held*, that the defendant's testimony was properly excluded, in the absence of any impeaching question having been asked.—*Miller v. Cook*, 24 N. E. 577, 124 Ind. 101.

[tt] (*Sup.* 1890)

Written statements made without the knowledge of the opposite party are not admissible in evidence in favor of one claiming under the person who made them, but they are admissible when made with the knowledge of the opposite party.—*Tobin v. Young*, 124 Ind. 507, 24 N. E. 121.

[u] (*Sup.* 1893)

In an action for damages for conveying certain property to another instead of to plaintiff, as agreed, and for false representations, it is not competent to show by defendant's own declaration out of court that he had so conveyed the property at plaintiff's request, or what a third person had said in regard to there being no false or fraudulent representations.—*Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

[uu] (*App.* 1893)

In an action against road contractors for damages to plaintiff's premises resulting from the taking of gravel therefrom, evidence of one of defendants that he instructed his foreman to be careful about injuring the property is inadmissible.—*Shauver v. Phillips*, 7 Ind. App. 12, 32 N. E. 1131, 34 N. E. 450.

[v] (*App.* 1893)

In an action on a claim against a decedent's estate, arising out of a contract with decedent, declarations of decedent are not admissible on behalf of the estate.—*Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709.

[vv] (*App.* 1895)

In an action against an administrator to recover on a claim against the decedent, the administrator cannot prove the declarations of the decedent, made in the absence of the claimant, to sustain his defense.—*Wetzel v. Kellar*, 39 N. E. 805, 12 Ind. App. 75.

[w] (*App.* 1895)

In an action by a woman for breach of marriage contract, declarations made by her during and relative to the alleged engagement, in the absence of the defendant, if not uttered in connection with some act or conduct of the defendant showing his intention to marry plaintiff, are inadmissible.—*Wilson v. Smelser*, 13 Ind. App. 31, 41 N. E. 76.

[ww] (*App.* 1899)

In a claim against an estate, where there was evidence that deceased acknowledged the debt, proof that near the same time he made contrary statements was properly excluded as self-serving.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

[x] (*App.* 1899)

Statements made by the attachment defendant after the garnishee has been served are not admissible, as self-serving declarations, against the attachment plaintiff and in favor of the garnishee.—*Phenix Ins. Co. v. Jacobs*, 55 N. E. 778, 23 Ind. App. 509.

[xx] (*App.* 1901)

A letter written plaintiff by defendant after commencement of the suit for divorce is not admissible in his behalf, to show his intention on the question of abandonment.—*Turner v. Turner*, 60 N. E. 718, 26 Ind. App. 677.

[y] (*App.* 1905)

In an action by cotenants to recover for the use and occupation of premises from the tenant in possession, testimony of an attorney as to whether he was instructed by one of the plaintiffs to make demand on the tenant in possession for possession was not incompetent; the witness not being asked to give any conversation he had with his client.—*McCrum v. McCrum*, 76 N. E. 415, 36 Ind. App. 636.

[yy] (*App.* 1906)

In an action for death caused by an explosion of dynamite in breaking iron machinery, where defendants contended that the work was done by an independent contractor, evidence that one of the defendants told a witness in the morning of the day of the accident that he would be in another city on that day was incompetent as showing a self-saving declaration.—*Falender v. Blackwell*, 39 Ind. App. 121, 79 N. E. 393.

[z] (*Sup.* 1908)

On a claim by a husband against the estate of his deceased wife for money deposited in bank in her name, as "Agent," testimony of a witness for the estate as to what deceased said about the money was properly excluded when the question called for a purely self-serving statement.—*Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 593.

[zz] (*App.* 1909)

In an action by an administratrix to recover securities representing loans of decedent, which his sister took possession of under claim of ownership, evidence that at a time not stated, and in the absence of the parties interested, witness had a conversation with decedent, in which decedent stated that he had made numerous loans, and that the loans were made in his sister's name to escape taxation, was inadmissible, because self-serving declarations by decedent, and because not explaining or qualifying any act which was in itself admissible in evi-

dence.—*Baker v. Baker*, 43 Ind. App. 26, 86 N. E. 864.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1068-1079, 1081-1104; 39 CENT. DIG. Paymt. § 205. See, also, 16 Cyc. pp. 1040, 1202-1206; note, 93 Am. Dec. 279.

**§ 272. Declarations against interest in general.**

[a] (Sup. 1882)

On an issue whether a wife owned property attached by a creditor of the husband, where the assignment list of the husband showing the property was introduced, it was proper to show by the assessor that at the time of making the list the husband told him that the wife owned the property.—*Hadley v. Hadley*, 82 Ind. 75.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1105-1107. See, also, 16 Cyc. pp. 1217-1222.

**§ 273. Declarations of person in possession or control as to title or possession.**

[a] (Sup. 1846)

In trover by husband and wife it was held that the declarations of the wife's mother, who had been the former wife of the defendant, as to the ownership of the property in dispute, which declarations were made while the mother was the guardian of her daughter and had possession of the property, and before her marriage with the defendant, were not evidence for the plaintiff.—*Collis v. Bowen*, 8 Blackf. 262.

[b] (Sup. 1847)

In ejectment, plaintiffs gave in evidence a deed from the patentee of a tract of land containing the 30 acres in controversy, to a certain person, for 30 acres, and as being the same land on which R. then lived, and also introduced mesne conveyances through which title passed to plaintiffs. Defendants introduced an older deed from the same patentee to certain persons, conveying 130 acres of land, "with the exception of 30 acres heretofore conveyed to the grantee named in the deed introduced by plaintiffs." The land described in this deed included the 30 acres mentioned in the deeds introduced by plaintiffs. Plaintiffs offered to prove that R., then deceased, had admitted while in possession that he held the land as tenant of the grantee in the deed of the patentee introduced by plaintiffs. Held, that the exception in the deed of the patentee introduced by defendants being valid, and R.'s possession being prima facie evidence of his ownership in fee, his admissions, being in derogation of his own title, were admissible to show a seisin in the grantee in the deed introduced by plaintiffs, under whom he held as tenant, thereby showing that the land so excepted was the identical

land conveyed to such grantee.—*Doe ex dem. Chandler v. Evans*, 8 Blackf. 322.

[c] (Sup. 1858)

Declarations by an execution defendant before levy are admissible to disprove property in the sheriff after levy.—*King v. Wilkins*, 11 Ind. 347.

[d] (Sup. 1862)

The cashier of a bank, having left the town under circumstances inducing a suspicion that he had carried away gold belonging to the bank, was arrested by the sheriff, and certain gold found secreted on his person was taken possession of by the sheriff. The bank sued the sheriff for the gold, and it was held that evidence by third persons of the declarations made by the arrested person at the time of his arrest to the effect that the gold belonged to the bank, etc., were admissible as part of the *res gestæ*.—*Boone County Bank v. Wallace*, 18 Ind. 82.

[e] (Sup. 1882)

In a suit against A. and B. for conversion, A. was defaulted, and B. pleaded that he had borrowed the property of A., and returned it to him without knowledge that plaintiff claimed to own it. Held, that statements by A., while in possession, made in the absence of plaintiff, as to the ownership of the property, and how B. obtained it from him, were admissible.—*Bunnell v. Studebaker*, 88 Ind. 338.

[f] (Sup. 1883)

The owner of a colt agreed with plaintiff for its exchange. The colt was left with plaintiff, and acts were done by the owner evincing a ratification of the original contract. He subsequently took the colt from the possession of plaintiff, whereupon the latter brought an action for the expense of feeding and caring for him, but the action was dismissed before trial. Defendant bought the colt from such owner after the oral agreement between him and plaintiff, and with notice of the agreement. Plaintiff brought replevin against defendant. Held, that testimony as to a conversation between such owner and plaintiff after the former had, without the consent of the latter, regained possession of the colt and was still in his possession, was competent because it proved the declarations of the person in possession.—*Kuhns v. Gates*, 92 Ind. 66.

[g] (Sup. 1884)

In a suit by an administrator to recover personal property alleged to belong to the deceased, declarations by the latter, while in possession, that he owned it, are admissible as part of the *res gestæ*.—*McConnell v. Hannah*, 96 Ind. 102.

[h] (Sup. 1890)

Declarations of a person through whom the claimant of attached personal property traces his title, made while in possession of the property, indicating the character in which he held it, are admissible, though not made in the pres-

ence of the adverse party.—*Maus v. Bome*, 123 Ind. 522, 24 N. E. 345.

[i] (Sup. 1890)

The owner of certain mares sold a half interest therein to defendant, payment to be made in four years. *Held*, that declarations of defendant as to the ownership of the mares, made while he was in possession thereof, were part of the *res gestæ* in replevin brought by a purchaser from the owner.—*Lowman v. Sheets*, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784.

[j] (Sup. 1894)

On an issue whether deceased agreed that plaintiff should have property on his death, whatever was said or done by deceased in relation to the property while he was in possession, including what he said as to ownership, was admissible as *res gestæ*.—*McDanel v. McDanel*, 136 Ind. 603, 36 N. E. 286.

[k] (Sup. 1894)

In an action for the return of property seized under a writ against a third person, declarations of ownership by plaintiff while in possession of the property are admissible in evidence as *res gestæ*.—*Gaar, Scott & Co. v. Shaffer*, 139 Ind. 191, 38 N. E. 811.

[l] Where the debtor remains in possession of property which once belonged to him, and which his creditor seeks to reach as fraudulently transferred, his acts and declarations while thus in possession are admissible in evidence against the vendee.—(App. 1894) *Benjamin v. McElwaine-Richards Co.*, 10 Ind. App. 76, 37 N. E. 362; (Sup. 1896) *Higgins v. Spahr*, 145 Ind. 167, 43 N. E. 11.

[m] (Sup. 1896)

Where the owner of land executed a deed whereby she had a right to retain possession during her life, her possession of the land was not equivocal and was not competent on an issue as to whether the deed had actually been executed, and hence her declarations accompanying such possession were not competent.—*Robbins v. Spencer*, 38 N. E. 522, 40 N. E. 263, 140 Ind. 483.

Inasmuch as possession by a person who has executed an instrument purporting on its face to be an absolute conveyance of land is in its nature equivocal, the declarations of such person in possession may be shown as explanatory of possession where they are accompanied by an act and they are explanatory of the act and immediately connected therewith, and the act is competent as explanatory of the possession, but narratives of a past transaction are inadmissible.—*Id.*

[n] (App. 1899)

A defendant, claiming title to chattels as buyer, may prove declarations of the seller, asserting ownership, while in possession of the property, though plaintiff was not present when the declarations were made.—*Remy v. Lilly*, 53 N. E. 387, 22 Ind. App. 109.

The fact that horses were on a farm on which a husband and wife resided is sufficient evidence that they were in her possession to justify the admission of evidence, on behalf of her vendee, of her declarations asserting ownership while the horses were on the farm, as against the adverse party, who was not present when the declarations were made.—*Id.*

[o] (App. 1908)

Declarations of defendants' intestate while in possession of land conveyed to him by a deed, which plaintiff seeks to have declared a mortgage, are admissible as part of the *res gestæ* to prove the nature and character of his possession, and that he held it as owner of the premises, and not as trustee for plaintiff.—*Vannice v. Dungan*, 41 Ind. App. 27, 83 N. E. 250.

[p] (App. 1910)

Declarations by a trustee of personality, made while in possession of the property, as to the manner in which he came into the possession thereof, and the purpose for which he held it, are competent; but declarations made by the trustee after the trust has been executed, and he has parted with the possession of the property, are incompetent.—*Traylor v. Hollis*, 91 N. E. 567.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1108–1120; 1 CENT. DIG. Adv. Poss. § 670; 47 CENT. DIG. Trusts, § 132.

See, also, 16 Cyc. pp. 1166–1174.

#### § 274. Declarations as to boundaries.

[a] (Sup. 1899)

In a suit involving the boundary between adjoining owners, where it was claimed by plaintiff that a boundary established by agreement between the grantors of plaintiff and defendant was the true boundary, a declaration of plaintiff's grantor, made while he was in possession of the land, to the effect that the fence was the boundary, was admissible.—*Burr v. Smith*, 53 N. E. 469, 152 Ind. 469.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1121–1134; 8 CENT. DIG. Bound. § 156.

See, also, 16 Cyc. pp. 1172, 1236; notes, 36 Am. Rep. 749, 60 Am. Rep. 589.

#### (B) BY DECEDENTS AGAINST INTEREST.

Admissibility against successor in interest, see ante, § 236.

Competency of witnesses to testify to declarations, see Witnesses, § 163.

Self-serving declarations, see ante, § 271.

#### § 276. Declarations against interest in general.

[a] (Sup. 1890)

Suit was brought to obtain an entry of satisfaction of a judgment on the ground that

while an execution thereon was in the hands of the sheriff, one of the defendants paid the same to an attorney of record for the judgment plaintiff, said attorney being also deputy sheriff. *Held*, that the declarations and admissions of such attorney, tending to show such payment, were admissible, both he and the defendant who made it being dead at the time of the trial.—*Royse v. Leaming*, 72 Ind. 182.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 1135.

### § 277. Disparagement of title.

[a] (Sup. 1898)

Declarations of a deceased deputy county treasurer, having the requisite means of information, made to plaintiff, that the taxes on property which he was about to buy had been paid, are admissible as declarations against interest, in a suit to enjoin the sale of the property for such taxes, to show that the taxes had theretofore been paid.—*Keesling v. Powell*, 49 N. E. 265, 149 Ind. 372.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 1136.

### § 278. Statements as to fact or nature of transfer or gift.

[a] (Sup. 1890)

Declarations of a father, in the absence of his son, that he had given certain notes to him, are admissible after the father's death in a suit by the son on a note executed to him in renewal of those referred to in the declaration.—*Dean v. Wilkerson*, 126 Ind. 338, 26 N. E. 55.

[b] (Sup. 1892)

On the trial of an issue as to whether some of the heirs of defendant had received property from him as an advancement, declarations of deceased, made several years after the transaction took place, are not admissible on the ground that they are against the interest of the person making them, since, so far as the interest of deceased was concerned, it was immaterial whether the transfer of the money and property was by way of gift or advancement.—*Thistlewaite v. Thistlewaite*, 31 N. E. 946, 132 Ind. 355.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1137, 1138.

### (C) AS TO PEDIGREE, BIRTH, AND RELATIONSHIP.

### § 285. Nature of questions of pedigree and matters relating thereto.

[a] (Sup. 1881)

Declarations concerning pedigree are an exception to the rule as to the admission of hearsay evidence, but they must be confined to the declarations of those related by blood or marriage to the person whose parentage is in question.—*De Haven v. De Haven*, 77 Ind. 236.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 1143.

See, also, 16 Cyc. pp. 1223–1225.

### § 287. Family records.

[a] (Sup. 1859)

Entries in a hymn book, made by a parent ante litem motam are evidence of the age of a child, the father and mother and near relatives being dead or beyond seas.—*Collins v. Grantham*, 12 Ind. 440.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1145, 1146.

### § 289. Declarations by members of family.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1149–1154.

See, also, 16 Cyc. pp. 1232–1234.

### § 290. — In general.

[a] (Sup. 1881)

The fact that the declarations of an ancestor relative to the pedigree of one who had been dead for many years were made by him as a witness in an action affecting his personal interests does not render evidence thereof objectionable.—*De Haven v. De Haven*, 77 Ind. 236.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 1149.

### (D) AS TO MATTERS OF PUBLIC OR GENERAL RIGHT OR INTEREST.

### § 300. Matters of private interest involved with public right or interest.

[a] (Sup. 1899)

Declaration of a surveyor that a tree marked by him as a monument on the line established by him was in fact some distance from the true line is not admissible, as it contradicts the official act and survey.—*Ellison v. Branstator*, 54 N. E. 433, 153 Ind. 146.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1155, 1157.

See, also, 16 Cyc. p. 1236.

### (E) PROOF AND EFFECT.

### § 311. Mode and requisites of proof of declarations.

[a] (Sup. 1881)

Where, upon direct examination, particular acts or statements of a deceased ancestor have been called out to indicate his treatment of one whose pedigree is in dispute, the opposite party may, on cross-examination, ask as to the general conduct of the ancestor in that respect.—*De Haven v. De Haven*, 77 Ind. 236.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1163, 1164.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

**§ 313. Conclusiveness and effect.**[a] (*Sup.* 1850)

Where an alleged creditor attached goods held by defendant under a deed from the debtor, the plaintiff's affidavit of attachment alone is not sufficient to establish the debt claimed as due to him.—*Shafer v. Alden*, 2 Ind. 42.

[b] (*Sup.* 1875)

On the issue whether, at the time a certain payment was made by the defendant to the plaintiff, the latter was 21 years old, the evidence of the defendant in proof of that fact consisted of the testimony of the defendant and two others that at the time of the payment the plaintiff stated that he was of that age, together with the testimony of another witness that plaintiff had made such statement to him prior to the time of the payment. To rebut this was the testimony of the plaintiff, together with a family record stating the date of his birth; but it was shown that this record was not made at the time of his birth, or by a member of the family, but by a stranger, at request of the plaintiff's father, when the plaintiff was "very small." *Held*, that a verdict in favor of the defendant would not be disturbed by the supreme court on the weight of evidence.—*State ex rel. Wade v. Joest*, 51 Ind. 287.

[c] (*Sup.* 1878)

In an action for lumber sold to Y. on defendant's request, Y. having testified that he bought on his own credit, and defendant having testified that he never authorized it to be charged to himself, it was permissible for plaintiff to prove that previous to the sale he told Y., though not in defendant's presence, that he could not get the lumber, but that the defendant could get it, since such conversation was not binding on defendant, but was only a circumstance to be considered, in connection with the subsequent conduct of the parties, for whatever it was worth.—*Henline v. Jacoby*, 62 Ind. 208.

[d] (*Sup.* 1893)

Evidence of declarations is generally a weak class of evidence by reason of the fact that the party making them may not have clearly expressed his meaning or may have been misunderstood, or the witness by unintentionally altering a few words of the expression really used may give an effect to a declaration completely at variance with what the party did actually say.—*Culp v. Wilson*, 32 N. E. 928, 133 Ind. 294.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1166, 1167;  
24 CENT. DIG. Gifts, § 96.

**IX. HEARSAY.**

Admissions in general, see ante, §§ 201-265.  
Declarations in general, see ante, §§ 266-313.  
Declarations by testator as to exercise of undue influence, see WILLS, § 165.

Hearsay evidence to show interest of witness, see WITNESSES, § 123.

Knowledge of impeaching witness, see WITNESSES, § 355.

Motion to strike out, see TRIAL, § 89.

**§ 314. In general.**[a] (*Sup.* 1846)

Hearsay evidence is inadmissible.—*Parker v. State ex rel. Town*, 8 Blackf. 292.

[b] (*Sup.* 1883)

Hearsay statements are not admissible, even in mitigation of damages.—*De Pew v. Robinson*, 95 Ind. 109.

[c] (*App.* 1898)

Testimony of an agent who purchased a judgment for plaintiffs which was sued on by them, as to what was done by plaintiffs with such judgment, within his own knowledge, is not hearsay.—*Snell v. Maddox*, 49 N. E. 856, 20 Ind. App. 169.

[d] (*App.* 1900)

The question, put to a cashier, what notice did the bank or any officer of it have of any defense to this note? is objectionable, as calling for hearsay evidence.—*Cooper v. Merchants' & Manufacturers' Nat. Bank*, 57 N. E. 569, 25 Ind. App. 341.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1168-1173.  
See, also, 16 Cyc. pp. 1192-1207.

**§ 315. Statements by persons other than parties or witnesses.**

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1174-1200.

**§ 317. — Oral statements.**[a] (*Sup.* 1829)

A. obtained judgment against B. on a note, and purchased, at sheriff's sale under the judgment, a tract of land which B., after the date of the note, but before the judgment, had conveyed to C. A. brought an action of ejectment for the land against C., alleging that B.'s deed to C. was fraudulent as to A. *Held*, that evidence that B. had stated that the consideration of the deed to C. was a valuable one was inadmissible as being hearsay.—*Doe ex dem. Helm v. Newland*, 2 Blackf. 233.

[b] (*Sup.* 1843)

In replevin for a horse the plea was, property in a third person. *Held*, that the declarations of such third person that he had sold the horse to the plaintiff, and had no claim to him, were hearsay and not admissible, such person being a competent witness for plaintiff.—*Fuller v. Wilson*, 6 Blackf. 403.

[c] (*Sup.* 1843)

The declaration of a clerk, since deceased, who had approved and filed a replevin bond, that the surety had been deceived as to its execution, etc., is hearsay, and inadmissible as evi-

dence.—*Doe ex dem. Burge v. Cunningham*, 6 Blackf. 430.

[d] (Sup. 1843)

The declarations or confessions of a person who is himself a competent witness are not admissible in evidence.—*Kendall v. Hall*, 6 Blackf. 507.

[e] (Sup. 1846)

Declarations of third persons are not admissible in evidence.—*Compton v. Fleming*, 8 Blackf. 153.

In replevin by the assignee of a bankrupt, plaintiff cannot prove the admissions of a stranger that the property belonged to the bankrupt; the stranger being a competent witness for plaintiff.—*Id.*

[f] (Sup. 1851)

In replevin of flour, plaintiff read in evidence a written contract entered into with C., whereby the latter was to manufacture within a limited time 2,000 barrels of flour, plaintiff to furnish the wheat. It appeared that afterwards he delivered the wheat to C., that the flour was manufactured and shipped to defendant's warehouse, who gave C. warehouse receipts for the flour and C. transferred them to D. Plaintiff then offered to prove the declarations of C. that, when he received the wheat, he stated it belonged to plaintiff, and, when he shipped the flour to defendant, he said it was plaintiff's flour. *Held*, that evidence of such declarations, being hearsay, was inadmissible.—*Ashby v. West*, 3 Ind. 170.

[g] (Sup. 1853)

Replevin by A. against B. for a horse. On the trial, B., having proved that the horse came into his possession by a purchase from one C., offered to prove a conversation between C. and himself soon after the trade occurred in relation thereto. It was not shown that C. was the agent of A. when the sale to B. was made. *Held*, that the court correctly refused to admit the evidence, as without such proof, the declarations of C. would have been mere hearsay.—*Travis v. Barkhurst*, 4 Ind. 171.

[h] (Sup. 1871)

Where defendant sold his interest in a commercial business to plaintiff, which included certain goods that were in the warehouse of a third party, and defendant gave plaintiff an order on the third party for the goods, but they refused to deliver them to the plaintiff, evidence of declarations of the third party to the effect that they held a lien on the goods was inadmissible.—*Shirts v. Irons*, 37 Ind. 98.

[i] (Sup. 1877)

In an action to recover for materials used in constructing a building, it was error to permit a witness to testify that a certain person had told him that the rule of measurement employed in measuring the masonry was the correct rule.—*Killian v. Eigenmann*, 57 Ind. 480.

[ii] (Sup. 1877)

Plaintiff's character for chastity cannot be attacked by proving the declarations of a deceased person to the effect that he had had criminal relations with her.—*Short v. Stotts*, 58 Ind. 29.

[j] (Sup. 1878)

In an action on an account stated, declarations of a deceased third party, not made by him as a witness on a former trial, and not shown to be part of the *res gestæ*, are inadmissible in evidence.—*Salem Gravel Road Co. v. Pennington*, 62 Ind. 175.

[k] (Sup. 1880)

In an action to have set aside a conveyance obtained from plaintiff by accusing him of having committed rape on a certain woman, the evidence of a witness who testified to a conversation with a person not connected with the transaction, in which the latter stated that the woman accused the witness himself of being the father of the illegitimate child to which she had given birth, is merely hearsay and inadmissible.—*Reynolds v. Copeland*, 71 Ind. 422.

[l] (Sup. 1881)

In an action for damages for false imprisonment, where plaintiff claimed special damages because he was prevented from accepting a position by reason of such arrest, the testimony of plaintiff that a third party had told him that such party had secured him a position was incompetent, as hearsay.—*American Exp. Co. v. Patterson*, 73 Ind. 430.

[m] (Sup. 1881)

In an action on a note, the testimony of a witness that a certain person signed the note was hearsay, where it appeared that all he knew about it was what the person whom he said had signed it had told him.—*Rotan v. Stoerber*, 81 Ind. 145.

[n] (Sup. 1882)

A witness testified that a deed absolute in terms was given merely as security, and on cross-examination stated that his only knowledge that it was so was based on statements made to him by the grantor both before and after the execution of the deed. *Held*, that his testimony should have been stricken out, as being hearsay.—*Rooker v. Rooker*, 83 Ind. 226.

[o] (Sup. 1882)

In an action by A. against B. to determine the title to property levied upon as the property of C. to satisfy a judgment recovered against C. by B., it is error to allow B. to prove that C., who was not a party to the action, stated that the property was his, as such statement, not made in the presence of A., was mere hearsay.—*Somers v. Somers*, 85 Ind. 599.

[p] (Sup. 1884)

In an action to set aside an alleged fraudulent conveyance, evidence of statements by the vendee's father that he intended to give her the land subsequently conveyed by him to her hus-



band is hearsay.—*Simpkins v. Smith*, 94 Ind. 470.

[q] (*Sup.* 1884)

In an action for slander, testimony as to what a certain person stated to one of defendant's witnesses, as to what plaintiff was going to use a certain article for, was properly rejected as hearsay.—*De Pew v. Robinson*, 95 Ind. 109.

[r] (*Sup.* 1884)

In an action for injuries alleged to have been occasioned by a defective bridge, where it appeared that plaintiff had employed a third person to assist him in hauling an engine, and that M. had agreed with such third person to help him haul the engine, it was not error to refuse to permit a witness to state what he said to M. in a certain conversation as to the unsafe condition of the bridge, as M. was not in the employ of the plaintiff, and it was not shown that plaintiff knew of the conversation.—*Board of Com'rs of Allen County v. Bacon*, 96 Ind. 31.

[s] (*Sup.* 1885)

In an action for breach of a covenant against incumbrances, where it appeared that plaintiff had been compelled to discharge a judgment on the land, evidence that the grantor of the land in response to an inquiry stated that plaintiff had taken the land subject to the judgment and was bound to pay it himself was incompetent as mere hearsay.—*Morehouse v. Heath*, 99 Ind. 509.

[t] (*Sup.* 1885)

Prior inconsistent statements introduced to impeach a witness on his cross-examination cannot be used as substantive proof of the matters in controversy.—*Allen v. Davis*, 101 Ind. 187.

[u] (*Sup.* 1888)

In an action for personal injuries by a passenger against a railroad company, evidence of what the conductor said about attending the trial is mere hearsay.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[uu] (*Sup.* 1889)

In an action for personal injuries, testimony of a physician that the surgeon who treated plaintiff told witness, while treating plaintiff, but in plaintiff's absence, that no bones were broken, but that there was simply an injury of the ligaments, was properly excluded.—*City of Goshen v. England*, 119 Ind. 308, 21 N. E. 977, 5 L. R. A. 253.

[v] (*Sup.* 1890)

Evidence of a conversation between third persons as to the title of a party who was not present is inadmissible against him.—*Tobin v. Young*, 124 Ind. 507, 24 N. E. 121.

[vv] (*Sup.* 1891)

In an action against the board of county commissioners for the alleged wrongful discharge of the superintendent of the county poor

farm, it was not competent to allow one of the commissioners to testify that the paupers had complained to him of their treatment by plaintiff, where it was not shown that plaintiff was present, or heard such complaints.—*Board of Com'rs of Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385.

[w] (*Sup.* 1886)

In an action for injuries to an employe caused by defects in the roof of defendant's mine, statements as to the condition of the roof, made by persons not connected with defendant, are inadmissible.—*Treager v. Jackson Coal & Mining Co.*, 142 Ind. 164, 40 N. E. 907.

[ww] (*Sup.* 1901)

The reason for the rule excluding hearsay evidence remaining the same, the rule applies to hearsay statements made by a person who has since died.—*Morell v. Morell*, 60 N. E. 1092, 157 Ind. 179.

In an action to secure the probate of an alleged will, the witnesses thereto being dead, evidence was introduced as to one of such witnesses having said, some 18 years previously, that he and the other alleged witness had witnessed such a will, and that the petitioner had been appointed executor. *Held* inadmissible, as being hearsay.—*Id.*

[x] (*App.* 1901)

In an action by a 13 year old girl against her stepmother for injuries by an assault, in which plaintiff claimed her sight was injured, evidence that plaintiff's mother, in the presence of plaintiff, then 2 years old, told witness that plaintiff had had the measles, and that it had caused her eyes to become weak, was properly excluded.—*Treschman v. Treschman*, 61 N. E. 961, 28 Ind. App. 206.

[xx] (*Sup.* 1903)

Testimony as to what was said and done between the trustee and the bankrupt's wife in the presence of a third party with respect to the nature and settlement of her claim against the bankrupt's estate was properly excluded.—*Goode v. Elwood Lodge*, No. 160, K. P., 66 N. E. 742, 160 Ind. 251.

[y] (*App.* 1903)

On the trial of a claim filed against decedent's estate by his daughter-in-law for cooking, waiting upon, nursing, washing, and boarding the decedent, a witness introduced by claimant was asked by defendant if she "heard any statement made to the merchant from whom these groceries were purchased \* \* \* as to whom these groceries should be charged," etc. Witness had previously testified that she was with a son of the decedent when certain groceries were purchased that were used in the family. Claimant was not present. *Held* not error to exclude the question.—*Ellis v. Baird*, 67 N. E. 960, 31 Ind. App. 295.

[yy] (*App.* 1905)

In proceedings for the laying out of a public highway a witness stated that he was ac-

quainted with the value of the land in the neighborhood, and he was asked as to the highest offer he had been able to get for his own land, to which he responded that there was a real estate man who would give a certain sum. *Held*, that a motion to strike out the answer for the reason, among others, that a portion of it was hearsay, was sufficient, and the motion should have been sustained.—*Pichon v. Martin*, 73 N. E. 1009, 35 Ind. App. 167.

[z] (Sup. 1906)

In a suit for specific performance of a contract to care for decedent during her life in consideration of the conveyance of real estate, the declaration of decedent to third persons that plaintiff was not satisfied with decedent's will is res inter alios acta and inadmissible in evidence.—*Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582.

[zz] (App. 1909)

What was said to a witness by the person who subpoenaed him, at the time of doing so, is inadmissible.—*Greener v. Nielhaus*, 89 N. E. 377.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1174-1192.

§ 318. — Writings.

[a] (Sup. 1857)

The report of a state fair committee upon agriculture, as to the value of a patented drill, being ex parte, not upon oath, and by men whose evidence could be obtained, is mere hearsay, and inadmissible upon that point, though for some purposes public documents are admissible.—*Gatling v. Newell*, 9 Ind. 572.

[b] (Sup. 1884)

Which of two deeds has priority cannot be proved by entries made by a stranger in a book for the keeping of which no authority is shown.—*Hamilton v. Shoaff*, 99 Ind. 63.

[c] (App. 1897)

A written statement made in the absence of the party objecting to the admission thereof, by one not a party to the suit, though containing matter material to the issue, is not competent evidence, as the parties against whom it is offered are entitled to have the evidence given under oath.—*Loomis v. Stevens*, 18 Ind. App. 184, 47 N. E. 237.

[d] (App. 1902)

Where, in an action on an assignment of a contract for the improvement of a street, in which it was stipulated that part of the consideration should be paid in bonds, it appeared that W. transferred his interest in the contract long prior to the time plaintiff acquired his interest, a receipt by which W. & Co. admitted receiving from the treasurer of the city certain of the bonds for the improvement of the street was improperly admitted, it being a statement of strangers to the issue, not under oath, made after plaintiff had acquired his interest in

the contract.—*Kellner v. Phillips*, 63 N. E. 877, 29 Ind. App. 100.

[e] (App. 1903)

Where a street railway company owning a park and maintaining attractions there for the public, has knowledge that there is a conspiracy to assault any colored persons visiting the park, and knows of acts of violence committed pursuant to such design, but transports colored persons there without warning them of the danger, and they are assaulted pursuant to the conspiracy, in an action for such injuries, evidence of articles published in daily newspapers, describing prior assaults committed on colored persons at the park, are admissible.—*Indianapolis St. R. Co. v. Dawson*, 68 N. E. 909, 31 Ind. App. 605.

[f] (App. 1903)

In an action on a note, defended on the ground that plaintiff was not the owner thereof, a letter to defendant, written by a third person, who defendant alleged was the owner, but under whom plaintiff did not claim, is hearsay and inadmissible.—*George v. Hurst*, 68 N. E. 1031, 31 Ind. App. 600.

[g] (App. 1905)

The record of the fire department of a city, containing a report by the captain of a fire company of a fire, made up of a memorandum made by another person, is inadmissible as hearsay, in action for damages resulting from the fire, alleged to have been caused by sparks from defendant's foundry.—*Over v. Dehne*, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

[h] (Sup. 1906)

Where decedent contracted to convey to plaintiff certain lots, a will executed by a decedent three days afterward is inadmissible as hearsay.—*Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1193-1200.

§ 319. Evidence founded on hearsay.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1201-1229.

See, also, 16 Cyc. p. 1213.

§ 322. — Reputation as to persons.

[a] (Sup. 1857)

In an action by a partner, after the dissolution of a partnership, to set aside an assignment of the effects of the firm made by his co-partner, ostensibly to secure the payment of a pretended debt of the firm, evidence of general reputation as to the pecuniary condition of the assignee at the time he made the alleged loan was inadmissible to show that the assignee had not that amount of money at the time when it was claimed the loan was made.—*Reed v. Thayer*, 9 Ind. 157.

[b] (Sup. 1876)

In an action to recover the amount paid for a judgment falsely represented by the assignor

to be collectible, testimony by the sheriff that he frequently had executions against the judgment debtor, that he knew his financial condition, that he had no property out of which any portion of the executions could be made, and that his general reputation in the community where he resided was that of an insolvent, was competent evidence to establish the judgment debtor's insolvency.—*Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

[c] (Sup. 1890)

In an action for personal injuries to an employé of a railroad, caused by the negligence of the engineer, where a witness has testified that he knew the general reputation of the engineer as to carelessness, it is proper to permit him to answer a question that his reputation was bad.—*Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1203-1213.

**§ 323. — Market value shown by sales, offers to purchase or sell, or market quotations.**

Relevancy of evidence of market value, see ante, § 113.

Sales of and price paid for property similarly situated as evidence of value, see ante, § 142.

[a] (Sup. 1857)

Where a witness had testified as to the value of a patent for a certain county, and proposed to further testify that he, though having no authority to sell, had been offered a like sum by an unknown person, such testimony was rejected. *Held error*.—*Gatling v. Newell*, 9 Ind. 572.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1214-1217.

**§ 324. — Repute as to facts.**

[a] (Sup. 1891)

In an action against a school town for breach of a contract engaging plaintiff as a teacher, the admission of evidence concerning rumors in regard to the purpose of the board and their intention not to permit plaintiff to teach is not reversible error, the evidence being at most merely immaterial.—*School Town of Milford v. Powner*, 126 Ind. 528, 26 N. E. 484.

[b] (App. 1901)

Where plaintiff in an action for assault claimed that her sight was injured, evidence that it was the general repute in the neighborhood that the weakness of plaintiff's eyes was from the measles was hearsay, and inadmissible.—*Treschman v. Treschman*, 61 N. E. 961, 28 Ind. App. 206.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1218-1220.

See, also, 5 Cyc. pp. 956, 957.

**X. DOCUMENTARY EVIDENCE.**

Admissibility of will or copy thereof in proceedings for probate or actions relating to wills or probate, see WILLS, § 298.

Affidavits, see AFFIDAVITS, § 18.

As constituting hearsay evidence, see ante, § 318.

Assessment list as evidence in action to declare trust, see TRUSTS, § 372.

Certificate of protest of bill or note, see BILLS AND NOTES, § 410.

Cross-examination of witnesses as to writings, see WITNESSES, § 271.

Depositions, see DEPOSITIONS, §§ 87-96.

Effect of absence of internal revenue stamps, see INTERNAL REVENUE, §§ 2, 34.

Effect of alteration of instrument, see ALTERATION OF INSTRUMENTS, § 24.

Effect of tax deeds as evidence, see TAXATION, § 787.

In actions on insurance policies, see INSURANCE, § 651.

In actions to establish boundaries, see BOUNDARIES, § 36.

In criminal prosecutions, see CRIMINAL LAW, §§ 420-447.

Instructions as to weight and sufficiency of documentary evidence as invasion of province of jury, see TRIAL, § 194.

In suits to restrain enforcement of taxes, see TAXATION, § 611.

Manner of introducing documentary evidence, see TRIAL, § 30.

Municipal ordinances, see MUNICIPAL CORPORATIONS, § 122.

Notice of mechanic's lien in suit to enforce lien, see MECHANICS' LIENS, § 280.

Objections to admissibility, see TRIAL, § 105.

Proof of loss under insurance policy, see INSURANCE, § 544.

Record for purpose of review, see APPEAL AND ERROR, § 524.

Right of jury to take documentary evidence to jury room, see TRIAL, § 307.

Stipulations as to admission, construction and operation in general, see STIPULATIONS, § 14.

Sufficiency and scope of objections to admission of documentary evidence, see TRIAL, § 84.

Sufficiency of documentary evidence as question of law or fact, see TRIAL, § 139.

Testimony from writings, see WITNESSES, § 258.

Use of writings to refresh memory of witness, see WITNESSES, §§ 253-257.

Waiver of objections to admission of documents in evidence, see TRIAL, § 75.

Writings as best evidence, see ante, §§ 157-187.

Writings submitted for comparison, see ante, §§ 196-198.

**(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.**

In criminal prosecutions, see CRIMINAL LAW, § 429.

Production of records and preliminary evidence for authentication, see post, § 366.  
Secondary evidence, see ante, § 162.

### § 325. Public records, documents, and publications in general.

[a] (Sup. 1881)

Where an answer claimed that defendant had, pursuant to an agreement between him and plaintiff, deposited with plaintiff a large number of county orders, drawn by the county and payable to himself, to be used by plaintiff as redeemed orders in settlement with the county, and for which plaintiff was to account to defendant, the orders so deposited were competent and material evidence.—*Highfill v. Monk*, 81 Ind. 203.

[b] (Sup. 1889)

A document purporting to be a printed report of a congressional subcommittee, which is not authenticated, does not purport to be a part of the authenticated journal, is not identified by it, and is not a record required to be kept or a publication required to be made, is not a document entitled to admission in evidence.—*Marks v. Orth*, 121 Ind. 10, 22 N. E. 668.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 1230.

See, also, 17 Cyc. p. 206.

### § 327. Laws.

Judicial notice, see ante, §§ 27–32, 34, 35, 37.  
Statutes not published under authority of state, see post, § 362.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1232–1236.

See, also, 17 Cyc. p. 298.

### § 330. — Ordinances.

[a] (App. 1909)

Under Burns' Ann. St. 1908, § 8654, providing for the publication of municipal ordinances and the recording of them in a book kept for that purpose, which record or a certified copy thereof shall be presumptive evidence of their passage, a municipal ordinance limiting the maximum speed of trains is admissible, in the absence of evidence that the ordinance appearing of record is invalid.—*Pittsburgh, C., C. & St. L. R. Co. v. Rogers*, 87 N. E. 28.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 1234.

See, also, 17 Cyc. p. 298.

### § 331. — Foreign laws.

[a] A printed volume purporting to be printed by authority and to contain the laws of another state is admissible.—(Sup. 1840) *Compart v. Jernegan*, 5 Blackf. 375; (1862) *Crake v. Crake*, 18 Ind. 156; (1878) *Rothrock v. Perkinson*, 61 Ind. 39.

[b] (Sup. 1858)

An alleged foreign statute book, containing nothing to show that it comes from the state printers, or that it is published by the authority of the state, though with a certificate from the secretary of state that it is a true copy of the rolls, is not admissible.—*Magee v. Sanderson*, 10 Ind. 261.

[c] (Sup. 1861)

A party offered to read in evidence, on trial, parts of a book, of which the title page ran: "By authority of the General Assembly; Statutes of the State of Ohio of a general nature, in force, August, 1854; with reference to prior repealed laws. Collated and compiled by Joseph R. Swan. Published in pursuance of the act of the general assembly of April 18, 1854. Cincinnati: published by H. W. Derby & Co. 1854." On the next page, Derby's copyright, and "stereotyped and printed at," etc. Held, that it sufficiently appeared that the book was a printed statute book of the state of Ohio, purporting to have been printed under the authority of that state.—*Vaughn v. Griffith*, 16 Ind. 353.

[d] (Sup. 1869)

A book purporting to be Swan and Critchfield's edition of the Statutes of Ohio was properly admitted in evidence, it appearing by the title page that it was "published by the state of Ohio, and distributed to its officers, under the act of the General Assembly."—*Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

[e] (App. 1891)

Where, in a trial occurring in 1880, it is sought to prove what the law of another state was in 1869 by the introduction of a statute passed in 1863, it is no objection to such evidence that it has not been shown that the statute is the law of said state at the time of the trial.—*Gross v. Haisley*, 2 Ind. App. 23, 28 N. E. 123.

[f] (App. 1892)

It is proper to allow the law of another state to be read from the statute book purporting to have been printed by authority; Code, § 457, authorizing such procedure.—*Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 220.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1235, 1236.

### § 332. Judicial acts and records.

Effect of probate on admissibility of will or proofs or of record or exemplified copy thereof, see WILLS, § 433.

Judgment as evidence of its own existence in actions by or against persons not parties or privies, see JUDGMENT, § 709.

Judgment as evidence of title or link in chain of title in actions by or against persons not parties or privies, see JUDGMENT, § 712.

Judicial notice, see ante, § 43.

parol or extrinsic evidence to contradict or vary, see post, § 386.  
Transcripts or certified copies, see post, § 340.

[a] (Sup. 1835)

To prove the issuing of a distress warrant by a justice of the peace on a particular day, the entries on the subject in the justice's docket (the docket being proved) are competent evidence.—*Richardson v. Vice*, 4 Blackf. 13.

[b] (Sup. 1842)

Rev. St. 1838, p. 360, allowing a person arrested by a process issued by one justice to be taken before another for trial, makes the latter justice the proper keeper of the process. Hence his certificate that a warrant in question was on file in his office is prima facie evidence that it was legally in his custody.—*Steel v. Pope*, 6 Blackf. 176.

[c] (Sup. 1843)

The order book of the circuit court is evidence of the record of a justice's transcript in that court, but not of the execution and its return described in the scire facias.—*Mahan v. Power*, 6 Blackf. 445.

[d] (Sup. 1849)

In proceedings on an application for partition in the probate court, it is sufficient that the record state there was satisfactory evidence of due service of process or publication of notice.—*Doe ex dem. Hain v. Smith*, 1 Ind. 451, *Smith*, 381.

[e] (Sup. 1850)

The minutes of a justice of the peace, noticing upon his docket the issuing and return of an execution, are not admissible as evidence of the contents of such execution, but the execution or certified copy should be produced.—*Stinson v. State ex rel. Sampson*, 2 Ind. 434.

[f] (Sup. 1852)

In an action on a replevin bond for the failure of the principal in the suit in replevin to prosecute it with effect, it appeared that the suit in replevin had been brought for certain hogs, and was dismissed for the insufficiency of the affidavit. Defendants introduced evidence that the property replevied was the product of hogs sold by the principal in the bond and B. to plaintiff's intestate, and that the latter had agreed that such principal and B. should retain a lien on the property for a balance due. The record of a suit in assumpsit by the principal and B. against the intestate for the price of the hogs, in which the intestate had pleaded the general issue, was offered in evidence in mitigation of damages, and also a special plea which recognized the validity of a public sale of the property, and set up that the principal and B. had received therefrom a certain sum, being more than the balance due on the hogs, to which the plaintiff had replied, traversing the plea as to the amount alleged to have been received and averring it to have been a specific sum less than the balance due, in which case

there was a general verdict for the principal and B. and judgment accordingly. *Held*, that such record was correctly admitted in evidence.—*Huff v. Earl*, 3 Ind. 306.

[g] (Sup. 1855)

Where plaintiff in an action for the continuance of a nuisance had previously obtained a judgment for the nuisance against defendant, the bill of exceptions in the former case was not admissible to show that the evidence in that case was too weak to support the verdict therein.—*Miles v. Wingate*, 6 Ind. 458.

[h] (Sup. 1856)

Bill of sale for goods sold by an administrator, sworn to by the clerk of the sale, and filed with the clerk of court, was the best evidence of the sale, and was properly admitted, though the memorandum taken by the clerk at the sale, from which the bill of sale was subsequently made, was not proved to have been lost.—*Meek v. Spencer*, 8 Ind. 118.

[i] (Sup. 1860)

The record of a guardian's sale, alleged to be illegal for the reason that the ward was not made a party to the proceeding, was *held* to be competent, in connection with parol proof of receipt by the ward of the purchase money, and of facts raising an equitable estoppel, as a link in the chain of evidence, in a suit brought to recover possession of the land.—*Morris v. Stewart*, 14 Ind. 334.

[j] (Sup. 1873)

Under Act 1847, p. 117, providing that on the sale of land by a guardian the deed must be entered at length on the final record, the record of a deed by a guardian may be introduced as a part of the record of proceedings by the guardian for sale of land.—*Worthington v. Dunkin*, 41 Ind. 515.

[k] (Sup. 1881)

The record of a justice's judgment and the pleadings and mesne or final process in the cause, when produced and properly identified, are competent evidence.—*Reed v. Whitton*, 78 Ind. 579.

[l] (Sup. 1882)

In an action against a sheriff for failing to levy an execution on property, the bill of exceptions filed in an action of replevin against the sheriff for such property was not such a part of the record in the replevin suit as to entitle it to admission.—*State ex rel. Nave v. Hawkins*, 81 Ind. 486.

[m] (Sup. 1883)

While a withdrawal of original pleadings from the proper clerk's office, to be used as evidence in the court of another county, cannot be approved or commended, yet, if such papers are competent evidence, irregularity in their procurement would not render them incompetent, or their admission in evidence erroneous.—*Anderson v. Ackerman*, 88 Ind. 481.

[n] (Sup. 1833)

A dismissal of a case does not take from the record the papers belonging thereto, so as to make them inadmissible in evidence.—*Woods v. Kessler*, 93 Ind. 356.

[o] (Sup. 1886)

The docket record of a justice of the peace is competent evidence, without the original papers, when properly identified by the oral testimony of the justice as a complete record.—*Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447.

[p] (App. 1892)

If a judicial record is admissible in evidence for any purpose, all of its parts are admissible, though some are immaterial and incompetent.—*Swope v. Paul*, 4 Ind. App. 463, 31 N. E. 42.

[q] (Sup. 1894)

A paper which is a part of the record in a cause may be formally introduced in evidence.—*Manor v. Board of Com'rs of Jay County*, 34 N. E. 959, 36 N. E. 1101, 137 Ind. 367.

[r] (Sup. 1906)

On the issue of mental capacity of a testator, affidavits made in a divorce action between testator and his former wife were properly identified by a witness having knowledge thereof, and when so identified were admissible, although such papers were part of the files of the office of the clerk of court.—*Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1237-1246.

See, also, 17 Cyc. pp. 290-305; note, 5 L.

R. A. (N. S.) 938; note, 81 Am. St. Rep. 358.

### § 333. Official records and reports.

Admissibility of records of health officers in action on mutual benefit certificate, see *INSURANCE*, § 818.

Parol or extrinsic evidence to contradict or vary, see post, § 387.

Relevancy as evidence in ejectment, see *EJECTMENT*, § 89.

Transcripts or certified copies, see post, § 341.

[a] (Sup. 1841)

Under Laws 1817, p. 134, requiring that a duplicate of an assessment roll of taxable property be verified by the clerk, the objection that a duplicate is not so verified is fatal to its admission in evidence, though the paper be admitted to be perfect in other respects.—*Robinoe v. Doe ex dem. Colwell*, 6 Blackf. 85.

[b] (Sup. 1843)

Under Rev. St. 1838, p. 314, making a general provision that on payment of mortgage money the mortgagee shall, if required by the mortgagor, enter satisfaction on the record, an entry made by a school commissioner on the record of deeds, stating the satisfaction of a mortgage to secure a loan of school funds by a sale of the mortgaged property, and a notice

given by him previous to such sale, is no evidence of the facts therein stated. Such an entry was not required nor contemplated by the statute, and hence could have no more effect than any other memorandum by the commissioner.—*Williamson v. Doe ex dem. Crawford*, 7 Blackf. 12.

[c] (Sup. 1831)

The fee book of the clerk of the circuit court is competent evidence of the amount of costs due the judgment plaintiff, in an action on the judgment.—*Palmer v. Glover*, 73 Ind. 529.

[d] (Sup. 1831)

Under 1 Rev. St. 1876, p. 189, declaring that constables' bonds shall be recorded, and that such record or a copy thereof shall have the same effect as evidence as the original, the record of a constable's official bond was admissible in evidence in an action thereon.—*Waymire v. State ex rel. Nickol*, 80 Ind. 67.

[e] (Sup. 1833)

Where a record of township trustees is offered in evidence, and their want of jurisdiction of the subject-matter is apparent, the record is properly excluded.—*Matlock v. Hawkins*, 92 Ind. 225.

[f] (Sup. 1834)

Where, in defense to an action on a note, defendant set up a breach of warranty, consisting of plaintiff's failure to pay taxes on the land, it was not error to exclude the tax receipts, where defendant offered no evidence that the taxes were properly assessed.—*Hanna v. Fisher*, 95 Ind. 383.

[g] (Sup. 1834)

The duplicate of the tax list retained by the county auditor under Rev. St. 1881, §§ 6417, 6422, requiring the auditor of each county to make out a duplicate list of taxes and deliver one list to the treasurer, is admissible in evidence without certification, or proof that it is a copy of the original; such duplicate being considered as original evidence.—*Standard Oil Co. v. Bretz*, 98 Ind. 231.

[h] (Sup. 1886)

Where it becomes material to determine the amount due for taxes and interest, in order to enforce the statutory lien of a purchaser at a tax sale where the deed fails to convey title, the auditor's certificate of the tax sale, and the tax deed, together with entries on the tax duplicate, are admissible in evidence, though no foundation has been laid adequate to make them evidence, in order to enable the tax deed to pass the title.—*McKeen v. Haskell*, 108 Ind. 97, 8 N. E. 901.

[i] (Sup. 1892)

In proceedings supplementary to execution, a decree was made directing a bank to pay to the sheriff certain money deposited with it in the name of P. This decree was reversed on appeal. Plaintiff filed an amended complaint on which defendant and P. joined issue. After

the evidence was introduced and while the court was holding the cause under advisement, plaintiff obtained leave to file a supplemental complaint making K. a party defendant, alleging that before the appeal the sheriff received from the bank the money deposited in P.'s name, that he turned it over to his successor, who turned it over to his successor K., who without plaintiff's knowledge and without order from the court paid it over to P. taking an indemnifying bond, of all of which plaintiff had no knowledge until the day before the trial. *Held*, that documentary evidence tending to prove that the fund in question was held by the sheriff of the county as the custodian of the court was admissible for that purpose.—*Pouder v. Tate*, 30 N. E. 880, 132 Ind. 327.

[J] (Sup. 1894)

In an action on a contract for building a bridge, and for extra work in tearing down and rebuilding the substructure at the direction of the county superintendent, it was not error to permit an unfiled report of the superintendent to be read in evidence, where the report was delivered to the auditor during a session, and in the presence of the board, and, before the file mark was placed on it, defendants' attorney took possession of it.—*Board of Com'rs of Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1247-1257, 1259-1265.

See, also, 17 Cyc. pp. 306-316; notes, 95 Am. St. Rep. 763, 129 Am. St. Rep. 848.

§ 334. Official certificates.

Parol or extrinsic evidence to contradict or vary, see post, § 387.

Return on execution, see EXECUTION, § 342.

Transcripts or certified copies of record of certificate, see post, § 341.

[a] (Sup. 1857)

A certificate of the township clerk that a claim for services for a pauper had been rendered to the township trustees, as overseers, and approved, not purporting to be a copy of any record, is evidence to show that they were rendered, not voluntarily, but at the instance of at least one member of the board, but not for any other purpose.—*Board of Com'rs of Fayette County v. Chitwood*, 8 Ind. 504.

[b] (Sup. 1858)

An authority of an officer to certify copies of documents so that they may be admitted as evidence does not extend to certifying other facts, and the facts which the officer is not authorized by law to certify must be proved as other facts.—*Wright v. Bundy*, 11 Ind. 398, 409.

[c] (Sup. 1884)

In an action by a physician for services on a post mortem examination, it is not error to admit the certificate of the coroner that he employed plaintiff, as such certificate is required

by statute.—*Board of Com'rs of Jay County v. Gillum*, 92 Ind. 511.

[d] (Sup. 1886)

A public officer may certify as to matters contained in a record in his custody, but he cannot recite matters not appearing of record.—*Daggett v. Bonewitz*, 107 Ind. 276, 7 N. E. 900.

[e] (App. 1906)

Election officers appointed to conduct an election for the incorporation of a town being required to canvass the votes, as provided by Burns' Ann. St. 1901, §§ 4314-4322, the officers' certificate of such canvass is competent evidence of the facts certified to, though the prima facie case established thereby may be overthrown by production of the ballots.—*Fleener v. Johnson*, 77 N. E. 366, 38 Ind. App. 334.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1266-1272; 15 CENT. DIG. Death, § 5.

See, also, 17 Cyc. p. 313.

§ 336. Records of conveyances and other private writings.

Transcripts or certified copies, see post, § 343.

[a] Where a deed regularly recorded is relied on by one not a party to it, the record book is admissible to prove its contents.—(Sup. 1839) *Dixon v. Doe ex dem. Lasselle*, 5 Blackf. 106; (1840) *Doe ex dem. Bowen v. Holmes*, Id. 319.

[b] (Sup. 1842)

The county record book of deeds is admissible to prove a conveyance of real estate therein recorded, if offered by a suitor not being a party to the conveyance, nor appearing to have it under his control.—*Foresman v. Marsh*, 6 Blackf. 285.

[c] (Sup. 1843)

A conveyance of land, if recorded, may be proven by the record book, when the person offering it is not a party to the conveyance, and has no control of it.—*Doe ex dem. Gardner v. Vandewater*, 7 Blackf. 6.

[d] (Sup. 1856)

The record of a mortgage receipted in the margin by an agent of the mortgagee is not objectionable as evidence merely on the ground that the agent had no written power of attorney to enter satisfaction.—*Mauzey v. Bowen*, 8 Ind. 193.

[e] (Sup. 1865)

The record of a deed duly acknowledged, and on which a proper certificate of the acknowledgment is indorsed, such certificate being recorded with it, is admissible in evidence without accounting for the absence of the original.—*Winship v. Clendenning*, 24 Ind. 439.

[f] (Sup. 1872)

Under 2 Gav. & H. Rev. St. p. 183, § 283, a record of a deed is proper evidence, and neither the original deed nor a certified copy there-

of is required.—*Bowers v. Van Winkle*, 41 Ind. 432.

[g] (Sup. 1874)

A record of a deed is proper evidence under 1 Gav. & H. St. p. 265, § 31. Neither the original nor a certified copy thereof is required.—*Patterson v. Dallas*, 46 Ind. 48.

[h] (Sup. 1878)

The record of the deed to the last of several purchasers of mortgaged land is competent evidence, in an action against him to foreclose, of the delivery thereof to him.—*Scarry v. Eldridge*, 63 Ind. 44.

[i] (Sup. 1879)

Under Prac. Act, § 283, making a certified copy of the record of a mortgage legal evidence, without accounting for the absence of the original, the record itself is admissible, without proof of execution, and without accounting for the absence of the original.—*Burns v. Harris*, 66 Ind. 536.

[j] (App. 1905)

Under *Burns' Ann. St.* 1901, § 3372, providing that every conveyance shall be recorded, together with the requisite certificate of acknowledgment, and, unless such certificate be recorded, neither the record of the conveyance, nor any transcript thereof, shall be received in evidence, the record of a mortgage is competent evidence, and it is not necessary to introduce the mortgage itself.—*Embree v. Emerson*, 74 N. E. 44, 1110, 37 Ind. App. 16.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1279-1282.

See, also, 17 Cyc. pp. 314-316.

(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

Fees of clerks of state courts for making, see *CLERKS OF COURTS*, § 24.

In criminal prosecutions, see *CRIMINAL LAW*, § 430.

Production of exemplifications or official copies, see post, § 366.

§ 338. Necessity and admissibility in general.

[a] (Sup. 1860)

Under 2 Rev. St. p. 225, §§ 9, 10, the original record of a court of conciliation is as good evidence as a certified copy thereof.—*Wiseman v. Risinger*, 14 Ind. 461.

[b] (Sup. 1865)

Section 284 of the Code (2 Gav. & H. St. p. 184), which provides that the acts and proceedings of a corporation may be proved by a sworn copy of the record, was not intended to make such copy the only legal evidence of such acts. The original record is the best evidence, and is always admissible in evidence.—*Green v. City of Indianapolis*, 25 Ind. 490.

[c] When a certified copy of a record is competent, the original, if it can be produced is equally competent.—(Sup. 1874) *James v. Greensboro & N. J. Turnpike Co.*, 47 Ind. 379; (1876) *Britton v. State ex rel. Miller*, 54 Ind. 535; (1881) *Iles v. Watson*, 76 Ind. 350; (1883) *Anderson v. Ackerman*, 88 Ind. 481.

[d] (Sup. 1878)

The docket of a justice of the peace, containing a judgment, when properly identified, is competent evidence to establish the rendition of the judgment, though the statute also provides that a copy of any judgment of a justice, certified under his hand and seal, shall be received as evidence.—*Miller v. State ex rel. Harrington*, 61 Ind. 503.

[e] (Sup. 1878)

The proceedings and judgment of a justice of the peace may be proved by either the original or a duly certified copy thereof.—*Kenard v. Carter*, 64 Ind. 31.

[f] (Sup. 1879)

A certified copy of a part of the military records of the state is, when offered in evidence, not objectionable on the ground that it is a copy of a copy, since every copy of a record is as a rule a copy of a copy; the record itself being a copy of some original instrument.—*Board of Com'rs of Monroe County v. May*, 67 Ind. 562.

[g] (Sup. 1890)

Although there is no express statutory provision authorizing what are known as "plat books," the court will take judicial notice that such books are kept as public records, and in view of Rev. St. 1881, § 3253, legalizing the recording of all plats theretofore taken and acknowledged before a competent officer, will hold them a legal public record, and a certified copy thereof admissible in evidence.—*Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228.

[h] (App. 1892)

Sup. Ct. Rule 34 provides that, "after a case has been decided, neither the record nor the opinion shall be taken from the office of the clerk, except by a judge of the court, or by the official reporter." *Held*, that the record of a case wherein alleged services were rendered by an attorney, filed with the clerk of the supreme court, was admissible in evidence, without showing that such record was withdrawn from the clerk's office under the above rule.—*McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1284-1288.

See, also, 17 Cyc. p. 323.

§ 339. Statutory provisions.

[a] (Sup. 1864)

1 Gav. & H. St. § 132, p. 103, providing that, in all suits brought against a county treasurer and his sureties, the county auditor shall be a competent witness, and all books and



papers belonging to his office shall, when proved by the oath of the auditor, be admissible testimony, is cumulative, and not inconsistent with section 233, authorizing the admission in evidence of exemplifications of public records; and therefore exemplifications of the books so kept by the auditor are admissible in evidence. —*Wells v. State ex rel. Board of Com'rs of Lake County*, 22 Ind. 241.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 1283.

See, also, note, 114 Am. St. Rep. 437.

**§ 340. Judicial records and proceedings.**

Of foreign state, see post, §§ 346–348.

Requisites of exemplification or certificate, see post, § 345.

**[a] (Sup. 1833)**

The transcript of a record of the district court of the United States for the state of Indiana, under the seal of the court, and certified by the clerk to be a complete copy of the record, is admissible as evidence in the courts of that state.—*Adams v. Lisher*, 3 Blackf. 241, 25 Am. Dec. 102.

**[b] (Sup. 1838)**

A writ of execution, when returned to the court from which it issued, becomes a record of the court, and a copy thereof may be certified to be used in evidence as other parts of the record.—*Hobson v. Doe ex dem. Harper*, 4 Blackf. 487.

**[c] (Sup. 1841)**

The contents of an execution issued by a justice cannot be proven by a transcript from the docket, but the execution, or a certified copy of it, must be produced.—*Snyder v. Norris*, 6 Blackf. 33.

**[d] (Sup. 1842)**

Under Rev. St. 1838, p. 274, making properly authenticated copies of "proceedings and judgments" of justices of the peace evidence, copies of process issued by the justice, and regularly returned and authenticated, are admissible; process being within the spirit, if not the letter, of the law.—*Steel v. Pope*, 6 Blackf. 176.

**[e] (Sup. 1843)**

Letters testamentary, in the form prescribed by statute, which, when granted, were entered of record in the probate court, and were afterwards, when delivered to the executor, certified by the clerk to be true copies of the record, were held to be valid, as being the original letters.—*Bales v. Binford*, 6 Blackf. 415.

**[f] (Sup. 1846)**

The transcript of a record of the district court of the United States for another state is, if properly authenticated, admissible evidence in the courts of this state.—*Redman v. Gould*, 7 Blackf. 361.

**[g] (Sup. 1846)**

A justice's transcript certified by his successor was, though objected to, admitted in evidence. *Held*, that the admission of the transcript (the record not showing the ground of the objection) could not be said to be improper.—*Parker v. State ex rel. Town*, 8 Blackf. 292.

**[h] (Sup. 1877)**

A duly-certified copy of the pleadings, proceedings, and judgment in a prior action is sufficient evidence to establish the fact of the rendition of such judgment, without the introduction of the original papers.—*Blizzard v. Bross*, 56 Ind. 74.

**[i] (Sup. 1877)**

The judgment rendered by the Supreme Court in the decision of a cause may be proved by a transcript of such judgment, properly attested by the clerk of such court, under the seal thereof, or by the record of such transcript in the order book of the court from which such cause was appealed, where the same has been certified down according to law.—*Donellan v. Hardy*, 57 Ind. 393.

**[j] (Sup. 1881)**

A certified copy of the transcript of a judgment by the supreme court is admissible in an action on the bond given on appeal from the judgment.—*Craig v. Encey*, 78 Ind. 141.

**[k] (Sup. 1881)**

A transcript of the record of the proceedings of the district court of the United States held within this state requires no other or different authentication in order to admit it in evidence in any court in this state than a transcript of a record of the proceedings of any state circuit court held within this state. The United States courts held within this state are domestic courts, and not foreign.—*Bradford v. Russell*, 79 Ind. 64.

2 Rev. St. 1876, p. 150, providing that "copies of record which are kept in any public office in this state, shall be proved or admitted as evidence," properly attested and sealed, applies to a transcript of a record of bankruptcy in the United States district court.—*Id.*

**[l] (Sup. 1883)**

A certified copy of a judgment is competent evidence, although it does not appear that the entry of such judgment has been signed by the proper judge.—*Anderson v. Ackerman*, 88 Ind. 481.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1294–1301.

See, also, 17 Cyc. pp. 320–329, 340–355.

**§ 341. Official documents, records, and proceedings in general.**

[a] A duly-certified transcript, from the books of the county auditor, of the account current of the county treasurer during his term of service, is admissible in evidence under Code,

§ 283, (2 Gav. & H. St. p. 183).—(Sup. 1863) Vail v. McKernan, 21 Ind. 421; (1864) Wells v. State ex rel. Board of Com'rs of Lake County, 22 Ind. 241.

[b] (Sup. 1882)

Properly certified copies of a county treasurer's settlement sheets and reports made to the state treasurer, when containing relevant matter, are admissible in evidence.—Board of Com'rs of Harrison County v. Benson, 83 Ind. 469.

[c] (App. 1895)

A certified copy of the assessment for a stated year, made by the board of equalization, is not inadmissible in evidence because it varies from the abstract certified down to the county auditor by the State Auditor, for, being a certified copy of the original assessment, its admissibility did not hinge on its being in harmony with the other evidence on that subject.—Midland R. Co. v. State ex rel. Harrison, 38 N. E. 57, 11 Ind. App. 433.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1280-1292.

See, also, 17 Cyc. pp. 357-359.

#### § 342. Records and proceedings in land office.

[a] (Sup. 1838)

Sworn copies of affidavits on file in the office of the register of a land office, respecting a pre-emption right, are admissible as evidence in cases in which the originals, could they be procured, would be evidence.—Smith v. Mosier, 5 Blackf. 51.

[b] (Sup. 1881)

In an action to recover the possession of an island, it is proper to admit in evidence a properly authenticated transcript by the state auditor, from the records of the land department, containing the survey and field notes of such island, as testified to by the county surveyor.—Bonewits v. Wygant, 75 Ind. 41.

[c] (Sup. 1889)

A certified copy of the record of letters patent for swamp lands, properly authenticated by the auditor of state, as required by Gen. St. 1881, § 462, is admissible in evidence; all records pertaining to swamp lands having been transferred from the office of the secretary of state to that of the auditor of state by section 5628; and Gav. & H. St. p. 607, § 4, having made it the duty of the former to record such letters patent.—Nitcher v. Earle, 117 Ind. 270, 19 N. E. 749.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1302-1314.

See, also, 17 Cyc. p. 330.

#### § 343. Records of conveyances and other private writings.

[a] (Sup. 1838)

A grantee of a registered deed cannot give a certified copy of it in evidence without ac-

counting for the absence of the original.—Hobson v. Doe ex dem. Harper, 4 Blackf. 487.

[b] An office copy is admissible when offered by one not entitled to custody of the original.—(Sup. 1842) Foresman v. Marsh, 6 Blackf. 285; (1843) Daniels v. Stone, Id. 450.

[c] (Sup. 1850)

Under Rev. St. 1843, pp. 422, 478, copies of deeds from the recorder's office are admissible as original evidence.—Pierson v. Doe ex dem. Turner, 2 Ind. 123.

[d] (Sup. 1858)

1 Rev. St. p. 301, § 10, requiring mortgages of personal property to be recorded, brings them within the purview of 2 Rev. St. p. 92, § 283, providing that exemplifications of records of deeds and other instruments which are kept in any public office shall be proved or admitted as legal evidence by the attestation of the keeper of the records.—Tenant v. Rumfield, 11 Ind. 130.

[e] (Sup. 1860)

Under our statute a recorded copy of a mortgage is original evidence of the contents.—Lyon v. Perry, 14 Ind. 515; Morehouse v. Potter, 15 Ind. 477.

[f] (Sup. 1862)

The statute constituting the charter of turnpike corporations does not make copies of articles of association evidence. Hence the original articles are the best evidence.—Evans v. Southern Turnpike Co., 18 Ind. 101.

[g] (Sup. 1876)

A certified copy of the record of a deed or a mortgage is admissible in evidence under 2 Gav. & H. p. 183, § 283; and the repeal of 1 Gav. & H. p. 265, § 31, by the act of May 4, 1869 (Davis' Rev. St. Supp. 1870, p. 136), did not affect such admissibility.—Abshire v. State ex rel. Wilson, 53 Ind. 64.

[h] (Sup. 1876)

A certified copy of a copy of an original article of incorporation filed in the office of the secretary of state is not admissible in evidence to establish the incorporation, where the law provides that a duplicate of the original shall be filed with the secretary of state.—Nelson v. Blakey, 54 Ind. 29.

[i] (Sup. 1881)

Where a bond was duly acknowledged and properly admitted to record, the record is competent evidence to prove its contents.—Lentz v. Martin, 75 Ind. 228.

[j] (Sup. 1884)

Where, in an action of ejectment, the deeds under which both parties claim refer for the identity of the lot to a certain recorded town plat, the record of such plat is admissible in evidence, whether made in accordance with the existing statutes or not, or if made by a person without authority, it having been placed on

record and acted on by the parties.—*Burk v. Andis*, 98 Ind. 59.

**FOR CASES FROM OTHER STATES.**

SEE 20 CENT. DIG. Evid. §§ 1315-1330.

See, also, 17 Cyc. pp. 330-336, 357, 358.

**§ 345. Requisites of exemplification or certificate.**

[a] (Sup. 1826)

If the clerk's certificate to the transcript of a circuit court record have not the seal of the court annexed, the transcript cannot be received in the supreme court.—*Hinton v. Brown*, 1 Blackf. 429.

[b] (Sup. 1835)

In an action of disseisin, for land which the plaintiff had purchased for taxes in 1827, it was *held* that the statute required the assessment roll and the advertisement of sale for taxes, to be filed in the office of the clerk of the circuit court, and that therefore the assessment of the tax and advertisement of sale should be proved by copies certified, not by the clerk of the board of justices, but by the clerk of the circuit court.—*Parker v. Smith*, 4 Blackf. 70.

[c] (Sup. 1836)

A transcript of the record of a judgment is not admissible as evidence unless it have the placita, and be legally authenticated.—*Doe ex dem. Maguire v. Smith*, 4 Blackf. 228.

[d] (Sup. 1837)

A justice of the peace, with whom the docket of a former justice is legally deposited, may give certified copies from such docket, but the certificate must show that the justice making it has the legal custody of the docket.—*Anderson v. Miller*, 4 Blackf. 417.

[e] (Sup. 1841)

The transcripts of two judgments of a justice of the peace, written on the same sheet of paper, may be authenticated by one certificate of the justice, including in its terms both transcripts.—*Remington v. Henry*, 6 Blackf. 63.

[f] (Sup. 1842)

The certificate of a justice of the peace that a copy of a warrant is a true copy of a warrant on file in his office is sufficient, without adding that it was a complete copy.—*Steel v. Pope*, 6 Blackf. 176.

[g] (Sup. 1843)

An execution issued by a justice and its return, if denied, must be proved by producing the execution and return, or certified copies, and cannot be proved by the transcript.—*Henkle v. German*, 6 Blackf. 423.

[h] (Sup. 1843)

When the existence of an execution is denied, the original or certified copy must be produced, and its existence cannot be proven by the justice's certificate that it was issued.—*Mahan v. Power*, 6 Blackf. 445.

[i] (Sup. 1861)

Suit to recover land. Plaintiffs relied on a purchase at a sheriff's sale, made upon three executions issued by the clerk of the common pleas court of said county, on transcripts filed in his office, of judgments rendered by a justice of the peace against one M. The certificate filed with the first transcript was in the following terms: "I," etc., "do hereby certify that the foregoing is a true and complete transcript of the judgment from my docket." This transcript stated the issuing and return of an execution before the justice. *Held*, that the certificate did not cover that portion of the proceedings had before the justice, but stopped at the judgment, even if it included the previous proceedings; that therefore the transcript was properly rejected as a part of the evidence.—*Brown v. McKay*, 16 Ind. 484.

[j] (Sup. 1861)

Under 2 Rev. St. § 286, p. 93, the judge's certificate to the attestation of the clerk must certify that the place where the judgment was rendered is within his judicial district.—*Phelps v. Tilton*, 17 Ind. 423.

[k] (Sup. 1862)

A clerk's certificate that a certain person is a justice of the peace is defective unless it alleges that he was so "when the proceedings were had or judgment rendered" before him.—*Dresser v. Wood*, 19 Ind. 199.

[l] (Sup. 1864)

A certified copy of a decree of a court is not sufficient to prove such decree, if it does not show that the court had jurisdiction of the parties in the suit, or that the matters ordered and decreed were within the relief sought.—*Cline v. Gibson*, 23 Ind. 11.

[m] (Sup. 1866)

On the trial of a suit by the state against a county treasurer for a failure to pay over moneys derived from liquor licenses, a certificate of the auditor of state was given in evidence, which stated that an account which preceded the certificate was "a true and correct statement of the account of F., treasurer," etc., "as the same appears from the records of my office." *Held*, that the account was not shown by the certificate to be either a copy of an account rendered by the defendant, or of an account stated by the auditor, as required by sections 6 and 8 of the act of 1852 (1 Gav. & H. St. p. 120), and hence was not admissible in evidence.—*Fry v. State ex rel. Ristine*, 27 Ind. 348.

[n] (Sup. 1866)

A certificate of the clerk of a court that the paper to which it is attached is "a true transcript of the proceedings had in said case, as appears by the record books," etc., is not equivalent to a certificate that the paper is a "full, true, and complete transcript of the record," and such transcript is inadmissible in evidence.—*Tull v. David*, 27 Ind. 377.

[o] (Sup. 1870)

A transcript of proceedings before a board of county commissioners, authenticated by the certificate of the auditor stating that it was copied from the records, but not reciting that it was a full, true, and complete transcript of the record, is insufficiently authenticated to be admissible in evidence.—*Weston v. Lumley*, 33 Ind. 480.

[p] (Sup. 1871)

The court should not recognize a paper as a copy or transcript of the records of another court unless it has the seal of that court.—*Brunt v. State ex rel. French*, 36 Ind. 330.

[q] (Sup. 1872)

Section 283 of the Code, prescribing the mode of attesting copies of records to be used as evidence, is to be construed in connection with section 4 of the act providing for the election of clerks, and describing some of their duties. Accordingly a certificate enumerating certain papers is not sufficient, if it does not show that the papers named are "complete copies of all the papers"; nor does a certificate that "the record entries of same in the above-entitled cause, now on file and of record in said office," cover and embrace "all the entries of such cause."—*Wiseman v. Lynn*, 39 Ind. 250.

[r] (Sup. 1874)

A certificate of a justice of the peace to a transcript from his docket that it is a true and correct transcript of the proceedings had before him in the cause, together with a true copy of all the papers in the case, given under the hand and seal of the justice, without the certificate and seal of the clerk of the county, is a sufficient authentication to entitle the transcript to be received in evidence in the several courts of this state.—*Fisher v. Hamilton*, 49 Ind. 341.

[s] (Sup. 1877)

In an action by a purchaser of lands at execution sale against the judgment debtor, who failed to redeem, for the use and occupation of the lands for the year allowed for redemption succeeding the sale, a duly-authenticated transcript of the complaint, decree, execution, and sheriff's return are admissible in evidence on behalf of plaintiff; and the certificate thereto is sufficient, although it does not purport to be a full and complete transcript of all the pleadings and proceedings in the case.—*Gale v. Parks*, 58 Ind. 117.

[t] (Sup. 1879)

A copy of the muster roll of a regiment of volunteers, prepared by the adjutant general of a state, is admissible in evidence of the enlistment and discharge of a volunteer, though the term of the officer certifying it had expired previous to the issuance of the copy.—*Board of Com'rs of Monroe County v. May*, 67 Ind. 562.

[u] (Sup. 1880)

The transcript of record entries in a case is not inadmissible because it is not a complete transcript of the whole cause, if it affords prop-

er evidence of such proceedings as are embraced therein.—*Jones v. Levi*, 72 Ind. 586.

[v] (Sup. 1881)

The mode prescribed by statute for the authentication of records and instruments is exclusive of all other modes.—*Painter v. Hall*, 75 Ind. 208.

A tax assessment list certified to by the county auditor as being "a true copy of the assessment" of a party named *held* inadmissible; it being necessary, under 2 Rev. St. 1876, p. 150, § 283, to render such a copy admissible, that it should be certified to by the auditor, as keeper of the instrument, to be "a true and complete copy" thereof.—*Id.*

[vv] (Sup. 1881)

A transcript of the record of bankruptcy proceedings in this state, authenticated by the certificate of the clerk with the seal of the court attached thereto, was admissible in evidence under 2 Rev. St. 1876, p. 150, § 283, providing that "exemplifications or copies of records," etc., "which are kept in any public office in this state shall be proved by or admitted as legal evidence in any court or office in this state, by the attestation of the keeper of said records," etc., "and the seal of the office of said keeper thereto annexed," etc.—*Bradford v. Russell*, 79 Ind. 64.

[w] (Sup. 1882)

On a motion to set off judgments, the fact that the transcript of one of the judgments contains matter irregularly there does not justify the exclusion of the transcript.—*Adams v. Lee*, 82 Ind. 587.

An authenticated transcript of the judicial record of a court of superior jurisdiction need not show that the proceedings of each day were signed by the judge.—*Id.*

[ww] (Sup. 1882)

Under Practice Act, § 283, requiring the certificate of official custodians of records to state that certified copies thereof are "true and complete copies" to entitle them to admission in evidence, a certificate of an officer that certain recitals "are true copies" of the originals on file in his office is inadmissible.—*Board of Com'rs of Vermillion County v. Hammond*, 83 Ind. 453.

[x] (Sup. 1883)

The fact that a certificate to a transcript of judgment states that it is a "full, true, and correct," instead of a "true and complete," copy of the judgment, does not render it inadmissible in evidence.—*Anderson v. Ackerman*, 88 Ind. 481.

The fact that the pleadings and proceedings in the cause are not attached to the transcript of judgment does not render it inadmissible in evidence.—*Id.*

[xx] (Sup. 1884)

The records of a circuit court which show that they are attested by the seal of the court

are admissible in evidence.—*Reynolds v. Linard*, 95 Ind. 48.

[y] (Sup. 1886)

A certificate of the clerk of a court, stating over his signature and the seal of the court, that "the above and foregoing is a full, true, and complete copy and transcript of the proceedings had and papers filed in said matter, as fully as the same appears of record, and from the files of said court in my office remaining," is sufficient to render the transcript to which it is appended admissible in evidence in a proper case.—*Vail v. Rinehart*, 105 Ind. 6, 4 N. E. 218.

[yy] (Sup. 1887)

The certificate of a justice of the peace to a transcript, that it contains "a correct statement of the proceedings had before him in the cause," sufficiently complies with section 459, Rev. St. 1881, requiring copies of proceedings before a justice to be certified by him as "true and complete copies of such proceedings or judgments," to entitle them to be received in evidence in the courts of the state.—*Yeager v. Wright*, 112 Ind. 230, 13 N. E. 707.

[z] (Sup. 1898)

A transcript of a justice of the peace, exhibiting a complete proceeding and judgment against the defendant therein named, and certified as "a true and correct copy, as appears of record on my docket," was admissible as evidence, in support of a deed on a sale of real estate on execution thereunder, under Rev. St. 1894, § 624 (Rev. St. 1881, § 612), which requires such justice "to make out and certify a true and complete transcript of the proceedings and judgment," as "a true and correct copy" and "a true and complete transcript" are equivalent terms.—*Collier v. Collier*, 49 N. E. 1063, 150 Ind. 276; *Pierce v. Same*, Id.

[zz] (Sup. 1905)

A transcript of a judgment, bearing the certificate of the clerk that it contains "a full and complete copy of the complaint, answer, reply, and judgment" in the cause, is sufficiently authenticated to be admissible in evidence.—*Chicago & S. E. R. Co. v. Grantham*, 75 N. E. 265, 165 Ind. 279.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1302-1314, 1331-1360.

See, also, 17 Cyc. pp. 337-345.

§ 346. Acts, records, and judicial proceedings of other states.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1361-1383.

See, also, 17 Cyc. pp. 347-359; note, 5 L. R. A. (N. S.) 938.

§ 347. — In general.

[a] (Sup. 1871)

2 Gav. & H. St. p. 185, § 286, relating to the authentication of judgments of courts of

record in foreign states, did not repeal, by implication, 2 Gav. & H. St. p. 181, § 279, relating to the authentication of the judgments of justices of the peace rendered in foreign states.—*Ault v. Zehering*, 38 Ind. 420.

[b] (Sup. 1881)

A tax list of another state may be proved by a sworn copy.—*Hall v. Bishop*, 78 Ind. 370.

[c] (Sup. 1881)

A transcript of judgment in another state, containing no date, and not professing to be a complete copy of the proceedings in the case, held not admissible.—*Kusler v. Crofoot*, 78 Ind. 597.

[d] (Sup. 1881)

Statutes of another state, authenticated as directed by the act of congress, are admissible in evidence, though not authenticated as required by the law of the state in which they are offered.—*Ansley v. Meikle*, 81 Ind. 260.

[e] (Sup. 1883)

A transcript of record duly authenticated by the clerk cannot be excluded as evidence because it fails to show that the entry of judgment was signed by the judge.—*Anderson v. Ackerman*, 88 Ind. 481.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1361-1383.

See, also, 17 Cyc. p. 357.

§ 348. — Requisites of exemplification or certificate.

[a] (Sup. 1822)

The exemplification of a statute under the seal of state is admissible evidence under the act of congress of 1790, without attestation of any public officer.—*Henthorn v. Doe ex dem. Shepherd*, 1 Blackf. 157.

[b] (Sup. 1825)

If the clerk's certificate, attached to the copy of a record of a court of another state, have not the seal of the court or officer granting the letters testamentary, the copy is not admissible as evidence.—*Allen v. Thaxter*, 1 Blackf. 399.

[c] (Sup. 1856)

In a suit on a judgment of the commercial court in Cincinnati, Ohio, the transcript was certified by the clerk of the court of common pleas of Hamilton county, Ohio, and bore the seal of that court. He certified that it was a true copy of a record of the said commercial court, as the same appeared among the records of said court, then in his office, and transferred there according to provisions of the constitution and laws of the state. To this was added the certificate of a judge of said court of common pleas, certifying the official character of the certifying clerk, that his attestation was in due form and by the proper officer. This transcript being offered in evidence, it was held that the certificate of the judge was at least prima facie evidence that the clerk's certificate

was in due form of law, and by the proper officer; that it proved the laws of Ohio; that it proved what faith and credit would be given to it in Ohio, and therefore it complied with the law of congress on the subject.—*Gatling v. Robbins*, 8 Ind. 184.

[d] (*Sup.* 1857)

Though the provision of the United States constitution requiring full faith and credit to be given to judgments, etc., of other states, applies to courts not of record, the act of congress as to the authentication of transcripts of them does not; and transcripts not within the statute are admitted, on general principles of evidence, without the certificate of the judge.—*Dragoo v. Graham*, 9 Ind. 212.

[e] (*Sup.* 1861)

A justice's transcript was certified by a justice of the peace of "A., formerly R., county, O." The clerk of A. county certified that the justice in question was an acting justice of said county, duly commissioned, etc.; that his signature was genuine, and his certificate in due form, etc. The clerk of R. county certified that he was an acting justice of "R., now A., county, duly qualified," etc. *Held*, that these certificates were sufficient, and the transcript admissible in evidence without the authentication of a judge. 2 Rev. St. 1852, pp. 90, 91, § 279.—*Dragoo v. Graham*, 17 Ind. 427.

[f] (*Sup.* 1871)

A transcript of the record of an action before a justice of the peace in a foreign state, which was certified by the justice under his seal, and which contained a certificate of a clerk of the court of common pleas in such foreign state that the justice was, at the date of the rendition of the judgment and the making of his certificate, an acting justice of the peace, duly commissioned and qualified, and that full faith and credit should be given to his official acts, and that his signature to the transfer was genuine, is sufficiently certified to be admissible.—*Ault v. Zehering*, 38 Ind. 429.

[g] (*Sup.* 1889)

The certificate of the clerk of a foreign court in which a judgment was rendered that the transcript of the judgment is a "true and correct copy" is not objectionable because the word "correct" is used instead of the word "complete."—*Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346.

In an action on a judgment of a sister state, mere formal irregularities constitute no ground for rejecting a duly-certified record of such judgment.—*Id.*

[h] (*App.* 1896)

Where the record of another case offered in evidence in the state of Kentucky was attested by the clerk of the Louisville law and equity court under his hand and seal of the court, and the judge of the court certified that C., who

signed the said certificate, was the clerk of said court, and that the attestation was in due form of law, this was in conformity to the act of Congress and was sufficient under Rev. St. 1894, § 458.—*Main v. Field*, 40 N. E. 1103, 41 N. E. 829, 13 Ind. App. 401.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1361–1383.

See, also, 17 Cyc. pp. 358, 359.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

In criminal prosecutions, see CRIMINAL LAW, §§ 431–439.

Secondary evidence of contents, see ante, §§ 164–166, 168.

§ 352. Corporate records and proceedings.

Secondary evidence, see ante, §§ 164, 166.

[a] (*Sup.* 1885)

Code, § 284 (2 Gav. & H. p. 184), which provides that the acts and proceedings of a corporation may be proved by a sworn copy of the record, does not make such copy the only legal evidence of such acts. The original record is always admissible in evidence.—*Green v. City of Indianapolis*, 25 Ind. 490.

[b] (*Sup.* 1874)

The entry in the record book of the board of directors of a turnpike company, signed by the secretary, is competent evidence of the act of the board requiring payment from subscribers to the capital stock.—*Fox v. Allensville, C. R. & V. Turnpike Co.*, 46 Ind. 31.

[c] (*Sup.* 1876)

Records of a corporation are competent to prove its organization and existence.—*Vawter v. Franklin College*, 53 Ind. 88; *Whitesides v. Same*, 53 Ind. 93.

The records of a stockholders' meeting, made on loose sheets of paper, and kept in a drawer several months before they were copied into a book called the "Record," are admissible; it not appearing that the minutes did not truly represent their action, or that the record was not adopted by them, or that there was anything improper in the transaction.—*Id.*

[d] (*Sup.* 1881)

The books of a corporation are competent evidence for and against its members in an action between the corporation and its members.—*Washer v. Allensville, C. S. & V. Turnpike Co.*, 81 Ind. 78.

[e] (*App.* 1899)

Where bad faith is charged in failing to incorporate a company, the articles, duly signed and acknowledged, are competent to rebut the charge, though they were not recorded as re-

quired by law.—*Warren v. Syfers*, 55 N. E. 103, 23 Ind. App. 167.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1398-1403.

See, also, 17 Cyc. pp. 401-405.

**§ 353. Conveyances, contracts, and other instruments.**

Parol or extrinsic evidence to contradict or vary, see post, §§ 390, 391, 395, 397, 400-403, 405, 408.

Preliminary evidence for authentication, see post, §§ 372-374.

Records of conveyances and other private writings, see ante, § 330.

Secondary evidence, see ante, § 165.

Transcript or certified copies, see ante, § 343.

**[a] (Sup. 1824)**

Where defendant examined, and by oral agreement agreed to carry out the terms of, a written contract which another had entered into with plaintiff and had abandoned, the contents of such written contract may be read, as a memorandum of the terms of the contract.—*McCarty v. Osborne*, 1 Blackf. 325.

**[b] (Sup. 1832)**

A. promised, in writing on the back of a promissory note held by B., to pay him the amount of the note if not collected from the maker, but the consideration of the promise was not specified in the written promise. *Held* that, in a suit by B. against A. on the promise, the writing signed by A. was legal evidence, but quære whether it was sufficient of itself to support the action.—*McCoskey v. Deming*, 3 Blackf. 145.

**[c] (Sup. 1841)**

A conveyance of land, executed by a feme covert under 21 years of age, is not admissible evidence if objected to, unless the certificate of consent, etc., required by the statute of 1839 be proved, like any other written instrument with subscribing witnesses, by examining those witnesses or one of them, if they or either of them can be procured. If neither of them can be procured, resort should be had to the next best evidence.—*Sheets v. Dufour*, 5 Blackf. 549.

**[d] (Sup. 1877)**

Deeds purporting to be executed by the trustees of the Wabash & Erie Canal are inadmissible as evidence of title in the grantee, in an action by him to recover the possession of such real estate, on evidence of the execution thereof by only one of such trustees; evidence of such execution by at least two of them being necessary.—*Westerman v. Foster*, 57 Ind. 408.

**[e] (Sup. 1877)**

An indenture of apprenticeship, although inoperative as such by reason of informality, is admissible to show an agreement that the master was to render a specific compensation to the child for its services, and consequently that the parent relinquished all right to compensation therefor.—*Kerwin v. Wright*, 59 Ind. 369.

**[f] (Sup. 1882)**

In an action to recover a balance of purchase money claimed to be due on the rescission by mutual agreement of a contract for the sale of a lease, a receipt given by the vendee to the vendor and reciting a part repayment of such purchase money, and also a lease whereby the vendor sublet to the vendee and others all his rights and privileges under the leases referred to in the contract for the sale thereof, were admissible in evidence on the question as to whether there had been a voluntary rescission of the contract.—*Pedrick v. Post*, 85 Ind. 255.

**[g] (Sup. 1884)**

A will constituting a link in a chain of title may be admitted in evidence to support such title.—*Trittipo v. Morgan*, 99 Ind. 269.

**[h] (Sup. 1885)**

Though a contract partly written and partly oral is a mere verbal contract, still the writing is competent evidence.—*Tomlinson v. Briles*, 101 Ind. 538, 1 N. E. 63.

**[i] (Sup. 1886)**

A deed executed as a part of the same general transaction as that out of which the controversy arose is admissible.—*Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1404-1431.

See, also, 17 Cyc. pp. 363-365.

**§ 354. Books of account.**

Failure to dispute entries as admission, see ante, § 220.

In action to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, § 291.

Preliminary evidence for authentication, see post, § 376.

**[a] (Sup. 1829)**

An entry in the partnership books by one of the partners in the business of a sawmill, charging himself with a boat which he had built at the mill, may be introduced by him as evidence *inter alia* to prove the boat to be his individual property.—*Reno v. Crane*, 2 Blackf. 217.

**[b] (Sup. 1836)**

The account books of a party are not evidence in his favor.—*De Camp v. Vandagriff*, 4 Blackf. 272.

**[c] (Sup. 1842)**

Where, in an action on an account, defendant sets up a note as a counterclaim, plaintiff may place in evidence his account books to show that the note was previously credited on the account.—*Powers v. Hamilton*, 6 Blackf. 293.

**[d] (Sup. 1867)**

In an action upon a bond given by a deputy collector of internal revenue to his principal, and conditioned for a faithful discharge of his duties, and the payment of moneys received, etc., it appeared that the defendant, under the

direction of the plaintiff, was to deposit the money in a certain bank to the latter's credit. On the trial the plaintiff introduced in evidence a book kept by a former cashier of the bank, then dead, containing an account of the deposits of the defendant made to the plaintiff's credit. This book, which contained many other deposit accounts that did not appear upon the regular deposit account book of the bank, was found among the books of the bank at the death of the cashier, and adopted by the bank as a regular deposit book; the accounts contained therein being settled by the bank, and it treated as one of its books. *Held*, that the book was properly admitted in evidence as one of the books of the bank, notwithstanding an officer of the bank, who testified, was of the opinion that it was the private book of the cashier.—*Glover v. Hunter*, 28 Ind. 185.

[e] (Sup. 1872)

Entries in the account books of a firm made prior to and at the date of any transaction in question, and open to the inspection of the partners, are prima facie evidence against any member of the partnership.—*Elden v. Lin-genfelter*, 39 Ind. 19.

[f] (Sup. 1873)

Entries in the books of certain railroad companies, proved to have been in the handwriting of a person whose duty and business it was to make them, showing the delivery to and receipt by the consignees of certain goods transported, are competent, as between the parties, as tending to show such delivery and receipt.—*Gilmore v. Merritt*, 62 Ind. 525.

[g] (Sup. 1881)

In suit for medical services rendered to paupers, the poor books of the township are admissible, though the entries were made therein after the transaction of the matters so entered, and copied from slips of paper and memorandum books used at the time before the trustees had got regular poor books.—*Board of Com'rs of Jay County v. Brewington*, 74 Ind. 7.

[h] (Sup. 1881)

In an action by an administratrix for money alleged to have been loaned by decedent to defendant, the account books kept by decedent were admissible in evidence touching the alleged indebtedness. They were not, however, admissible for the purpose of proving any item of set-off or payment, but it was competent to introduce them in connection with other evidence that all the items contained therein were included in a settlement made with plaintiff before suit.—*Slade v. Leonard*, 75 Ind. 171.

[i] (Sup. 1881)

In an action against a railroad company, entries in its private books, though made at the time, are not admissible in evidence for it, though they may be used as memoranda to refresh the memory of those who made them.—

*Pittsburg, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[j] (Sup. 1888)

Entries in the books of a bank are admissible, especially when against the interest of the bank.—*Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129.

[k] (Sup. 1889)

Plaintiff, in an action against his partner who prosecuted him for larceny in disposing of the firm's stock, having asserted that he had a right to sell the stock, as defendant was indebted to him, and that defendant had so erased and changed the accounts on the books as to show that nothing was due, the books were competent evidence for the inspection of the jury.—*Peden v. Mail*, 118 Ind. 560, 20 N. E. 446.

[l] (Sup. 1890)

Original entries made by the proper officers in the books of a bank, showing the account of a depositor, are competent evidence, though some of the persons making the entries are dead, some out of the state, and the others have no recollection of the facts.—*Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489.

It is not error to permit a statement of a depositor's account made from the bank's books by an expert accountant to be read in evidence, where the books are also in evidence, and the accountant is examined as a witness.—*Id.*

[m] (App. 1892)

In a suit against a bank for an alleged deposit, as shown in plaintiff's bank pass book, the court properly refused to allow defendant to read in evidence the bank ledger showing plaintiff's account.—*First Nat. Bank of Porter County v. Williams*, 4 Ind. App. 501, 31 N. E. 370.

Where the amount sued for was an alleged deposit entered in plaintiff's pass book by defendant bank, and plaintiff's account as contained in such pass book was placed in evidence, the court properly charged that the jury might "consider the position of the account as shown in that book, and the manner of placing it as you have seen it on the book."—*Id.*

[n] (App. 1894)

On an issue as to whether plaintiff, C., was doing business with G. as a firm, at a certain time, the books of a concern with whom it was claimed C. and G., as such partners, did business, and which contained accounts of C. and G., were admissible in evidence for defendant, the entries having been made by a disinterested person, in the usual course of business, who testified as to their truthfulness, though stating that the particulars had escaped his recollection, plaintiff being the only person familiar with the entire circumstances.—*Cle-*



land v. Applegate, 8 Ind. App. 499, 35 N. E. 1108.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 1432-1483.

See, also, 17 Cyc. pp. 365-398; notes, 52 L. R. A. 546, 689, 833; 2 L. R. A. (N. S.) 401; note, 15 Am. Dec. 191.

**§ 355. Private memoranda and statements in general.**

See MECHANICS' LIENS, § 317.

Parol or extrinsic evidence to contradict or vary, see post, § 410.

[a] (Sup. 1859)

There was a regular award signed by the three arbitrators; then a paragraph in question in the case as to a certain settlement of certain claims, signed by the three; then another paper explaining and showing that the paragraph was of matters not submitted, and not embraced in the body of the award, and signed by two. To prove the facts substantially recited in the last paper, the two arbitrators were called on a trial nine years after the award. One of them agreed with the paper, and said it was signed about an hour after the award, for the purpose of explaining the last paragraph of it. The other arbitrator differed in his testimony as to the facts, but agreed as to the time and purpose of signing the third paper. *Held*, that the paper was admissible as a record of the facts made by both witnesses at the time, and that it might aid the jury in weighing the discordant testimony of the two.—*McCullough v. McCullough*, 12 Ind. 487.

[b] (Sup. 1863)

In a suit on a parol contract, a written memorandum thereof, signed only by the plaintiff, is admissible to establish its terms or as a link in the evidence, if any collateral circumstances can show, or raise a sufficient presumption of, assent thereto by the defendant.—*Cook v. Anderson*, 20 Ind. 15.

[c] (Sup. 1885)

Although a contract partly written and partly oral becomes a mere verbal contract, yet the writing is admissible in evidence, just as a letter might be in a contract not evidenced in whole or in part by a written instrument.—*Tomlinson v. Briles*, 101 Ind. 538, 1 N. E. 63.

[d] (Sup. 1886)

Where, in an action against a county school superintendent for refusing to grant a license, the defendant, being called as a witness by the plaintiff, refers to fragmentary and unsigned memoranda of the questions and answers of the applicant, the plaintiff is not entitled to put such memoranda in evidence.—*Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 1444, 1484-1491.

See, also, 13 Cyc. p. 307; 17 Cyc. pp. 399, 400; note, 41 L. R. A. 449.

**§ 357. Letters, telegrams, and other correspondence.**

As hearsay evidence, see ante, § 318.

As self-serving declarations, see ante, § 271.

Competency as evidence, see ante, § 215.

Preliminary evidence for authentication, see post, § 378.

Presumptions as to mailing and delivery of letters, see ante, § 71.

Secondary evidence, see ante, § 168.

[a] (Sup. 1885)

A contract may be embraced in letters constituting a correspondence between the parties, and such letters are admissible for the purpose of proving the contract and its terms and conditions.—*Thames Loan & Trust Co. v. Beville*, 100 Ind. 309.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 1492-1499.

See, also, 17 Cyc. pp. 406-412; note, 44 L. R. A. 438; note, 38 Am. Rep. 5.

**§ 358. Maps, plats, and diagrams.**

[a] (Sup. 1865)

In a suit by the owners of certain lots in the city of Vincennes to enjoin the city from opening a street, alleging that the line of the street as surveyed and about to be opened was incorrect, the city offered in evidence, to establish the line of the street, the record of a plat of the city made in 1821, and recorded in the deed records of the county. It did not appear by what authority the survey was made, nor was the plat acknowledged or proved so as to entitle it to record. *Held*, that the record of the plat was not admissible in evidence.—*Allen v. City of Vincennes*, 25 Ind. 531.

[b] (Sup. 1883)

In ejectment for part of a city lot, the recorded plat of the lot is proper evidence for plaintiff.—*Meikel v. Greene*, 94 Ind. 344.

[c] (Sup. 1889)

There is no error in excluding the record of a plat purporting to be that of a town, where the plat bears no date, is not acknowledged, nor does the date of record appear, and another plat, identical with the one excluded, is admitted.—*City of Huntington v. Hawley*, 120 Ind. 502, 22 N. E. 326.

[d] (Sup. 1899)

A map made by a drainage company, and placed on file in the county auditor's office, not being an ancient map, is not admissible against one who does not deraign title through such company.—*Ellison v. Branstrator*, 54 N. E. 433, 153 Ind. 146.

An unofficial tracing or copy of a map is not admissible in evidence.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1500-1508.

See, also, 17 Cyc. p. 412.

**§ 359. Photographs and other pictures.**

[a] (App. 1902)

Where in a change of highway proceeding the cost and damages incident to the change were pertinent to the issue, the photograph of a dwelling house, in front of which a strip of land was to be appropriated, was competent in evidence, as showing the character of the improvements affected by the change.—*Raab v. Roberts*, 64 N. E. 618, 65 N. E. 191, 30 Ind. App. 3.

[b] (App. 1904)

Photographs of the part of the street where the accident occurred, showing the stump which frightened the horse, are admissible, with evidence that there had been no material change in the appearance of the place, and that the photographs correctly represented it at the time of the accident.—*City of Huntington v. Lusch*, 70 N. E. 402, 33 Ind. App. 476.

[c] (App. 1905)

Photographs of a building are admissible in evidence on proof that the appearance of the building was correctly represented thereby.—*Huntington Light & Fuel Co. v. Beaver*, 73 N. E. 1002, 37 Ind. App. 4.

[d] (App. 1905)

In an action against a railroad for wrongful death at a crossing, photographs of the crossing and surroundings were admissible in evidence, where the witness taking the same testified that they were correct reproductions of the surroundings as they then were; the points from which the photographs were taken going to their value as evidence, but not to their admissibility.—*New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1509-1512.

See, also, 17 Cyc. pp. 414-420; note, 78 C. C. A. 145; note, 35 L. R. A. 802; note, 75 Am. St. Rep. 468.

**§ 360. Books and other printed publications.**

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1513-1520.

See, also, 17 Cyc. pp. 421-425; note, 17 L. R. A. 851; note, 90 Am. Dec. 258; notes, 38 Am. Rep. 578; 39 Am. Rep. 416.

**§ 362. — Statutes, law reports, and legal text-books.**

[a] (Sup. 1858)

The books of reports of decisions of the supreme court of a sister state are admissible

to prove the common law of such state.—*Billingsley v. Dean*, 11 Ind. 331.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 1515.

See, also, 17 Cyc. p. 424; note, 51 Am. Rep. 680.

**§ 364. — Mortality tables and tables of expectancy of life.**

In actions for causing death, see DEATH, § 71. In actions for wrongful discharge of insurance agent, see INSURANCE, § 85.

Relevancy of evidence as to expectancy of life of person injured, see DAMAGES, § 167.

[a] (Sup. 1895)

The Carlisle tables are admissible to show the expectancy of life.—*Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343.

[b] (App. 1897)

Life tables are admissible, not as fixing the expectancy of the life of the particular person, or as forming a legal basis for a calculation, but as furnishing some evidence, to be considered by the jury in connection with all other pertinent evidence, in ascertaining the probable duration of the life in question.—*Smiser v. State ex rel. King*, 47 N. E. 229, 17 Ind. App. 519.

The admission of life tables in evidence, in an action on a saloonkeeper's bond for causing the death of plaintiff's husband, is not error though the expectation of life as based on such tables is that of a healthy person, and the evidence showed that plaintiff's husband was diseased.—Id.

[c] (Sup. 1907)

In an action for permanent injuries to a railroad employé, it was not error for the court to admit the Carlisle Tables of Mortality in evidence.—*Pittsburgh, C., C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033.

[d] (Sup. 1907)

In an action for personal injuries, expectancy tables are properly admitted in evidence.—*Pittsburgh, C., C. & St. L. R. Co. v. Ross*, 80 N. E. 845, 169 Ind. 3.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 1520; 33 CENT. DIG. Life Est. § 4.

See, also, 1 Cyc. p. 296, 17 Cyc. p. 422.

**(D) PRODUCTION, AUTHENTICATION, AND EFFECT.**

Competency of parties or persons interested to testify as to written instruments to which person deceased or incompetent was party, see WITNESSES, § 164.

In criminal prosecutions, see CRIMINAL LAW, §§ 440-442, 444.

Production and inspection before trial, see DISCOVERY, §§ 80-107.

Production of bond, note, or other obligation secured by mortgage, in action to foreclose, see MORTGAGES, § 464.

**§ 366. Public documents, records, exemptions, or official copies.**

[a] (Sup. 1828)

A satisfaction of a judgment entered on a justice's docket, purporting to have been executed by the justice, is inadmissible in an action against him for the proceeds of the judgment, without proof of its execution by him.—*Modisett v. Governor ex rel. Williams*, 2 Blackf. 135.

[b] The final entry of a judgment on the record, without showing any of the previous files or proceedings on which it should have been based, is insufficient proof of a valid judgment.—(Sup. 1837) *Foot v. Glover*, 4 Blackf. 313; (1884) *Brown v. Eaton*, 98 Ind. 591.

[c] (Sup. 1837)

The seal of the general land office, and the signature of the commissioner thereof to copies of papers required by law to be deposited in that office, prima facie prove themselves.—*Harris v. Doe ex dem. Barnett*, 4 Blackf. 369.

[d] (Sup. 1838)

A patent for United States land, appearing to be signed by the president and countersigned by the commissioner of the general land office, and verified by the seal thereof, is admissible without proof of its execution.—*Bowser v. Warren*, 4 Blackf. 522.

[e] (Sup. 1853)

A subscriber to stock of a railroad company cannot require the production of the articles of association subscribed by him, and upon which he is sued, if they are filed in the office of the secretary of state.—*Eakright v. Lozanoport & N. I. R. Co.*, 13 Ind. 404.

[f] (Sup. 1865)

A properly certified copy of an affidavit which had been filed in the Supreme Court as the basis of a motion to reinstate a cause which had been dismissed was given in evidence against the party who had made it in an action in the lower court. *Held*, that as it did not appear that any motion was made on the affidavit to reinstate the case, and, as the case dismissed was no longer in fieri, the affidavit was not the fragment of a record, but an isolated paper.—*Thom v. Wilson's Ex'r*, 24 Ind. 323.

[g] (Sup. 1866)

The introduction in evidence of the record of the judgment only, without a transcript of the record of the proceedings in the case, showing jurisdiction in the court rendering the judgment, and that the judgment itself was within the relief sought, is not a sufficient showing of title in the purchaser at a sheriff's sale under the judgment.—*Glidewell v. Spaugh*, 26 Ind. 319.

[h] (Sup. 1868)

A tract book kept in a recorder's office admitted in evidence had the following heading: "List of Lands Sold in That Part of Delaware County Lying in the Indianapolis District, from the First Sale up to the 1st of January, 1841." And the following certificates of authentication were attached thereto: "Auditor's Office, Indianapolis, April 27th, 1841. I, Morris Morris, Auditor of Public Accounts, do hereby certify that the foregoing list of lands is correctly transcribed from the tract book on file in my office. M. Morris A. P. A." *Held*, that this was a sufficient authentication under the act of March 6, 1861 (2 Gav. & H. Rev. St. p. 181, § 1).—*Keesling v. Truitt*, 30 Ind. 306.

[i] (Sup. 1873)

The record of a domestic court of general jurisdiction need not show affirmatively jurisdiction over the persons of the parties to authorize its introduction in evidence in a collateral proceeding.—*Gavin v. Graydon*, 41 Ind. 559.

[j] (Sup. 1874)

The authenticity of the jurat of a justice of the peace may be proved by parol evidence, and the fact that a party was a justice of the peace may also be proved by parol evidence that he acted as such officer.—*Fisher v. Hamilton*, 49 Ind. 341.

[k] (Sup. 1875)

In an action to enforce an assessment on realty, an appointment of the assessor made by a judge in vacation, and written on the petition or on a separate paper, and signed by him, is inadmissible in evidence without proof of its genuineness.—*Bannister v. Grassy Fork Ditching Ass'n*, 52 Ind. 178.

[l] (Sup. 1876)

In a suit for the breach of the covenants in a deed from defendant to plaintiff, who founds his claim for damages on a previous conveyance of the land by the sheriff to a third person, the sheriff's deed is admissible in evidence as a link in the chain of title, but is not of itself sufficient to prove the sale, without also introducing the judgment and execution.—*Nichol v. McCalister*, 52 Ind. 596.

[m] (Sup. 1881)

A sheriff's deed cannot be given in evidence without producing the judgment and execution under which the sale was made, such documents being necessary to show that the sheriff had authority to sell.—*Teal v. Langsdale*, 78 Ind. 339.

[n] (Sup. 1881)

The rule against the admission in evidence of detached parts of the record extends only to such matters as are properly and strictly a part of it, and not as to matters which are merely collateral, though connected with the proceedings.—*Bennett v. Gaddis*, 79 Ind. 347.

[o] (Sup. 1881)

The reading in evidence of a decree of foreclosure, without production of the complaint and other pleadings, together with an execution and return of sale of land, and the sheriff's deed based thereon, is sufficient to support the sale, and show title in the purchaser, as against a party claiming title through the judgment defendant.—*Woolen v. Rockefeller*, 81 Ind. 208.

[p] (Sup. 1882)

One who produces an administrator's deed in evidence must show that its execution was authorized.—*La Plante v. Lee*, 83 Ind. 155.

[q] (Sup. 1884)

In an action to foreclose a mortgage, a transcript of the record of an action between some of the parties is properly excluded, where it appears that in the action of which it was a record an amended complaint was filed which was not set forth and the finding and the judgment refer to the complaint, and without it they were unintelligible.—*Ellis v. Johnson*, 96 Ind. 377.

[r] (Sup. 1884)

In an action against an administrator and his sureties on his bond to recover money alleged to have been received on the sale of real estate, it was error to exclude the records and files relating to such sale made by defendant while administrator on the ground that there was no proof that such files were a record of the circuit court, as the files themselves furnished presumptive evidence of such fact.—*State ex rel. Wells v. Lindley*, 98 Ind. 48.

[s] (Sup. 1884)

The report of a judicial sale is admissible in evidence without proof of its identity by an entry in the order book, as such report, found among the papers in the case, and purporting to be the original report, is prima facie genuine.—*Hammann v. Mink*, 99 Ind. 279.

[t] (Sup. 1885)

Where the record of proceedings for the reinstatement of a lost record showed an appearance, a default, and that process had been served on the defendants, it was admissible, though it did not contain a copy of the summons and service thereof, as the appearance was a waiver of objections to the process.—*Dehority v. Wright*, 101 Ind. 382.

[u] (Sup. 1887)

A deed purporting to be granted under a statute authorizing a county to convey land to the state in payment of county indebtedness is not admissible in evidence without proof that the lands conveyed belonged to the county, and were within the provisions of the statute.—*Wines v. Woods*, 100 Ind. 201, 10 N. E. 399.

[v] (Sup. 1891)

An assessment list is not admissible in evidence without preliminary proof of its identity.—*Tyres v. Kennedy*, 126 Ind. 523, 26 N. E. 394.

[w] (App. 1892)

A record is an entire thing, and, if admissible for any purpose, all its parts are to be received.—*Dygert v. Dygert*, 29 N. E. 490, 4 Ind. App. 276.

[x] (Sup. 1893)

A recital in the bill of exceptions that "plaintiff offered to read in evidence the files and papers in a cause tried before" a justice of the peace is not an identification of such files, but a statement by way of designation for the record on appeal, and is not a finding that such files were genuine.—*Bridges v. Branam*, 133 Ind. 488, 33 N. E. 271.

[y] (App. 1908)

In an action on a promissory note against the maker and surety thereon, where it appears that on a former trial the finding was against plaintiff, who thereafter was granted a new trial upon a motion supported by his affidavit that at the time of the trial he was unable to learn the whereabouts of the maker, who since had returned and was then present in court and would testify to the surety's signing the note at the maker's request, and the maker's affidavit that he and his codefendant signed the note as maker and surety, respectively, plaintiff's affidavit being a part of the record, complete within itself, its relevancy not being questioned, may be read in evidence by defendant, being unobjectionable on the ground that the motion for a new trial and the affidavits constituted a written instrument, a part of which was not admissible, unless all was offered and admitted.—*Closson v. Bligh*, 41 Ind. App. 14, 83 N. E. 263.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1521-1539.

### § 368. Compelling production by adverse party.

Compelling production by witness, see WITNESSES, § 16.

Privilege of witness as to production, see WITNESSES, § 298.

[a] (Sup. 1850)

When a party is entitled to the inspection of the original papers referred to by the pleadings in general terms, it may be obtained by motion, but it is not necessary that profert should be made of such originals.—*Cecil v. Dynes*, 2 Ind. 266.

[b] (Sup. 1861)

2 Rev. St. pp. 97, 98, providing that the court may, upon motion, compel, by order, either party to produce at or before the trial any book, paper, or document in his possession or power, upon a reasonable notice to the adverse party, and that the court may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection and a copy of any book, or part thereof, paper, or document in his possession or under his control, containing evi-

dence relating to the merits of the action or to the defense therein do not operate to change the common-law rule that, where the form of action or the pleading gives the party notice to be prepared to produce a written instrument, no other notice to produce is necessary.—*Silvers v. Junction R. Co.*, 17 Ind. 142.

2 Rev. St. pp. 97, 98, provide that the court or judge thereof may, upon motion, compel, by order, either party to produce any book, paper, or document in his possession or power, and that, if not produced, parol evidence may be given of their contents. It further provides that the court may, on proper restrictions, upon due notice, order either party to give the other an inspection and a copy of any book, or part thereof, paper, or document, in his possession or under his control, containing evidence relating to the merits of the action, or the defense therein, and that, if compliance with the order be refused, the court may exclude such evidence, or punish the party refusing, or both. 2 Rev. St. p. 120, provides that an action may be dismissed without prejudice by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. *Held*, that the three provisions must be construed together, as authorizing the court, upon disobedience to an order to produce papers, to allow parol evidence to be given of their contents, or to exclude the evidence, or to punish the party refusing, and, if the disobedience be by the plaintiff, to dismiss the suit without prejudice.—*Id.*

[c] (Sup. 1862)

Under 2 Rev. St. pp. 97, 98, §§ 305, 306, a party to an action cannot be compelled, by service of a subpoena duces tecum issued ex parte, to produce his books on the trial. An order by the court or a judge thereof is necessary.—*Duke v. Brown*, 18 Ind. 111.

[d] (Sup. 1890)

The fact that an order for the production of books and papers was too broad is not reversible error where it does not appear that irrelevant or improper parts of the books or papers were used as evidence.—*Cleveland, C., C. & I. Ry. Co. v. Closser*, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593.

[e] (App. 1895)

Refusal to compel a party to produce certain books on the trial is not error if such party was neither notified of the motion, as required by Rev. St. 1894, § 487 (Rev. St. 1881, § 479), nor was present in person or by counsel when the motion was made.—*Globe Acc. Ins. Co. v. Helwig*, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1540-1558; 17 CENT. DIG. Dismissal, § 119.

See, also, 16 Cyc. pp. 1266-1268; 17 Cyc. pp. 457-464; note, 15 L. R. A. 138.

§ 369. Preliminary evidence for authentication.

Acknowledgment as affecting admissibility of instrument, see ACKNOWLEDGMENT, § 54. Unacknowledged instruments as evidence, see ACKNOWLEDGMENT, § 5.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1538, 1559-1657.

See, also, 17 Cyc. pp. 425-442; notes, 35 L. R. A. 321, 44 L. R. A. 142.

§ 370. — Necessity in general.

[a] (Sup. 1830)

A paper purporting to be an affidavit made before a justice of the peace in another county is not admissible in evidence without proof of its authenticity.—*Hagaman v. Stafford*, 2 Blackf. 351.

[b] (Sup. 1834)

Where a justice of the peace was sued for neglect in failing to file a transcript in time, the fact that the justice filed an appeal bond in the clerk's office after the time limited precluded him from requiring the plaintiff to prove its execution.—*Ingram v. Plasket*, 3 Blackf. 450.

[c] (Sup. 1837)

To make a verified answer to a bill of discovery admissible in evidence in an action at law, it should be shown that it was filed as such, and the signature of the party thereon shown to be genuine, as well as the signature of the officer before whom it was sworn to.—*Doughton v. Tillay*, 4 Blackf. 433.

[d] (Sup. 1837)

An instrument in writing, not set out in the pleadings, if offered in evidence, must be proved.—*Smith v. Scantling*, 4 Blackf. 443.

[e] The certificate of an acknowledgment is no proof of the execution of a deed, but proof must be made by the subscribing witnesses.—(Sup. 1838) *Bowser v. Warren*, 4 Blackf. 522; (1839) *Mullis v. Cavins*, 5 Blackf. 77.

[f] (Sup. 1843)

In assumpsit against A. and B. the plaintiff offered in evidence a paper purporting to be an answer of A. to a bill in chancery filed against him and B. in the Clark circuit court. There was no proof of A.'s signature to the paper, nor that it was entitled to the character given to it by the plaintiff. *Held*, that the evidence was inadmissible.—*Johnson v. Prather*, 6 Blackf. 411.

[g] (Sup. 1871)

Under Code, § 283, an authenticated copy of a constable's bond is admissible in evidence, without proof of its execution, in a suit on the bond against the administrator of one of the sureties.—*Nutzenholster v. State ex rel. Sumner*, 37 Ind. 457.

[h] (Sup. 1873)

Entries in corporate books of the proceedings of the corporation are inadmissible in evi-

dence by simply attaching them to a deposition and making them a part thereof, since such entries must be authenticated as required by Code, § 284, requiring that the proceedings of a corporation may be proved by a sworn copy of the record of such proceedings.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

[l] (Sup. 1878)

In an action on an additional guardian's bond, the bond itself may be given in evidence without first establishing its approval by the court, as evidence of the latter fact may be afterwards given.—*Allen v. State ex rel. Stevens*, 61 Ind. 268, 28 Am. Rep. 673.

[j] (Sup. 1881)

In an action by landlord against tenant to recover leased property, a lease referred to in the complaint, and purporting to have been executed by the tenant, may be used in evidence without being shown to have been so executed.—*Leary v. Meier*, 78 Ind. 393.

[k] (Sup. 1881)

Under an answer admitting the signature of a mortgage, but denying its delivery, the admission of the instrument in evidence without first proving the delivery was harmless error.—*Kusler v. Crofoot*, 78 Ind. 597.

[l] (Sup. 1884)

In the absence of statutes on the subject, the grantee offering a deed in evidence must prove its execution, whether it has been acknowledged and recorded or not, especially if its execution is put in issue by a plea of non est factum.—*Carver v. Carver*, 97 Ind. 497.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1538, 1559-1579, 1592.

See, also, 17 Cyc. pp. 425-431; note, 44 L. R. A. 142.

§ 371. — Writings collateral to issues.

[a] (Sup. 1846)

In assumpsit for money paid by the plaintiff for the defendant's use, and at his request, on a writing obligatory for the payment of money, payable to one A., in which the defendant was principal and the plaintiff was surety, and which the plaintiff had to pay, the plea was non assumpsit, without oath. *Held*, that the writing obligatory, not being the foundation of the suit, was not admissible in evidence without proof of its execution by the defendant.—*Jessup v. Gray*, 7 Blackf. 332.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 1580.

See, also, 17 Cyc. p. 435.

§ 372. — Ancient documents.

[a] (Sup. 1822)

A deed 30 years old is admissible in evidence without proof of its execution.—*Henthorn v. Doe ex dem. Shepherd*, 1 Blackf. 157.

[b] (Sup. 1860)

Where the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison with documents known to be in his handwriting is admissible.—*Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90.

[c] (Sup. 1882)

In a suit to quiet title to land claimed by a railroad company as a right of way, the release to the company of the right of way, which was more than 30 years old, was properly admitted in evidence—even if not very satisfactorily proved.—*Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 394.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1613-1627.

See, also, note, 9 Am. St. Rep. 302.

§ 373. — Form and sufficiency in general.

[a] (Sup. 1847)

In an action on a bond alleged to have been executed by defendant and a third person, there was evidence showing that, after the third person had signed the bond with the seals attached to it, it was shown to defendant by plaintiff and that he said it was all right. The witness so testifying did not swear positively to the fact, but merely to the best of his recollection and belief. *Held*, that the evidence was sufficient to authorize the reading of the bond to the jury.—*Rhode v. Louthain*, 8 Blackf. 413.

[b] (Sup. 1869)

In a suit on a county treasurer's official bond against the principal and his sureties, the defense of the sureties was in effect that the bond sued on was not their deed. The plaintiff, after proving the genuineness of the signatures of the defendants, offered the bond in evidence, but the court refused to admit it as against the sureties. *Held* to be error.—*State ex rel. Griswold v. Blair*, 32 Ind. 313.

[c] (Sup. 1873)

Under Prac. Act, p. 284 (2 Gav. & H. St. p. 184), providing that the acts and proceedings of corporations may be proved by a sworn copy of the record, and that the whole shall be made by the person having the legal custody of such records, entries in the books of a corporation cannot be admitted in evidence on behalf of the corporation by simply attaching them to a deposition and making them a part thereof, where the deponent does not state that he has the legal custody of the books, nor that the copies are true and full copies of the original entries.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

[d] (Sup. 1880)

Evidence showing that an indorsement on a lease was made in the lessor's office, in the due course of business, was sufficient preliminary proof, if such proof was necessary, to

authorize the reading of the indorsement in evidence.—*Isbell v. Brinkman*, 70 Ind. 118.

[e] (Sup. 1885)

It is not necessary, to entitle a written instrument to be read in evidence, that its execution should be proved by direct evidence, but it will be sufficient if that fact is fairly inferable from the facts and circumstances proved.—*Forgerson v. Smith*, 104 Ind. 246, 3 N. E. 866.

[f] (Sup. 1895)

The certificate of acknowledgment is sufficient prima facie evidence of the execution of a mortgage to entitle it to be read in evidence.—*Krom v. Vermillion*, 143 Ind. 75, 41 N. E. 539.

[g] (Sup. 1907)

Possession of a note by plaintiff in an action thereon with proof of defendant's signature authorizes the admission of the note in evidence.—*Digan v. Mandel*, 167 Ind. 586, 79 N. E. 899, 119 Am. St. Rep. 515.

[h] (Sup. 1908)

In an action against a corporation on corporate notes drawn by its president, in which the defense is non est factum, the notes cannot be admitted in evidence, where no proof is made that the president was authorized to execute the notes in the name of the corporation.—*Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1581-1586, 1590, 1592, 1593, 1610, 1611.

§ 374. — Attesting witnesses.

[a] (Sup. 1819)

Where the subscribing witness on a bond is dead, proof that the signature is his is sufficient to make the bond admissible in evidence.—*Jones v. Coopridger*, 1 Blackf. 47.

If the attesting witnesses to a bond reside in another state, the bond will be received in evidence upon proof of their handwriting.—*Id.*

[b] (Sup. 1827)

One of two subscribing witnesses to a bond, being called to prove its execution, denied his signature. *Held*, that the other, if he could be procured, should be examined, but, if he could not be found, secondary evidence might be resorted to.—*Booker v. Bowles*, 2 Blackf. 90.

If a subscribing witness deny his signature, the case stands in the same situation as if his name were not on the instrument.—*Id.*

[c] (Sup. 1828)

The subscribing witness to a deed resided in Ohio, and the acknowledgment had been taken before the mayor of Cincinnati. *Held*, that the deed on proof that the grantor had executed it, and that the witnesses had subscribed it in the presence of the witness, was admissible in evidence.—*Ungles v. Graves*, 2 Blackf. 191.

[d] (Sup. 1830)

Parol evidence is admissible to establish the authenticity of an affidavit purporting to be made before a justice of the peace in another county.—*Hagaman v. Stafford*, 2 Blackf. 351.

[e] (Sup. 1838)

An instrument attested by witnesses cannot be used in evidence by merely proving the handwriting of the party who signed it.—*Bowser v. Warren*, 4 Blackf. 522.

The execution of a deed cannot be proved by proving the handwriting of the grantor, unless the absence of the subscribing witnesses be accounted for, and due diligence used, without effect, to procure proof of their handwriting.—*Id.*

[f] (Sup. 1841)

The execution of a written instrument must be proved by the subscribing witnesses, if they, or either of them, can be had.—*Sheets v. Dufour*, 5 Blackf. 549.

[g] (Sup. 1844)

Execution of a deed cannot be shown by proof of the handwriting of a subscribing witness not shown to be dead, or out of the state, or otherwise incapacitated from testifying.—*Sampson v. Grimes*, 7 Blackf. 176.

[h] (Sup. 1845)

Where the attesting witness lives out of the state, secondary evidence of its execution is admissible.—*State ex rel. Lowry v. Bodly*, 7 Blackf. 355.

Proof of the handwriting of a nonresident witness to a bond may be made, though plaintiff has procured and filed his deposition in the case.—*Id.*

[i] (Sup. 1849)

Proof that a subscribing witness to a bond was residing out of the state when last heard from by one who was well acquainted with him is prima facie proof of his absence from the state, so as to render proof of his handwriting admissible.—*Gordon v. Miller*, 1 Ind. 531, *Smith*, 297.

[j] (Sup. 1855)

A witness called to prove the signature of a deed executed in 1837 testified that he had known the grantor 18 or 20 years ago, and was acquainted with his handwriting; that he thought the signature was his, but could not be positive. There were no subscribing witnesses, and the deed was executed in a foreign state. *Held*, that the proof was sufficient.—*Haynes v. Thomas*, 7 Ind. 38.

[k] (Sup. 1879)

The testimony of a subscribing witness in whose presence an assignment of a policy purports to have been executed, though the best,

is not the only, evidence that may be given of its execution.—Pence v. Makepeace, 65 Ind. 345.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1583, 1584, 1587-1612.

See, also, 17 Cyc. pp. 431-441; notes, 35 L. R. A. 321, 340.

**§ 375. — Handwriting.**

By attesting witnesses, see ante, § 374.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1591, 1602, 1604, 1606.

**§ 376. — Books of account.**

[a] (Sup. 1824)

In assumpsit for goods sold and delivered, the plaintiffs, L. and others, to prove their demand, offered in evidence certain books of account, proved to be those of the Steam-Mill Company. *Held*, that the books, not being proved to be the plaintiffs', were inadmissible.—Harrison v. Lagow, 1 Blackf. 307.

[b] (Sup. 1865)

On the trial of an action upon an account for goods sold, a witness was permitted to testify that he made the entries of the items of account in the book at the time the goods were sold, and that he then knew and recollected that the account was correct, and still believed it to be correct, but did not now distinctly remember the items of account charged. *Held*, that the testimony was properly received.—Davis v. Franklin, 25 Ind. 407.

[c] (Sup. 1881)

An unauthenticated journal entry is not admissible in a collateral action to establish an indebtedness for the costs of the action in which such entry was made.—Bane v. Ward, 77 Ind. 153.

[d] (App. 1895)

Where, in an action on account, plaintiff's bookkeeper testified that the method of transacting business was for the employes to do the work and furnish the materials, and then inform him or furnish him with memoranda from which he made entries on books, there was not a sufficient showing that the entries were made by a person having personal knowledge, or were made contemporaneously, and hence they were not admissible.—Dodge v. Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

[e] (App. 1896)

A page from a decedent's account book is properly rejected as evidence, where there is no proof that entries were in decedent's handwriting, nor as to when they were made.—Rouyer v. Miller, 44 N. E. 51, 45 N. E. 674, 16 Ind. App. 519.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1628-1646.

**§ 378. — Letters, telegrams, and other correspondence.**

[a] (Sup. 1851)

Postmarks on letters are admissible in evidence, in a civil case, without proof, where no reason is shown for doubting their genuineness.—Burgess v. Clark, 3 Ind. 250.

[b] (Sup. 1871)

In an action against a carrier for the conversion of goods, a letter, by which it was sought to establish an agency between defendant and other connecting carriers, purporting to be written by defendant, is inadmissible in the absence of proof of its genuineness.—Baltimore & O. R. Co. v. McWhinney, 36 Ind. 436.

[c] (Sup. 1877)

Letters introduced in evidence by a party, the handwriting of which has once been proved by competent evidence, may be used, without further proof of handwriting, by any party to the record.—Haskit v. Elliott, 58 Ind. 493.

[d] (Sup. 1889)

A letter purporting to have been written to an agent by a third person at the instance of his principal is not admissible, where there is no evidence that the principal authorized the writing of the letter.—Hargrove v. John, 120 Ind. 285, 22 N. E. 132.

[e] (App. 1901)

A private letter is not admissible in evidence against the person by whom it purports to have been written, but who denies having written it, under oath, where no evidence is offered to establish its genuineness, either by proof of the handwriting, or that it was received in answer to one written and sent to such person, or even that it was received through the mail.—Lingg v. State ex rel. Weitzel, 61 N. E. 606, 28 Ind. App. 248.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1648-1650.

See, also, 17 Cyc. pp. 409-411.

**§ 383. Conclusiveness and effect.**

Certified copy under judge's signature and seal of court as evidence of discharge in bankruptcy, see BANKRUPTCY, § 436.  
Of tax deeds, see TAXATION, §§ 787-789.

[a] (Sup. 1840)

If a warrant issued by a justice of the peace of one county be indorsed, as provided by statute, by a justice of another county, the indorsement is prima facie evidence that an oath authorizing the indorsement had been previously made.—Brown v. Connelly, 5 Blackf. 390.

[b] (Sup. 1849)

Recitals in the preamble of a private statute are prima facie evidence of the matters recited, as between the person for whose relief the statute was passed and the state.—State v. Beard, 1 Ind. 460, Smith, 276.



[c] (Sup. 1855)

If a record or copy of a record is offered in evidence, the whole which relates to the questions in dispute may be read.—*Miles v. Wingate*, 6 Ind. 458.

[d] (Sup. 1859)

The statute provides that the sworn certificate of a corporation clerk to an extract of the records shall be admissible. This refers only to the admissibility of the copy, not to its effect when admitted. Therefore, if an unsworn certificate be admitted without objection, it is as effective as if sworn to.—*Smith v. Indiana & I. R. Co.*, 12 Ind. 61.

[e] (Sup. 1830)

Where an instrument was admitted in evidence, all marks and memoranda thereon, having any reference to the matter in controversy, or corroborative of other evidence in the case, were also placed in evidence.—*Isbell v. Brinkman*, 70 Ind. 118.

[f] (Sup. 1882)

Where during the trial one party gave in evidence detached parts of records, it was proper for the other party afterwards to give in evidence the remaining parts as the rule is that all of the record, and not merely fragmentary parts, shall be put in evidence.—*State ex rel. Nave v. Hawkins*, 81 Ind. 486.

[g] (Sup. 1886)

Rev. St. 1881, § 6493, requiring that certain records made by the auditor respecting delinquent lands and sales thereof shall be prima facie evidence of the facts contained therein, is not applicable in the case of gravel road assessments.—*Kirkpatrick v. Pearce*, 8 N. E. 573, 107 Ind. 520.

[h] (Sup. 1891)

Where part of a letter has been put in, other explanatory parts are admissible.—*Glover v. Stevenson*, 126 Ind. 532, 26 N. E. 486.

[i] (App. 1893)

Defendants having cross-examined plaintiff as to certain of his letters, he was properly allowed to give in evidence other letters of his on the same subject to defendants.—*Stringer v. Breen*, 7 Ind. App. 557, 34 N. E. 1015.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1660-1677; 41

CENT. DIG. Pub. Lands, § 216.

See, also, 17 Cyc. p. 464.

## **XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**

Advancement as ademption of legacy, see WILLS, § 770.

As secondary evidence, see ante, §§ 157-187.

As to advancements by testator, see WILLS, § 761.

As to award of arbitrators, see ARBITRATION AND AWARD, §§ 87-89.

Decisions as to admissibility of parol evidence as rules of property, see COURTS, § 93.

Evidence of custom, see CUSTOMS AND USAGES, §§ 15, 16.

Extrinsic circumstances affecting construction of deed, see DEEDS, § 100.

Extrinsic evidence as to jurisdictional facts on collateral attack on judgment, see JUDGMENT, § 499.

Impeachment of items or charges in judgment for costs, see JUDGMENT, § 478.

In action for insurance premium, see INSURANCE, § 188.

In suits to reform instruments, see REFORMATION OF INSTRUMENTS, § 44.

Motion to suppress parol evidence in deposition, see DEPOSITIONS, § 83.

Objections to admissibility, see TRIAL, § 105.

Of matters avoiding bar of limitations, see LIMITATION OF ACTIONS, § 106.

Parol evidence as to advancement, see DESCENT AND DISTRIBUTION, § 116.

Parol evidence as to jurisdiction in case of foreign judgments, see JUDGMENT, § 818.

Parol evidence of claim against county, see COUNTIES, § 204.

Parol evidence of dedication, see DEDICATION, § 43.

Parol evidence of existence of ordinance, see MUNICIPAL CORPORATIONS, § 109.

Parol warranties, see SALES, § 260.

To correct mistake in will, see WILLS, § 164.

To establish constructive trust, see TRUSTS, § 100.

To establish execution, existence and genuineness of will, see WILLS, § 293.

To establish express trust, see TRUSTS, § 43.

To establish resulting trust, see TRUSTS, § 88.

To show assignment of notes to be a pledge, see PLEDGES, § 16.

To show bill of sale, absolute on its face, a mortgage, see CHATTEL MORTGAGES, § 38.

To show deed absolute on its face a mortgage, see MORTGAGES, § 37.

To show filing and approval of bond on appeal from justice's court, see JUSTICES OF THE PEACE, § 159.

To show payment of mortgage, see MORTGAGES, § 298.

## **(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.**

Evidence or custom, see CUSTOMS AND USAGES, § 16.

Separate or subsequent oral agreements affecting writings, see post, §§ 439-445.

Showing discharge or performance of obligation, see post, §§ 464-469.

## **§ 384. Grounds for exclusion of extrinsic evidence.**

[a] (Sup. 1890)

Parol evidence may not be introduced to impeach the contents of a writing or to control its legal effect, but the circumstances under

which a writing is executed, or the consideration upon which it rests, may always be shown by parol.—*Kentucky & I. Bridge Co. v. Hall*, 25 N. E. 219, 125 Ind. 220.

#### FOR CASES FROM OTHER STATES,

See, also, 17 Cyc. pp. 567, 749-753; note, 17 L. R. A. 271.

### § 385. Writings excluding extrinsic evidence in general.

#### [a] (Sup. 1873)

Allegations and evidence of matters in contradiction of a written instrument are inadmissible.—*Spurgin v. McPheeters*, 42 Ind. 527.

#### [b] (Sup. 1896)

Where the articles of faith of a church are a solemn written compact, they are conclusive on the question of faith, and oral testimony cannot be considered in opposition to the written compact.—*Smith v. Pedigo*, 33 N. E. 777, 44 N. E. 363, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1757, 1758.

### § 386. Judicial records and proceedings.

Evidence of judgment as estoppel or defense, see JUDGMENT, §§ 951, 953-957.

Evidence to impeach or contradict return, certificate, or affidavit of service of process, see PROCESS, § 148.

#### [a] (Sup. 1846)

Parol evidence is not admissible to vary a recognizance of bail.—*Murphy v. Merry*, 8 Blackf. 295.

#### [b] (Sup. 1882)

Where, in an action against the sheriff for seizing exempt property under an execution, there was no ambiguity in respect to the nature of the cause of action declared upon in the complaint upon which the judgment, under which the execution issued was rendered, it was error to admit parol testimony to show that judgment was rendered upon a cause of action arising out of contract instead of tort.—*Gentry v. Purcell*, 84 Ind. 83.

#### [c] (Sup. 1883)

A judgment cannot be corrected on parol evidence after the term at which it was rendered and entered.—*Williams v. Henderson*, 90 Ind. 577.

#### [d] (Sup. 1884)

The record of a justice in a proceeding before him to obtain surety of the peace may be contradicted by parol.—*Smelzer v. Lockhart*, 97 Ind. 315.

#### [e] (Sup. 1884)

Parol evidence is admissible for the purpose of showing the amount of money received by an administrator for a sale of land, though such

amount is different from the amount named in the report of sale made by such administrator.—*State ex rel. Wells v. Lindley*, 98 Ind. 48.

#### [f] (Sup. 1902)

In a suit to compel defendant to allow plaintiff to repair a tile ditch, which he had constructed, at his own expense, across defendant's land, jurors in a case in which plaintiff had sued defendant for tearing up part of it, and which had been tried by the parties and the court on the theory that plaintiff was entitled to recover, as part of his damages, the entire cost of constructing the ditch, cannot contradict the record by testimony that they did not include such cost in their verdict.—*Oster v. Broe*, 64 N. E. 918, 161 Ind. 113.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1678-1697; 5 CENT. DIG. Bail, § 404; 46 CENT. DIG. Trial, § 815.

See, also, 17 Cyc. pp. 571-581.

### § 387. Official records and documents.

Return on execution, see EXECUTION, § 344.

Sheriff's return, see EXECUTION, § 444.

#### [a] (Sup. 1832)

The recorded plot of a town, showing the width of a certain street, was introduced as evidence to prove the width of that street. *Held*, that parol evidence to show that the proprietor of the town intended the street to be of a different width than was shown by the plot was inadmissible.—*Wood v. Mansell*, 3 Blackf. 125.

#### [b] (Sup. 1853)

The journals of the general assembly cannot be impeached, except in the assembly.—*McCulloch v. State*, 11 Ind. 424.

#### [c] (Sup. 1877)

Under Act March 5, 1875 (1 Rev. St. 1876, p. 669) § 3, providing that the report of inspectors, appointed for the purpose of examining turnpike roads constructed under the provisions of the act, shall be conclusive as evidence that the road reported by them to be complete is in a condition for travel, and of the right of the company to take tolls over such portion of the road, is not conclusive that the road has not become out of repair since such report was made, and parol evidence is admissible to establish such fact.—*Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213; *Sidener v. Columbus & H. Turnpike Co.*, Id. 598.

#### [d] (Sup. 1882)

In an action wherein plaintiff claimed title to land by virtue of a deed executed to him by the city treasurer on a sale under a precept issued for the collection of an assessment for a street improvement, it was proper to sustain an objection to evidence showing that the order to issue a precept was directed against lot No. 52 where lot No. 20 was the one involved.—*Lan-gohr v. Smith*, 81 Ind. 495.

## [e] (Sup. 1889)

The record of the board of county commissioners cannot be contradicted, added to, or deducted from by parol testimony.—*Hill v. Probst*, 22 N. E. 664, 120 Ind. 528.

[f] An implied dedication may be rebutted by parol testimony, but, where the dedication is express and evidenced by a recorded plat, the evidence as expressed in such plat cannot be contradicted by parol.—(Sup. 1890) *Miller v. City of Indianapolis*, 24 N. E. 228, 123 Ind. 196; (1896) *Rhodes v. Town of Brightwood*, 43 N. E. 942, 145 Ind. 21.

## [g] (Sup. 1890)

The defense was that the land in controversy had been dedicated to the public as a street in partition proceedings instituted by plaintiff. The commissioners divided the premises into lots, blocks, streets, and alleys, and the plat prepared by them left the land in question, which ran through the entire width of the premises, entirely undivided. The report of the commissioners stated that they had divided the property, and assigned to each party his or her share of the same. All the property abutting on the strip in question had passed into the hands of third parties by deeds referring to the plat. *Held*, that parol evidence offered by plaintiff to show that the strip was left as undivided land, and was not intended as a public street, was properly excluded.—*Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228.

## [h] (Sup. 1894)

Where a contract was entered of record in the proceedings of the board of county commissioners, and was not controverted, it was not error to exclude parol evidence of their version of it.—*Board of Com'rs of Carroll County v. O'Conner*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

## [i] (Sup. 1900)

The meaning of a plat showing a railroad right of way, and marking adjoining land as a highway, could not be explained by oral testimony.—*Baltimore & O. S. W. R. Co. v. City of Seymour*, 55 N. E. 953, 154 Ind. 17.

## [j] (App. 1901)

Where owners of land platted the same and designated certain portions as alleys, in proceedings by a purchaser to enjoin the obstruction of one of such alleys it was error to admit parol evidence to explain the plat.—*Strunk v. Pritchett*, 61 N. E. 973, 27 Ind. App. 582.

## [k] (App. 1907)

In an action for injuries to real estate and growing crops caused by the diversion of water, it was not error to refuse to permit a witness to state what was shown from a topographical chart prepared by the United States government survey to be the watershed drained through a tile.—*Evansville & P. Traction Co. v. Broermann*, 40 Ind. App. 47, 80 N. E. 972.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1698-1713; 44 CENT. DIG. Statut. § 385.  
See, also, 17 Cyc. pp. 581-587.

## § 390. Deeds.

Evidence to show deed absolute on its face a mortgage, see MORTGAGES, § 37.  
Intent to make advancement, see DESCENT AND DISTRIBUTION, § 116.

## [a] (Sup. 1848)

Parol evidence is admissible to show that certain incumbrances on land, existing at the time of executing a deed thereof, were known to the grantee, and not intended to be included in a covenant of warranty, although the covenant be of general warranty.—*Allen v. Lee*, 1 Ind. 58, Smith, 12, 48 Am. Dec. 352.

[b] Parol evidence is inadmissible to add to, vary, or change the terms of a deed not attacked on the ground of fraud or mistake.—(Sup. 1851) *Trullinger v. Webb*, 3 Ind. 198; (1857) *Burns v. Jenkins*, 8 Ind. 417; (1858) *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Same v. Slaughter*, Id. 218; (1874) *Barnes v. Bartlett*, 47 Ind. 98.

## [c] (Sup. 1862)

A defendant in ejectment cannot prove that a deed professing to convey a certain number of acres was intended to convey more.—*Doe ex dem. Searight v. Swails*, 3 Ind. 320.

[d] Evidence of a parol reservation of crops is inadmissible to vary the terms of a deed conveying the land on which the crops were growing.—(Sup. 1858) *Chapman v. Long*, 10 Ind. 465; (1864) *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449.

## [e] (Sup. 1874)

W. conveyed by warranty deed land on which was a mortgage executed by him. I. (a married woman), by successive conveyances, afterwards became the owner of the land, and, with her husband, by warranty deed conveyed the land to R., who, at the execution of said deed, promised I. that he would, for her use and benefit, pay off and discharge said mortgage lien, and that all actions and rights of action for breach of the covenants of the deed of W. should inure to and were reserved by her. *Held*, that the promise by R. to I., and the said reservation by I., being in parol, were inadmissible in evidence to vary the terms of the deed of I. to R., which vested in R. the legal right, which ran with the land, to sue for the breach of the covenants in the deed of W.—*Sage v. Jones*, 47 Ind. 122.

## [f] (Sup. 1882)

Refusal to admit parol proof that the words "north part of" a lot described in a deed meant the "north half" of such lot was not error.—*Langohr v. Smith*, 81 Ind. 495.

## [g] (Sup. 1882)

Parol evidence will not be received to vary a definite description in a deed, though the description and quantity as given do not correspond.—Porter v. Reid, 81 Ind. 569.

## [h] (Sup. 1884)

The rule that a written contract cannot be varied in any way by oral evidence applies to a contract in a deed assuming the payment of an incumbrance, the same as to other written agreements.—Martindale v. Parsons, 98 Ind. 174.

## [i] (Sup. 1885)

The fact that a grantee suing on a covenant against incumbrances assumed an outstanding incumbrance, as part of the consideration, cannot be shown by evidence that before he purchased he went on the land, and knew that it was of much greater value than the agreed price, and for what purposes it was specially adapted.—Morehouse v. Heath, 99 Ind. 509.

## [j] (Sup. 1886)

Under the statute the interest of a wife in her husband's lands is more than an incumbrance. It is an estate in the land itself. In an action for breach of covenant of warranty the grantor cannot introduce parol evidence to show that a deed with full covenants of warranty was taken by the grantee with the knowledge of a widow's outstanding rights in the land conveyed, and that the grantee assumed and agreed to pay off the incumbrance created by her estate.—Bever v. North, 107 Ind. 544, 8 N. E. 576.

## [k] (Sup. 1887)

A deed and a written agreement by the grantee, assuming an incumbrance on the real estate conveyed, constitute one written contract; and a verbal agreement by the grantee, constituting part of the consideration of the deed, that the grantor should remain in possession for a certain time, and be allowed to pasture cattle thereon to be furnished by the grantee, is not collateral thereto or independent thereof, and cannot control or vary the written contract.—Carr v. Hays, 110 Ind. 408, 11 N. E. 25.

## [l] (App. 1892)

If one buys land incumbered by a railroad right of way, and takes a deed of general warranty therefor without excepting the incumbrance, it may, in an action for breach of the covenant against incumbrances, be shown by parol evidence that the price paid was what the parties agreed upon as the purchase price subject to the incumbrance; and in case of such proof there can be no recovery.—Maris v. Iles, 3 Ind. App. 579, 30 N. E. 152.

## [m] (Sup. 1894)

In an action to quiet title to land, evidence that certain quitclaim deeds from a tax-sale purchaser of said lots to defendant were mere releases, and not assignments of his lien,

is not admissible.—Cole v. Gray, 139 Ind. 396, 38 N. E. 856.

## [n] (App. 1903)

Where a widow conveyed certain of her husband's property to plaintiff in trust to pay the husband's debts, after fulfillment of such trust the conveyance could not be changed by parol into a mortgage of lands remaining unsold to indemnify plaintiff as surety for the widow's debts.—Christian v. Highlands, 69 N. E. 266, 32 Ind. App. 104.

## FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1719-1728.

See, also, 17 Cyc. pp. 613-620; note, 16 L. R. A. 321; notes, 1 Am. Dec. 44, 90 Am. Dec. 270.

## § 391. Bills of sale.

Evidence to show bill of sale, absolute on its face, a mortgage, see CHATTEL MORTGAGES, § 38.

## [a] (Sup. 1859)

Where a bill of sale and a note are shown to have been executed at the same time, and as a part of the same transaction, parol evidence is inadmissible, in an action on the note, to vary the terms of the bill of sale by showing that it did not in fact include all the stipulations of the parties.—Allen v. Nofsinger, 13 Ind. 494.

## [b] (Sup. 1871)

A written contract of sale cannot be varied by evidence that a parol warranty was made at the time of the sale, which the parties agreed should not be included in the writing.—Smith v. Dallas, 35 Ind. 255.

## [c] (Sup. 1872)

Though a purchaser of a patent right may rely on the representations of a seller as to what is covered by the patent, if there is no contract of warranty in the deed by which the law requires these rights to be transferred, such warranty cannot be shown by parol.—Rose v. Hurley, 39 Ind. 77.

## FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1729-1732.

See, also, 17 Cyc. pp. 503, 594.

## § 393. Leases.

## [a] (Sup. 1844)

By a lease of real estate executed by the lessor and lessee, under their seals, for one year, the time fixed for the payment of the last half year's rent was February 1st. Held, that parol evidence that the said rent was not due until March 1st was inadmissible.—Carpenter v. Shanklin, 7 Blackf. 308.

## [b] (Sup. 1881)

Where a lease fixes the commencement and the duration of the term and is not ambiguous,

evidence is not admissible to prove when it expired.—*Leary v. Meier*, 78 Ind. 393.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 1736-1744.  
See, also, 17 Cyc. pp. 622-623.

**§ 395. Mortgages.**

[a] (Sup. 1881)

Parol evidence is inadmissible to describe land sought to be covered by a mortgage, and then to apply the description to a particular tract.—*Craven v. Butterfield*, 80 Ind. 503.

[b] In the absence of allegations of fraud or mistake, parol evidence is inadmissible to vary the terms of a mortgage.—(Sup. 1889) *Stewart v. Babbs*, 120 Ind. 568, 22 N. E. 770; (1894) *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 1746-1753.  
See, also, 17 Cyc. pp. 626-628.

**§ 397. Contracts in general.**

Admissibility of evidence, see post, § 408.

[a] Where a contract is susceptible of a sensible construction, and in the absence of mistake or fraud, parol evidence is inadmissible to explain or determine its construction.—(Sup. 1840) *Lett v. Horner*, 5 Blackf. 296; (1872) *Free v. Meikel*, 39 Ind. 318; (1874) *Spears v. Ward*, 48 Ind. 541; (1879) *Heath v. West*, 68 Ind. 548; (1882) *Davis v. Liberty & C. Gravel Road Co.*, 84 Ind. 36.

[b] In the absence of mistake or fraud, parol evidence is not admissible to vary or add to the terms of a written contract.—(Sup. 1846) *Russell v. Branham*, 8 Blackf. 277; (1855) *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; (1857) *Madison & I. Plank-Road Co. v. Stevens*, 10 Ind. 1; (1858) *Harper v. Pound*, Id. 32; (1864) *Feaster v. Woodfill*, 23 Ind. 493; (1875) *Lowry v. Megee*, 52 Ind. 107; (1881) *Robbins v. Magee*, 76 Ind. 381; (1882) *Davis v. Liberty & C. Gravel Road Co.*, 84 Ind. 36; (1882) *Colton v. Vandervolgen*, 87 Ind. 361; (1895) *Woodward v. Mitchell*, 39 N. E. 437, 140 Ind. 406.

[c] (Sup. 1858)

In an action on a subscription for a railroad, where the instrument clearly defined its location, parol evidence is inadmissible to show that it was to extend to another point than that stated in the subscription.—*Evansville, I. & C. Straight Line R. Co. v. Shearer*, 10 Ind. 244.

[d] (Sup. 1858)

Representations of one soliciting stock subscriptions about the location of a railroad cannot vary the plain, written contract of the subscribers, leaving it to the discretion of the directors.—*Johnson v. Crawfordsville, F., K. & Ft. W. R. Co.*, 11 Ind. 280.

[e] (Sup. 1864)

Evidence is admissible to vary the terms of a letter containing an offer to make a gift.—*Sourse v. Marshall*, 23 Ind. 194.

[f] (Sup. 1872)

The terms of a contract cannot be varied by a mere allegation of the intention or object of the parties.—*Goddard v. Bébout*, 40 Ind. 114.

[g] (Sup. 1881)

A partnership agreement in writing cannot be varied by parol evidence that the interest of one partner in the capital stock is greater than his interest as stated in the written agreement.—*Wood v. Deutchman*, 75 Ind. 148.

[h] (Sup. 1882)

The recital in a contract of co-partnership that each partner has contributed to the stock a specified sum is not conclusive, but, like a receipt, or the recital of the consideration for a deed, may be explained, controlled, qualified, or contradicted.—*Lowe v. Thompson*, 86 Ind. 503.

[i] (Sup. 1884)

The fact that a receipt was given for money paid on a contract in part performance did not render the contract written, so as to exclude parol evidence of its terms.—*Flood v. Joyner*, 96 Ind. 459.

[j] (App. 1895)

Extraneous evidence is not admissible to contradict or change the terms or conditions of a written contract; but, when the contract is uncertain or indefinite, such evidence is admissible for the purpose of explaining and making definite that which is uncertain and indefinite.—*Marion School Tp. v. Carpenter*, 39 N. E. 878, 12 Ind. App. 191.

[k] (App. 1897)

The terms of a written contract expressing the whole agreement of the parties cannot be varied, contradicted, or added to by parol evidence.—*Singer Mfg. Co. v. Sults*, 47 N. E. 341, 17 Ind. App. 639.

[l] (Sup. 1906)

The plain meaning of the language used in a written contract cannot be varied by parol, but oral evidence is admissible to clear up indefiniteness or ambiguity.—*Warner v. Marshall*, 106 Ind. 88, 75 N. E. 582.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. EVID. §§ 1756-1765.  
See, also, 17 Cyc. p. 596.

**§ 400. Contracts of sale or exchange.**

Bills of sale, see ante, § 391.

[a] (Sup. 1845)

Where plaintiff entered into a written contract with defendant for the purchase of 20 acres of land, known as the "Evans Red House," and for 6 acres besides, parol evidence is not admissible on the part of defendant to show that the 6 acres mentioned were part of the 20.—*Jacobs v. Finkel*, 7 Blackf. 432.

## [b] (Sup. 1846)

In ejectment, defendant cannot show that he is entitled to possession of premises sued for by introducing a title bond describing a tract other than that sued for, in connection with parol evidence to show that it was the intention to describe the land sued for in the title bond, as such evidence would vary the terms of the written contract.—*Patterson v. Doe ex dem. Fisher*, 8 Blackf. 237.

## [c] (Sup. 1856)

Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract.—*McClure v. Jeffrey*, 8 Ind. 79.

Where a warranty is not contained in the written contract, it cannot be proved by parol evidence, unless, in addition to the averment that there was such a warranty, there is an allegation that it was false or fraudulent, and that thereby the vendee was deceived; and in such case parol proof is only evidence of a representation.—*Id.*

Where a contract of sale has been consummated by writing, parol evidence is inadmissible to vary it.—*Id.*

## [d] (Sup. 1871)

Where writings between the parties show a full, definite, and completed agreement of bargain and sale, evidence of an oral warranty is inadmissible.—*Johnson v. McCabe*, 37 Ind. 535.

## [e] (Sup. 1874)

In a suit for specific performance of a contract to exchange a "woolen mill, with all appurtenances, situated in the northwest corner of public square in the town" named, parol evidence is inadmissible to show that such premises were not in the public square of such town, nor adjoining it, since such evidence contradicted the written contract.—*Baldwin v. Kerlin*, 46 Ind. 426.

## [ee] (Sup. 1887)

In an action for breach of a land-clearing contract, in failing to clear away the smaller trees, evidence of the condition of the land, and the timber thereon, at the time the contract was made, is inadmissible.—*Seavey v. Shurick*, 110 Ind. 494, 11 N. E. 597.

## [f] (Sup. 1889)

Where a written contract provides that one party is to furnish and put in operation "machinery for a 100-barrel mill," and describes the machinery, the other party cannot show, by parol, that the agreement was to furnish machinery that would manufacture three designated grades of flour.—*Conant v. National State Bank of Terre Haute*, 121 Ind. 323, 22 N. E. 250.

## [g] (App. 1896)

Where a contract for sale of land showed that the vendee did not assume payment of a

ditch assessment against the land as part of the price, parol evidence to show such assumption was properly excluded.—*Leak v. Thorn*, 13 Ind. App. 335, 41 N. E. 602.

## [h] (App. 1899)

Parol evidence is inadmissible to vary the terms of a written acceptance of an offer of sale, in the absence of fraud or mistake.—*Colles v. Lake Cities Electric R. Co.*, 53 N. E. 256, 22 Ind. App. 86.

## [i] (Sup. 1906)

A contract of decedent to convey property to plaintiff for services is dispositive rather than casual in character and cannot be varied nor contradicted by parol.—*Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582.

Where decedent contracted with plaintiff to convey certain lots, a will, executed three days afterward, devising to plaintiff only a part thereof, is not admissible to show decedent's intention in the making of a contract, but the expressed intention governs.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1778-1793;  
43 CENT. DIG. Sales, § 721.

See, also, 17 Cyc. pp. 607-611; note, 5  
Am. St. Rep. 197.

## § 401. Bonds.

## [a] (Sup. 1846)

Parol evidence is not admissible to vary a recognizance of bail.—*Murphy v. Merry*, 8 Blackf. 295.

[b] In an action on a bond, parol evidence is inadmissible to vary its terms and conditions.—(Sup. 1849) *Miller v. Elliott*, 1 Ind. 484, Smith, 267, 50 Am. Dec. 475; (1853) *Clifford v. Smith*, 4 Ind. 377; (1883) *Rhoades v. Jones*, 92 Ind. 328.

## [c] (Sup. 1849)

In an action on a bond conditioned that the obligor shall not do certain acts, defendant cannot set up in defense leave and license not alleged to have been given by deed.—*Miller v. Elliott*, 1 Ind. 484, Smith, 267, 50 Am. Dec. 475.

## [d] (Sup. 1882)

Where a forthcoming bond in the attachment proceedings had before a justice of the peace clearly shows that it was based on Code 1852, § 168 (Rev. St. 1881, § 924), and not on Code 1852, § 172 (Rev. St. 1881, § 928), defendant cannot under Code, § 790, show by extrinsic evidence that it was the intention that the bond should be operative under section 172, since section 790 is not to be construed as to permit parties who have made definite choice as between the two sections of the statute to withdraw from the position they have taken, and claim that their proceedings were brought under the other section.—*Smith v. Scott*, 86 Ind. 346.

[c] (Sup. 1884)

An undertaking of replevin is a written contract, to be governed by the general rules applicable to other written contracts, and cannot be varied by parol evidence.—*Baker v. Merriam*, 97 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1704-1798.

See, also, 17 Cyc. p. 595.

#### § 402. Bills and notes.

Evidence to contradict or vary indorsement, see post, § 403.

[a] Parol evidence is not admissible to vary the terms of a bill or note.—(Sup. 1840) *Burge v. Dishman*, 5 Blackf. 272; (1845) *Mahan v. Sherman*, 7 Blackf. 378; (1851) *Calhoun v. Davis*, 2 Ind. 532; (1854) *Columbia v. Amos*, 5 Ind. 184; (1863) *Fankboner v. Fankboner*, 20 Ind. 62; (1864) *Billan v. Hercklebrath*, 23 Ind. 71; (1877) *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; (1877) *Stump v. Same*, Id. 598; (1877) *Davis v. Green*, 57 Ind. 493; (1878) *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226.

[b] (Sup. 1842)

In a suit on a note payable on demand, brought by the payee against the maker, it was held that parol evidence of plaintiff's declaration, at the time the note was executed, that payment of it was not to be demanded until after his death, was inadmissible.—*Graves v. Clark*, 6 Blackf. 183.

[c] (Sup. 1852)

In an action by the payee against the makers of a note, the latter cannot show by parol that a guaranty indorsed on the note was, at the time it was made, accepted by the payee in full satisfaction of the note.—*Smith v. Stevens* 3 Ind. 332.

[d] (Sup. 1865)

Where the parties to a verbal agreement for the payment of a sum of money in a certain contingency passed a note for the amount, payable without condition, the condition, in the absence of fraud, will be held to be waived.—*Swank v. Nichols' Adm'r*, 24 Ind. 199.

[e] (Sup. 1875)

Parol evidence is not admissible to vary the terms of a certificate of deposit.—*Rich v. Dessar*, 50 Ind. 309.

[f] (Sup. 1875)

In an action on a note given in consideration of an assignment of a patent right, all oral negotiations and stipulations between the parties to the note which preceded or accompanied the execution of the assignment and note are to be regarded as merged in the written contract, and are not admissible in evidence.—*Woodall v. Greater*, 51 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1799-1806.

See, also, 17 Cyc. p. 589.

#### § 403. Indorsements and transfers of bills or notes.

[a] (Sup. 1841)

A blank indorsement by a third person of nonnegotiable paper, or negotiable paper which has not been transferred by the payee, prima facie renders the indorsee liable as surety, provided the indorsement be made at the date of the contract; but this presumption may be rebutted by parol evidence.—*Wells v. Jackson*, 6 Blackf. 40.

[b] (Sup. 1861)

Where the payee of a note does not, but third parties do, indorse it at the time of execution, it may be allowable by parol evidence to rebut their prima facie liability as indorsers, and hold them as makers.—*Snyder v. Oatman*, 16 Ind. 265.

[c] (Sup. 1863)

In an action against indorsers of a negotiable note, as makers or otherwise, parol evidence is inadmissible to prove that they, by their indorsements, intended to assume other relations to the paper than those of indorsers.—*Drake v. Markle*, 21 Ind. 433, 83 Am. Dec. 358.

[d] (Sup. 1872)

Where a promissory note is indorsed by the payee, whose name is followed upon the back of the note by other names in blank, parol evidence will not be permitted to vary the legal effect of the indorsements thus appearing on the note.—*Roberts v. Masters*, 40 Ind. 461.

[e] (Sup. 1878)

It is competent to show by parol evidence that the indorsement of a promissory note was intended not to transfer the note absolutely, but as collateral.—*Hazzard v. Duke*, 64 Ind. 220.

[f] (Sup. 1881)

Where a note was indorsed by a third person before its indorsement by the payee, no implied contract is thereby created, and hence parol evidence is admissible to show what liability the parties intended should be assumed by such indorser.—*Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113.

While it is a general rule that a contract created by an indorsement regularly following that of the payee of a note or bill of exchange cannot be varied or contradicted by parol, such evidence is admissible to show that the indorsement was for the purpose of creating a trust, that it was for collection merely, and that the instrument was indorsed as collateral, or delivered as an escrow, or indorsed to an agent for a particular purpose.—Id.

The indorsement of a note or bill of exchange, regularly following that of the payee, constitutes a certain and defined contract, with a legal force and meaning, as complete and certain as if all its conditions and stipulations had been fully written, and parol evidence is inadmissible to contradict or modify it.—Id.

## [g] (Sup. 1886)

A regular indorsement of a note cannot, as against the payee or subsequent holders, be contradicted or varied by parol evidence; but an irregular indorsement may, as between indorsers and sureties, be explained or varied by oral testimony.—*Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

## [h] (Sup. 1886)

Where the payee of a note indorses it in regular course, he cannot be held as maker, and parol evidence is not admissible to extend his liability.—*Smythe v. Scott*, 106 Ind. 245, 6 N. E. 145.

## [i] (Sup. 1890)

A general indorsement of commercial paper may, except as against a bona fide holder, be explained, and the precise terms of the agreement shown by parol evidence.—*Brown v. Nichols, Shepard & Co.*, 24 N. E. 339, 123 Ind. 492.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1807-1812.

See, also, notes, 9 Am. Dec. 381, 57 Am. Dec. 665; note, 7 Am. St. Rep. 366.

## § 405. Contracts of insurance.

## [a] (Sup. 1873)

In a suit on a policy of insurance, where plaintiff read in evidence the original policy, and it was not disputed that it was the true and genuine policy, it was error to permit to be read in evidence on behalf of the insurance company what was said to be a copy, but which was never signed or issued, and which contained entries which were not in the original.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

Parol evidence cannot be received to contradict or vary the express terms of a policy of insurance.—*Id.*

## [b] (App. 1902)

Statements not amounting to fraud or mistake, made by an insurance agent during the negotiations for a policy, are not available to vary the terms of a written contract subsequently entered into, in which such negotiations are merged.—*Wells v. Vermont Life Ins. Co.*, 62 N. E. 501, 63 N. E. 578, 28 Ind. App. 620.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1818-1824.

See, also, 17 Cyc. p. 606.

## § 407. Contracts of carriage.

## [a] (Sup. 1853)

A bill of lading, embracing all the terms of the contract, cannot be varied by parol evidence.—*Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 518.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1826-1828, 1841; 9 CENT. DIG. Carr. § 148.

See, also, 17 Cyc. p. 602.

## § 408. Receipts.

## [a] (Sup. 1825)

In an action of assumpsit on an instrument which recites that defendant had received a sum of money for safe-keeping, parol evidence that it was not received for safe-keeping, but was paid in discharge of a debt, is inadmissible.—*Tisloe v. Graeter*, 1 Blackf. 353.

## [b] (Sup. 1847)

The record of deeds of a county showing an entry by the recorder of the redemption of land sold on execution is not conclusive evidence of such redemption.—*Nichols v. Woodruff*, 8 Blackf. 493.

## [c, d] (Sup. 1849)

In an action for breach of contract made with a carrier by the master of a canal boat, the carrier may show by parol evidence that a receipt was given him by the master as captain of the boat, and that the freight named therein was to be carried by his boat.—*Deford v. Seinoir*, 1 Ind. 532, Smith, 325.

## [e] (Sup. 1855)

A receipt for a sum of money set forth that it was received "on a decree" named therein. *Held*, that parol evidence was not admissible to show that this was intended to cover the principal only of that decree.—*Hull v. Butler*, 7 Ind. 267.

[f] A receipt may always be explained or contradicted by parol.—(Sup. 1858) *Prible v. Kent*, 10 Ind. 325, 71 Am. Dec. 327; (1858) *Sherry v. Picken*, 10 Ind. 375; (1858) *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; (1858) *Moore v. Korty*, 11 Ind. 341; (1876) *Krutz v. Craig*, 53 Ind. 561; (1877) *Pauley v. Weisart*, 59 Ind. 241; (1880) *Lash v. Rendell*, 72 Ind. 475; (1881) *Candy v. Hanmore*, 76 Ind. 125; (1883) *Ferguson v. State ex rel. Hagans*, 90 Ind. 38; (1884) *Flood v. Joyner*, 96 Ind. 459; (1887) *Adams v. Davis*, 109 Ind. 10, 9 N. E. 162; (1891) *Miller v. Eldridge*, 27 N. E. 132, 126 Ind. 461; (App. 1896) *Lemmon v. Reed*, 43 N. E. 454, 14 Ind. App. 655; (1898) *Fox v. Cox*, 50 N. E. 92, 20 Ind. App. 61; (1899) *Bettman v. Shadle*, 53 N. E. 662, 22 Ind. App. 542.

[g] Though a mere receipt may be varied or contradicted by parol, an instrument embodying a contract, though in the form of a receipt, cannot be so varied or contradicted.—(Sup. 1858) *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; (1863) *McKernan v. Mayhew*, 21 Ind. 291; (1876) *Krutz v. Craig*, 53 Ind. 561; (1881) *Alcorn v. Morgan*, 77 Ind. 184; (1886) *Fordice v. Scribner*, 108 Ind. 85, 9 N. E. 122.

## [h] (Sup. 1860)

A writing that is both a receipt and a memorandum of agreement is conclusive as to the agreement, but the receipt of the property, although that be the subject-matter of the agreement, may be disproved.—*Dale v. Evans*, 14 Ind. 288.



## [i] (Sup. 1863)

Where a creditor filed an account of the amount due him from a debtor with plaintiff, who was intrusted with funds for the purpose of liquidating accounts against the debtor, and plaintiff gave the creditor a receipt stating that his account would be paid out of a certain one of several claims against the government which plaintiff held, evidence was not admissible against the assignee of the receipt to show an oral agreement with the creditor that the account should fare pro rata with all accounts against the debtor, to be paid out of the aggregate amount collected on the several government claims, as such evidence was contradictory to the plain terms of the receipt.—*McKernan v. Mayhew*, 21 Ind. 291.

## [j] (Sup. 1867)

A receipt may be so corrected by parol evidence as to defeat a defense of usury supported by its terms.—*Charlton v. Tardy*, 28 Ind. 452.

## [k] (Sup. 1867)

On the payment of a claim against an estate, a mistake was made in the computation of interest, as a result of which the claimant gave a receipt for the amount paid, as in full of the claim. *Held*, that such receipt was not conclusive, but was open to explanation and contradiction by parol evidence.—*Markel's Adm'r v. Spittler's Adm'r*, 28 Ind. 488.

## [l] (Sup. 1878)

A ward's receipt to his guardian "in full of all demands," executed on arriving at full age, is not conclusive, but may be contradicted by parol evidence.—*Beedle v. State ex rel. Small*, 62 Ind. 26.

## [m] (Sup. 1878)

An entry of satisfaction of a judgment indorsed thereon by an attorney may be explained, qualified, or contradicted by parol evidence; such entry being in the nature of a receipt for the amount thereof.—*Stewart v. Armel*, 62 Ind. 593.

## [n] (Sup. 1879)

A receipt entered by a judgment plaintiff, or his assignee, on the record of the judgment, of a part or all of the judgment, which is a lien on real estate, is not conclusive in favor of a subsequent purchaser of the property without notice, but can be explained, contradicted, and set aside as against him.—*Lapping v. Duffy*, 65 Ind. 229.

## [o] (Sup. 1882)

That money receipted for was not in fact paid may be shown, even against an innocent third person, who relied on the receipt without inquiry.—*Travellers' Ins. Co. v. Chappelow*, 83 Ind. 429.

## [p] (Sup. 1883)

Parol evidence is admissible to show the business or profession of one who has accepted a claim for collection, where the receipt given

for such claim is not signed by him as an attorney, but such evidence cannot vary the terms of the receipt.—*Foulks v. Falls*, 91 Ind. 315.

## [q] (Sup. 1886)

An instrument reciting the receipt of a named sum "on deposit in national currency" imports, by implication of law, a contract to repay the money, and parol evidence is inadmissible to vary it.—*Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

## [r] (Sup. 1886)

A receipt for money in full of all demands is always open to contradiction or explanation. The rule that parol evidence is inadmissible to contradict or vary writings does not apply to it.—*Fordice v. Scribner*, 108 Ind. 85, 9 N. E. 122.

## [s] (App. 1892)

In an action for services rendered, the issue was whether the work was extra or was part of the work called for by a contract between the parties. Defendant put in evidence a receipt, which was a final estimate and statement of account of all the work done under the contract, and in which it was shown that a balance was due plaintiffs, and that they received such balance in full of such account. *Held*, that the receipt did not conclude plaintiffs from asserting a claim for extra work, being only prima facie evidence of payment.—*Ohio & M. R. Co. v. Crumbo*, 4 Ind. App. 456, 30 N. E. 434.

## [t] (App. 1896)

A bill of lading, in so far as it is a mere receipt for goods, may be explained or contradicted by parol.—*Cleveland, C., C. & St. L. R. Co. v. Moline Plow Co.*, 13 Ind. App. 225, 41 N. E. 480.

## [u] (App. 1901)

A receipt for an insurance premium may be contradicted by parol evidence showing that part of the premium has not been paid as recited.—*Robison v. Wolf*, 62 N. E. 74, 27 Ind. App. 683.

## [v] (App. 1909)

A paper acknowledging satisfaction of a judgment of which it forms no part is a mere receipt, and may be contradicted or explained.—*Wilson v. Fahnestock*, 86 N. E. 1037.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1820-1842;

39 CENT. DIG. Paymt. §§ 138, 139.

See, also, 17 Cyc. pp. 629-634.

## § 410. Memoranda not constituting contract or disposition of property.

## [a] (Sup. 1878)

In an action, on the relation of a county auditor, on the bond of a county treasurer, for money not accounted for, the settlement sheet between them having been admitted, parol evidence was admissible to show the details of the circumstances under which the statement was made, and is not objectionable as being parol

evidence of a written contract.—*Hostetler v. State ex rel. Dean*, 62 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1846-1854.

See, also, 17 Cyc. p. 636.

#### § 412. Writing showing alteration.

[a] (Sup. 1861)

Where it is shown that defendant had erased a subscription made by him to a proposed corporation, action on such subscription may still be maintained, as it is admissible to show the terms of the subscription by parol evidence.—*Johnson v. Wabash & Mt. V. Plank-Road Co.*, 16 Ind. 389.

[b] (Sup. 1861)

In a suit on a note, where an assigned note was relied on in set-off, and the answers had not specially set out the assignment, so as to fix its character, it was held that parol evidence offered to show where certain erasures in the assignment were made, and thus to show what the real assignment was, was admissible.—*Bailey v. Boylan*, 17 Ind. 478.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1900-1902.

See, also, 17 Cyc. p. 640.

#### § 413. Evidence extrinsic to writing in general.

[a] (Sup. 1883)

The rule prohibiting the contradiction of written instruments by oral evidence is not invaded by permitting testimony of the declarations of the grantor as to the character and condition of the property.—*Scheible v. Slagle*, 89 Ind. 323.

[b] (Sup. 1894)

Parol evidence of the fact that a deed was executed is not rendered inadmissible on the ground that the deed is the best evidence, as the fact of the execution is independent of the deed.—*Uhl v. Moorhouse*, 137 Ind. 445, 37 N. E. 366.

[c] (App. 1903)

A witness may testify that a paper shown him was one he took an assignment of, over objection that the instrument was mutilated, and torn into three pieces, this being merely an identification of it.—*Baltes Land, Stone & Oil Co. v. Sutton*, 69 N. E. 179, 32 Ind. App. 14.

[d] (App. 1904)

A written contract between a building and loan association and certain borrowing members cannot be varied by evidence of a statement as to its supposed meaning, made by one of the borrowing members to his associates, though he was also a local agent of the association.—*Coppes v. Union Nat. Savings Loan Ass'n*, 69 N. E. 702, 33 Ind. App. 367.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1855-1857, 1859, 1860.

See, also, 17 Cyc. p. 638.

#### § 414. Date of instrument.

[a] (Sup. 1872)

The date recited in the chattel mortgage is only prima facie evidence of the date when it was executed, and if erroneous the true date may be shown.—*Stonebreaker v. Kerr*, 40 Ind. 186.

[b] (Sup. 1882)

Parol evidence is not admissible to show that a judgment of a justice of the peace was entered on a date other than that shown by the justice's record.—*Hopper v. Lucas*, 86 Ind. 43.

[c] (Sup. 1887)

A mistake in the date of a chattel mortgage may be shown by parol, or it may be shown that it was not delivered on the day it bears date; but, to entitle the mortgagee to show either of these things, the complaint must aver the mistake in the date, or that the mortgage was not delivered on the day of its date.—*Briggs v. Fleming*, 112 Ind. 313, 14 N. E. 86.

[d] (Sup. 1905)

A life insurance policy dated in December may be shown not to have been delivered until the following February.—*Haughton v. Aetna Life Ins. Co.*, 73 N. E. 592, 74 N. E. 613, 165 Ind. 32.

FOR CASES FROM OTHER STATES,

SEE 9 CENT. DIG. CHAT. MTG. § 111.

#### § 415. Sustaining validity of instrument.

[a] (Sup. 1835)

If an indenture by which overseers of the poor bind out a child as an apprentice shows that it was executed in a case not warranted by the statute, it is void, and parol evidence is inadmissible to show that the indenture was executed on a different ground from that which the indenture itself describes.—*Demar v. Simonson*, 4 Blackf. 132.

[b] (Sup. 1859)

Parol proof is admissible to show that resolutions purporting to have been passed by the board of directors of a corporation, the records of which have been introduced in evidence, were passed by a minority of such board of directors.—*Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *Hamilton v. Same*, Id. 347.

[c] (Sup. 1871)

Where defendant, being sued on an indorsement, alleged that the indorsement had been made for the benefit of the third person, and that plaintiff had agreed with defendant, at the time of the indorsement, that a mortgage held by plaintiff against such third person should be held thereafter for defendant, in consideration of the indorsement, and that entry was made on the mortgage to that effect, but that the mortgage was ineffective, in that it had not been recorded within the time required, and that plaintiff was cognizant of such fact, the conversations of the parties and their at-

torneys at the time of making the indorsement and the entries on the mortgage were proper evidence to show the attending circumstances of the transaction.—*Hubbard v. Harrison*, 38 Ind. 323.

[d] (Sup. 1879)

The clerk's record of the return on an execution may be proved by the contents of the execution, though the execution was lost and its contents proved by parol; and such method is not objectionable as being the correction of a record by oral testimony.—*Newhouse v. Martin*, 68 Ind. 224.

[e] (Sup. 1885)

In a proceeding to amend a judgment two years after its rendition because of the alleged omission of one of plaintiffs' names, other evidence than the record is admissible, but the mistake must be clearly shown.—*Brownlee v. Board of Com'rs of Grant County*, 101 Ind. 401.

[f] (Sup. 1888)

In an action on a nonnegotiable note, the answer averred that judgment had been rendered against the maker as garnishee, on a judgment against the payee; that the date of such note and the rate of interest were misstated, by mistake, by him in the garnishment, but that the debt sued on and the debt he was charged with as garnishee were the same. *Held* that, parol evidence being admissible to prove these facts, such answer was sufficient on demurrer.—*Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. Evid. §§ 1863-1873.

#### § 416. Connection of contemporaneous writings.

[a] (Sup. 1896)

Parol evidence is not admissible to prove that a written contract to construct a railroad, and another made between different parties, and at a different time, to lease the same road, are parts of the same transaction.—*Reynolds v. Louisville, N. A. & C. R. Co.*, 143 Ind. 579, 40 N. E. 410.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. Evid. §§ 1903-1905.  
See, also, 17 Cyc. p. 647.

#### § 417. Matters not included in writing or for which it does not provide.

[a] (Sup. 1861)

Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is admissible to show such additional stipulations as are not inconsistent with the writing.—*Kieth v. Kerr*, 17 Ind. 284.

A writing was: "I have this day bought of A. 16,371 lbs. of hogs, to be paid for at the pens at M. [Signed] B." *Held*, that there was

an incompleteness in the writing, to explain which parol evidence would be competent, inasmuch as it failed to designate the place of delivery of the hogs.—*Id.*

[b] (Sup. 1866)

On an exchange of land for merchandise, the buyer of the land gave an order on third parties for the merchandise forming the consideration of the exchange; viz., "for nine hundred and seventy-five pounds of tobacco of good merchantable quality at one dollar per pound." *Held*, that parol evidence was admissible to show what the terms of the exchange were, and what quality of tobacco was due. Whether the order was received in satisfaction of the debt, or whether, if the order was not filled, the appellant was to pay the money, was a matter outside of the purpose for which the order was given, which was to secure the delivery of the tobacco.—*Crofoot v. Truax*, 27 Ind. 72.

[c] (Sup. 1869)

Where a written order for goods is not sufficiently complete to constitute a contract, parol evidence is admissible to prove the terms of the contract as finally entered into.—*Morehead v. Murray*, 31 Ind. 418.

[d] (Sup. 1879)

Where the memorandum of a sale required by the statute of frauds to be in writing does not state the contract with reasonable certainty, parol evidence cannot be received to supply the omitted facts.—*Lee v. Hills*, 66 Ind. 474.

[e] (Sup. 1879)

Where a condition of a lease requires the lessor to inclose the land with a good and substantial fence, and the lease does not indicate what fencing is necessary, parol evidence is admissible to show that the lessee executing the lease had examined the land and agreed with the lessor as to what fences were necessary.—*Heath v. West*, 68 Ind. 548.

[f] (Sup. 1881)

Recourse may not be had to parol evidence to supply a description of land in a contract for the conveyance of lands.—*Pulse v. Miller*, 81 Ind. 190.

[g] (Sup. 1884)

Where one agrees to pay mortgage notes as part of the consideration for a deed, and it is doubtful, from the language used, whether he meant to pay five notes or more, parol evidence is admissible to show that his grantor represented to him that there were but five notes, and that these only he meant to pay.—*Martindale v. Parsons*, 98 Ind. 174.

[h] (Sup. 1889)

Defendant railroad company wrote plaintiffs a letter, inclosing passes, to be full compensation for legal services in W. county for one year, "except for assisting in trials of cases against the company other than stock cases; for such services, if rendered, you are to receive reasonable attorney's fees," in addition

to the passes. *Held* that, as the letter did not purport to contain all the contract, parol evidence was admissible to show what was done in cases "other than stock cases," and what compensation was due.—*Louisville, N. A. & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711.

[l] (*Sup.* 1889)

Where the grant of the right of way to a railroad company does not fix its width, the declarations and acts of the parties are admissible in evidence to fix such width.—*Indianapolis & V. R. Co. v. Lewis*, 21 N. E. 600, 119 Ind. 218.

[j] (*Sup.* 1890)

In proceedings to enjoin a town from opening a street, it appeared that the record of the board of trustees failed to show that they accepted the report of the commissioners appointed to assess benefits and damages within 20 days from the filing of the same with the town clerk, as required by Rev. St. 1881, §§ 3370-3372. *Held*, that parol evidence was inadmissible to show that the trustees had actually accepted the report within the time prescribed.—*Byer v. Town of New Castle*, 124 Ind. 86, 24 N. E. 578.

[k] (*Sup.* 1891)

Where the description in a conveyance of land so far as it goes is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract.—*Weaver v. Shipley*, 27 N. E. 146, 127 Ind. 526.

[i] (*App.* 1891)

Where a contract of transportation of goods is silent with reference to the time of shipment, the law imports into the contract an obligation to ship within a reasonable time after the goods have been delivered for that purpose, and such element becomes a substantial provision of the contract, as much as if it had been explicitly written in it, and its effect cannot be modified by parol.—*Pennsylvania Co. v. Clark*, 27 N. E. 586, 28 N. E. 208, 2 Ind. App. 146.

[m] (*Sup.* 1892)

Where a writing, executed as security for a debt, shows on its face that it does not embody the entire contract, parol testimony is admissible to show the whole transaction.—*Burton v. Morrow*, 133 Ind. 221, 32 N. E. 921; *Smith v. Wood*, *Id.*

[n] (*App.* 1892)

In an action for injuries alleged to have been caused by defendant's negligence, the complaint, after proper averments, set out a written release, which recited that plaintiff, in consideration of a sum of money paid to him, and of the payment of certain doctor's fees, waived all claims for damages against defendant. *Held* that, as the writing was incomplete, and did not of itself constitute an enforceable contract, in order to give it legal effect it was proper to allege and prove extrinsic facts.—*Kentucky*

& I. Cement Co. v. Cleveland, 4 Ind. App. 171, 30 N. E. 802.

[o] (*App.* 1895)

Where a writing is intended as a satisfaction of a prior obligation but does not so state on its face, parol evidence is admissible to show the reason for its execution on the ground that the instrument is incomplete.—*Keck v. State ex rel. National Cash Register Co.*, 39 N. E. 899, 12 Ind. App. 119.

[p] (*App.* 1895)

A teacher and a school trustee entered into a written agreement, whereby the former was to teach during the school year at a certain price per day, and the number of days was to be inserted when the trustee ascertained the amount of the tuition fund for that year. *Held*, that in an action for breach of the contract parol evidence was admissible to show how many days the school year contained.—*Marion School Tp. v. Carpenter*, 12 Ind. App. 191, 39 N. E. 878.

[q] (*App.* 1902)

Parol testimony is inadmissible to supplement the record of proceedings by a town to appropriate land for a street, so as to make it show compliance with the statutory requirements in such proceedings.—*Terre Haute & L. R. Co. v. Town of Flora*, 64 N. E. 648, 29 Ind. App. 442.

[r] (*Sup.* 1903)

Where a railroad time-table, on the reverse side of which rules for employes were printed, contained nothing to show when the rules took effect, the fact that the time-table recited that it took effect on January 1, 1900, which was subsequent to the date of the accident, did not preclude proof aliunde that the rules were in force at the time of the accident.—*Lake Erie & W. R. Co. v. Charman*, 67 N. E. 923, 161 Ind. 95.

[s] (*App.* 1910)

In order that collateral oral matter may be admitted to complete a written contract, it must be shown, if the evidence contradicts it, that the written contract is incomplete.—*McCaskey Register Co. v. Curfman*, 90 N. E. 323.

[t] (*App.* 1910)

Where a writing does not embrace the entire contract of the parties, parol evidence is admissible to show the part omitted if it does not vary the terms of the instrument.—*Buffalo Oilitic Limestone Quarries Co. v. Davis*, 90 N. E. 327.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1874-1899.  
See, also, 17 Cyc. pp. 741-748.

§ 418. Parties to instrument or obligation.

Identification of parties. see post, § 459.

## [a] (Sup. 1856)

Where there is nothing, either in the body of an instrument, or attached to the signature, to indicate that it was intended to be anything other than the personal obligation of the party signing it, parol evidence is inadmissible to show that the maker or obligor was acting in the matter as agent merely.—*Hiatt v. Simpson*, 8 Ind. 256.

## [b] (Sup. 1839)

B. executed a writing, stating that he "has this day sold to" plaintiff "106 oak trees, to be taken from the farm known as the 'W. Farm,' in F. township, M. county, Indiana. Choice of said trees by said" plaintiff, "Consideration, \$927 cash paid in hand. Receipt hereby acknowledged." In an action against another for their conversion, evidence of previous negotiations, showing that the sale was to defendant, and plaintiff advanced the money, and evidence of B.'s understanding as to whom he supposed he was selling the timber to or as to the effect of the contract, is inadmissible to vary the writing.—*Hosletter v. Auman*, 119 Ind. 7, 20 N. E. 506.

## FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. EVID. §§ 1906-1911.

See, also, 17 Cyc. pp. 708-712; note, 20 L. R. A. 705.

## § 419. Nature of consideration.

## [a] (Sup. 1848)

Though the consideration expressed in the deed is prima facie evidence of the true consideration, yet parol evidence may be introduced to show the true consideration, as affecting the damages.—*Allen v. Lee*, 1 Ind. 58, *Smith*, 12, 48 Am. Dec. 352.

## [aa] (Sup. 1851)

Where the writing does not purport to set out the consideration in full which was to be paid for the land, nor the manner of its payment, evidence showing what it was, and how it was to be paid, was admissible, as it did not contradict the deed or instrument of writing.—*Cunningham v. Banta*, 2 Ind. 604.

## [aaa] (Sup. 1851)

Evidence is admissible to show the nature of the consideration of a general receipt on a judgment.—*Lewis v. Matlock*, 3 Ind. 120.

[b] Parol evidence is admissible to show the actual consideration for a deed.—(Sup. 1854) *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607; (1857) *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; (1859) *Jones v. Jones*, 12 Ind. 389; (1876) *Stearns v. Dubois*, 55 Ind. 257; (1877) *Headrick v. Wisheart*, 57 Ind. 129; (1880) *Wallace v. Goff*, 71 Ind. 292; (1882) *Moore v. Butler University*, 83 Ind. 376; (1884) *Hamilton v. Barricklow*, 96 Ind. 398; (1885) *Levering v. Shockey*, 100 Ind. 558; (1885) *Cuthrell v. Cuthrell*, 101 Ind. 375; (1886) *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274.

## [bb] (Sup. 1858)

In consideration of a conveyance, the grantee acknowledged payment of "all demands of every kind and nature whatever." *Held*, that this was not a mere receipt, but amounted to a contract, and could not be controlled by parol, showing that judgments were not included.—*Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354.

[c] The clause in a deed acknowledging payment of the consideration is merely prima facie evidence, and may be varied or rebutted by parol proof that the consideration was natural love and affection.—(Sup. 1859) *Jones v. Jones*, 12 Ind. 389; (1883) *Kenney v. Phillippy*, 91 Ind. 511.

## [cc] (Sup. 1861)

The recital, in an agreement for purchase and sale, of the receipt of the purchase money, stated to be a part of the consideration for the execution of the agreement, is not conclusive; but the truth may be inquired into.—*Swope v. Forney*, 17 Ind. 385.

## [d] (Sup. 1862)

Suit will lie to recover the consideration for the conveyance of land, even though the deed recite its payment, or to recover a consideration different from, and not inconsistent with, that set forth in the deed.—*Lamb v. Donovan*, 19 Ind. 40.

## [dd] (Sup. 1864)

Parol evidence is admissible to show a different consideration of a bill of sale from that expressed in writing in the bill.—*McMahan v. Stewart*, 23 Ind. 590.

[e] In an action for breach of covenant against incumbrances in a deed, parol evidence is admissible to prove that the covenants, for breach of which suit is brought, were against incumbrances, which plaintiff agreed to pay as part of the consideration for the deed.—(Sup. 1866) *Pitman v. Conner*, 27 Ind. 337; (1868) *Fitzer v. Fitzer*, 29 Ind. 468; (1872) *Carver v. Louthain*, 38 Ind. 530.

## [ee] (Sup. 1868)

Where, at the time of the purchase, the growing crops are reserved by the vendor, as a part of the consideration of the sale, the agreement, though by parol, is valid as the agreement only affects the consideration of the deed, which may always be proved or explained by parol proof.—*Heavilon v. Heavilon*, 29 Ind. 509.

## [f] (Sup. 1870)

Where a person subscribed a certain sum to the capital stock of a turnpike company, in consideration of the agreement of the agents of the company that, if he would so subscribe, a lifetime pass over the road for himself and family should be issued to him by the company. *Held*, that parol evidence of said agreement to issue a pass was inadmissible.—*Irwin v. Lee*, 34 Ind. 319.

[ff] (Sup. 1870)

Either party to a deed may show, except for the purpose of defeating its operation, the true consideration, although it be entirely different from that expressed in the deed.—*Mather v. Scoles*, 35 Ind. 1.

[g] (Sup. 1873)

The consideration of a deed is usually open to explanation, and the grantor, in an action on a covenant of warranty brought by one to whom the grantee in the deed has conveyed, can show that the consideration actually paid for the land was less than the sum expressed in the deed.—*Gavin v. Buckles*, 41 Ind. 528.

[gg] (Sup. 1873)

Parol evidence may be given to show the real consideration of a deed of real estate, and that the purchaser took the conveyance subject to incumbrances, and agreed to discharge them, in addition to the consideration stated in the deed.—*McDill v. Gunn*, 43 Ind. 315.

[h] (Sup. 1876)

In a suit to recover for the price of land sold and conveyed by the plaintiff to the defendant, the consideration expressed in the deed of conveyance may be contradicted by parol evidence.—*Stearns v. Dubois*, 55 Ind. 257.

[hh] (Sup. 1877)

In an action by the payee on a note executed by defendant to a duly-incorporated educational institution, promising to pay a certain sum "as endowment fund," defendant answered, in abatement, admitting the execution of such note as a subscription to such fund, but averring that the same was to consist of a certain amount to be, but not yet, raised by subscription, and that he had only delivered such note in trust until such fund should be fully subscribed. *Held*, on demurrer, that such answer was insufficient.—*Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Stump v. Same*, Id. 598.

[i] (Sup. 1877)

In consideration of the conveyance of certain real estate by quitclaim deed by A. to B., and the promise of the former to pay all delinquent taxes due thereon, B. conveyed certain real estate to A. by warranty deed, and also promised to pay all delinquent taxes thereon. Afterwards B., to save the real estate conveyed to him by A. from sale for such taxes, paid the same, and then brought an action therefor against A. *Held*, that plaintiff may show by parol evidence the actual consideration of his deed to defendant, and that the same, or some part thereof, remains unpaid.—*Headrick v. Wisheart*, 57 Ind. 129.

[ii] It may be shown by parol evidence that a promissory note was executed to evidence an advancement.—(Sup. 1877) *Peabody v. Peabody*, 59 Ind. 556; (1886) *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263.

[j] (Sup. 1880)

The consideration of a deed is always, as between the immediate parties thereto, open to inquiry, and this inquiry may go to the extent of showing a consideration different from that expressly stated in the deed.—*Jones v. Noe*, 71 Ind. 368.

[jj] (Sup. 1881)

The fact that a part of the evidence of the consideration of the note in suit was in writing does not preclude the admission of the oral part.—*Everhart v. Puckett*, 73 Ind. 409.

[k] (Sup. 1881)

The consideration of a written contract may be proven by parol.—*Walters v. Walters*, 73 Ind. 425.

[kk] (Sup. 1881)

In an action on a new or renewal note, evidence is admissible that at its execution the parties thereto reserved the right to inquire into its consideration.—*Smith v. Boruff*, 75 Ind. 412.

[l] (Sup. 1881)

In an action to recover property claimed by plaintiff as purchaser under a bill of sale, it is competent to show a different consideration from that recited in the bill of sale, and to show that such other consideration was paid before the making of the bill of sale.—*Schenck v. Sithoff*, 75 Ind. 485.

[ll] Parol evidence is admissible to prove the consideration of a written contract, where none is expressed therein.—(Sup. 1881) *Jessup v. Trout*, 77 Ind. 194; (1886) *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334, 9 N. E. 372.

[m] (Sup. 1882)

The consideration, or want of consideration, for a written contract, may be shown by parol; as, for instance, that a note was given by one in consideration of a gift to his wife.—*Bragg v. Stanford*, 82 Ind. 234.

[mm] (Sup. 1883)

The consideration of an agreement may be shown to be different from that expressed.—*Brown v. Summers*, 91 Ind. 151.

In an action on an indorsement of a note, parol evidence is admissible in behalf of defendant to show what the consideration of the indorsement was.—*Id.*

[n] (Sup. 1884)

Though parol testimony is inadmissible to contradict or vary the terms of a note, the consideration for which a note was given may be established by such testimony.—*First Nat. Bank v. Nugen*, 99 Ind. 160.

[nn] (Sup. 1885)

Where the consideration of the assignment of an insurance policy is therein stated as value received, it may be shown what the value received was.—*Damron v. Penn. Mut. Life Ins. Co.*, 90 Ind. 478.

[nnn] (Sup. 1885)

The actual consideration of a conveyance of land may be shown by a memorandum of the various amounts going to make it up, made at the time by one of the parties in the presence of the other.—*Morehouse v. Heath*, 99 Ind. 509.

[o] (Sup. 1886)

A receipt simply reciting the release of a claim may be explained by parol evidence as to the consideration.—*Scott v. Scott*, 105 Ind. 584, 5 N. E. 397.

[oo] (Sup. 1886)

Evidence is not admissible to prove a parol agreement by the indorser of a note to pay the note. The legal presumption is that the consideration for the indorsement was the amount of the note and interest; but the actual consideration may be proved where that which the law presumes is in dispute.—*Smythe v. Scott*, 106 Ind. 245, 6 N. E. 145.

[p] (Sup. 1886)

For the purpose of showing the true consideration of a deed, parol evidence is admissible to show that the grantee verbally agreed, prior to the delivery of the deed, to pay an existing incumbrance, as part of the consideration; the consideration being stated in the deed in merely general terms.—*Hays v. Peck*, 107 Ind. 389, 8 N. E. 274.

[pp] (Sup. 1886)

Where a bond covers every indebtedness of the obligee, whether existing at the time it was executed or which thereafter exists or is in any manner incurred, in an action thereon, it was competent to aver and prove by parol that the sole consideration of the bond was a contract of agency, which was executed concurrently with it.—*Singer Mfg. Co. v. Forsyth*, 9 N. E. 372, 108 Ind. 334.

In an action for breach of the bond of an agent it is competent for defendant to show a parol contemporaneous agreement, forming the consideration for the bond, where the bond fails to state any consideration, and indicates on its face that it is collateral to some contract not expressed therein; and the extent of the liability of the guarantors may be thus limited to indebtedness incurred as to matters contemplated in such agreement, although the bond, if construed alone, might seem to include all indebtedness.—*Id.*

[q] (Sup. 1888)

Evidence of the conduct and declarations of the parties forming part of the transactions between them, and of the admissions of the mortgagee, he being dead, is admissible to show the true consideration of a mortgage.—*Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106.

[qq] (Sup. 1889)

Where parties have made a written farm lease, complete on its face, with minute provisions as to their rights and obligations, parol evidence is inadmissible to prove that at the date of its execution, "and as a part of the con-

sideration for said contract, and in addition to the consideration stated therein," the lessors orally agreed to drain the land.—*Diven v. Johnson*, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

[r] (Sup. 1889)

The consideration of a mortgage may be proved, but the conveying part cannot be contradicted, by parol.—*Murdock v. Cox*, 118 Ind. 266, 20 N. E. 786.

[rr] (Sup. 1889)

Where, by the terms of a written contract, defendant sold to plaintiffs certain chattels and his good will in the practice of medicine, and agreed not to practice in a certain district for a number of years, "in consideration of which said second parties [plaintiffs] hereby agree to pay said first party [defendant] \$100," the stipulation as to the consideration is contractual, and cannot be varied by oral evidence.—*Pickett v. Green*, 120 Ind. 584, 22 N. E. 737.

[s] (Sup. 1889)

In an action on a note for \$400, payable absolutely, parol evidence is inadmissible to show that plaintiff orally agreed to sell defendant some land in consideration of being paid an annuity of \$40 for life, and that she deeded the land to defendant, and he gave her in payment the note in suit.—*Coapstick v. Bosworth*, 121 Ind. 6, 22 N. E. 772.

[ss] (Sup. 1890)

It is a familiar law that the consideration of a contract or conveyance is always open to extrinsic inquiry, and may be shown by parol evidence.—*Kintner v. Jones*, 23 N. E. 701, 122 Ind. 148.

[t] (Sup. 1890)

Parol evidence is admissible to show the consideration upon which a promissory note was executed, unless the consideration was expressed in the note, and made contractual.—*Dowden v. Wood*, 24 N. E. 1042, 124 Ind. 233.

In a suit by an administrator on notes and to foreclose mortgages given to secure payment of the notes, the answer alleged that plaintiff's intestate gave \$1,000 to defendants to make the first payment on land, that one of the notes in suit was given for the same, but merely for the purpose of securing the payment of the interest during intestate's life, it being understood that the note should never be paid; that the other notes in suit were given by defendants for the deferred payments on the land and were bought back by them with money given them by plaintiff's intestate; that it was understood that the notes were never to be paid, but they were assigned to plaintiff's intestate, to secure the payment of the interest thereon during his life. *Held*, that parol evidence in proof of the averments of the answer did not violate the rule prohibiting the admission of parol evidence to contradict a written instrument.—*Id.*

[tt] (Sup. 1891)

The recital in a deed that it is given in consideration of natural love and affection does

not estop the parties from showing in support of the deed that it was really given for a valuable consideration.—*Nichols, Shepherd & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737.

[u] (App. 1892)

A deed is not conclusive on the question of consideration, except so far as the consideration may affect its validity as an instrument of conveyance. Under a deed of general warranty, it may be established by parol that the grantee undertook to pay any particular lien or discharge any encumbrance as part of the consideration where the deed is silent on the subject.—*Maris v. Iles*, 30 N. E. 152, 3 Ind. App. 579.

[uu] (App. 1892)

Parol evidence is admissible to show a consideration for a written release and discharge in addition to the money consideration recited therein.—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

[v] (Sup. 1895)

The consideration mentioned in a written release of a railroad company from liability for personal injuries, reciting the receipt of a specified sum, and that the company shall be released from all further liability, is not contractual, and parol evidence is admissible that such release was not supported by any consideration.—*Stewart v. Chicago & E. I. R. Co.*, 141 Ind. 55, 40 N. E. 67.

[vv] (Sup. 1895)

Where a written contract of sale of a patent right recited that the vendor guarantied the validity of the letters patent, and that contract was afterwards supplemented by another relative to the payment of costs in case of litigation over the patent, parol evidence is not admissible to show that the second contract was made in consideration that the vendor would be relieved from his liability assumed in the first contract, in guarantying the validity of the patent.—*Sandage v. Studabaker Bros. Manuf'g Co.* 41 N. E. 380, 142 Ind. 148, 34 L. R. A. 363, 51 Am. St. Rep. 165.

[vvv] (Sup. 1895)

Parol evidence is admissible to show that the reservation in a deed of a life estate to the grantors was made to secure payment of the unpaid purchase price payable in support, and by allowing the grantors to reside on the premises.—*Bever v. Bever*, 144 Ind. 157, 41 N. E. 944.

[w] (App. 1896)

Where a deed provided that it was "made by the grantors and accepted by the grantee in full satisfaction of all claims of the grantee against the grantors, or either of them, to this date, and of any and all kinds, and in satisfaction of any pretended claims of the grantee against" a certain estate, such stipulation is not contractual, but is in the nature of a receipt or release, and parol evidence is admissible to show the nature of the claims included therein.

—*French v. Arnett*, 15 Ind. App. 674, 44 N. E. 551.

[ww] (Sup. 1898)

Where the consideration in a deed is stated in general terms, the true consideration may be shown by either party by parol evidence, for any purpose, except to defeat the deed as a valid grant; and it may be shown that the grantee verbally agreed, as a part of the consideration to pay an incumbrance existing on the real estate conveyed.—*Lowery v. Downey*, 50 N. E. 79, 150 Ind. 364.

[www] (App. 1898)

Where the consideration of a deed is contractual, and is a direct promise to do certain things, it cannot be changed or modified by parol evidence.—*Hilgeman v. Sholl*, 51 N. E. 728, 21 Ind. App. 86.

[x] (Sup. 1901)

Where a written instrument was executed releasing a street railway company from liability for personal injuries, and reciting the receipt of a specified sum as consideration, parol evidence was admissible to contradict the recital as to consideration.—*Citizens' St. R. Co. v. Heath*, 62 N. E. 107, 29 Ind. App. 395.

[xx] (App. 1901)

Parol evidence is admissible to show the consideration for an antenuptial agreement that the survivor should take no share of the estate of the deceased one.—*Moore v. Harrison*, 59 N. E. 1077, 26 Ind. App. 408.

[xxx] (App. 1903)

The consideration of a written contract may be shown by parol.—*Baltes Land, Stone & Oil Co. v. Sutton*, 69 N. E. 179, 32 Ind. App. 14.

[y] (App. 1905)

Though written contracts cannot be enlarged or altered by prior or contemporaneous agreements, the consideration mentioned in a deed or mortgage is always open to modification or contradiction by parol.—*Gemmer v. Hunter*, 74 N. E. 586, 35 Ind. App. 501.

[yy] (Sup. 1906)

The consideration for a written contract need not be stated in the writing and may be shown by parol.—*Howard v. Adkins*, 167 Ind. 184, 78 N. E. 605.

[yyy] (App. 1906)

The consideration of a contract cannot be varied by parol when it is made contractual.—*Chicago, I. & L. R. Co. v. Southern Indiana R. Co.*, 38 Ind. App. 234, 70 N. E. 843.

[z] (App. 1907)

Parol evidence is admissible to prove or vary the consideration of a deed, where such consideration is expressed in general terms or by way of recital; but such evidence is admissible only when it is the best obtainable.—*Pierse v. Bronnenberg*, 40 Ind. App. 662, 81 N. E. 739, 82 N. E. 126.



**[xx] (App. 1910)**

A written release by a servant of a claim for injury received, which recites that the servant has made a claim on the master for money compensation for the injury, asserting a legal liability therefor, which the master expressly denies, and which provides that the servant in satisfaction of the disputed claim acknowledges a specified sum paid to the servant by reason of the injury does not make the consideration contractual so as to exclude parol evidence to vary the consideration, but states the consideration by way of recital, and parol evidence of the true consideration is admissible.—*American Car & Foundry Co. v. Smock*, 91 N. E. 749.

**[xxx] (App. 1910)**

Where the consideration of a release of a claim, evidenced by a written instrument, is stated therein by way of recital, parol evidence of the true consideration is admissible.—*Illinois Cent. R. Co. v. Fairchild*, 91 N. E. 836.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 1912-1928;  
7 CENT. DIG. Bills & N. §§ 1738-1739;  
11 CENT. DIG. Contracts, §§ 220, 408;  
14 CENT. DIG. Covenants, § 267.

See, also, 17 Cyc. pp. 648-661; note, 20 L. R. A. 101.

**§ 420. Existence of condition or contingency.**

Prior or contemporaneous agreement showing conditions precedent to obligation in writing, see post, § 444.

**[a] (Sup. 1837)**

Parol evidence is not admissible to prove that it was the understanding of the parties to a mortgage of personal property, at the time of its execution, that the mortgagor should retain possession of the goods until forfeiture; the mortgage being silent on the subject.—*Case v. Winship*, 4 Blackf. 425, 30 Am. Dec. 664.

**[b] (Sup. 1845)**

In an action on a bill or note absolute in terms, parol evidence is not admissible to show that it was to be paid only on a contingency.—*Miller v. White*, 7 Blackf. 491.

[c] In the absence of fraud, accident, or mistake, an absolute note cannot be changed by parol evidence into a conditional obligation.—(Sup. 1851) *Railsback v. Liberty & A. Turnpike Co.*, 2 Ind. 656; (1863) *Swank v. Nichols' Adm'r*, 20 Ind. 198; (1864) *McClintic's Adm'r v. Cory*, 22 Ind. 170; (1865) *Swank v. Nichols' Adm'r*, 24 Ind. 199.

[cc] Except in cases of fraud or mistake, parol evidence is inadmissible to show that a subscription for corporate stock, absolute on its face, was made on condition.—(Sup. 1855) *Madison & I. Plank-Road Co. v. Stevens*, 6 Ind. 379; (1856) *Jones v. Milton & R. Turnpike*

*Co.*, 7 Ind. 547; (1860) *McAllister v. Indianapolis & C. R. Co.*, 15 Ind. 11; (1860) *Evansville, I. & C. Straight Line R. Co. v. City of Evansville*, Id. 395; (1867) *Cincinnati U. & Ft. W. R. Co. v. Pearce*, 28 Ind. 502.

**[d] (Sup. 1855)**

Parol evidence is not admissible to modify a written contract by adding a condition not contained in it.—*Madison & I. Plank-Road Co. v. Stevens*, 6 Ind. 379.

**[e] (Sup. 1857)**

Parol evidence is inadmissible to reduce an absolute deed to a conditional one.—*Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

**[f] (Sup. 1864)**

Parol evidence is inadmissible to show that, when a person made a written agreement to pay a sum of money to the trustees of a Baptist Church for the purpose of erecting a meeting house, he understood that the church was to be free.—*Sourse v. Marshall*, 23 Ind. 194.

**[g] (Sup. 1872)**

Parol evidence is not admissible to show that at the time of the execution of a deed of conveyance of real estate, and of a mortgage thereof by a vendee to secure unpaid purchase money, the vendor agreed to pay for street improvements then in progress, and for which the real estate would be liable to assessment; and especially is such evidence inadmissible where the mortgage contained an agreement on the part of the mortgagor to keep all legal taxes and charges against the real estate paid as the same became due.—*Jones v. Schulmeyer*, 39 Ind. 119.

**[h] (Sup. 1885)**

The terms and conditions on which a deed was to be delivered, when there was no absolute delivery and no consideration paid, may be shown by parol.—*Cuthrell v. Cuthrell*, 101 Ind. 375.

**FOR CASES FROM OTHER STATES.**

SEE 20 CENT. DIG. Evid. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944.

See, also, 17 Cyc. pp. 641-647.

**§ 422. Existence or accrual of liability.****[a] (Sup. 1858)**

Parol evidence that a written lease for a year is to take effect from its date, and not from its execution, which was delayed unintentionally, no time being expressed in the instrument, is admissible.—*Legget v. Harding*, 10 Ind. 414.

**[b] (Sup. 1880)**

A husband executed a note to certain persons who were sureties on his wife's recognizance to appear to answer to a criminal charge against her, payment of said note being conditioned on her nonappearance in court for trial. The amount of the note was the same as that of the recognizance. In a suit on the note by

the payees, the maker answered, alleging that when the note was made it was agreed between himself and the payees that he should not be liable on the note if he should endeavor to procure his wife's appearance, which he alleged he did. *Held*, that the answer was sufficient.—*King v. King*, 69 Ind. 467.

**FOR CASES FROM OTHER STATES.**

SEE 20 CENT. DIG. Evid. §§ 1953-1956.

See, also, note, 18 L. R. A. 33.

**§ 423. Nature and extent of liability.**

**[a] (Sup. 1822)**

In an action by an assignee against an assignor of a sealed note, parol evidence is not admissible to show that the assignment was without recourse.—*Odam v. Beard*, 1 Blackf. 191.

[aa] Parol evidence is inadmissible to vary the implied contract of an unrestricted indorsement of a negotiable instrument.—(Sup. 1822) *Odam v. Beard*, 1 Blackf. 191; (1873) *Holton v. McCormick*, 45 Ind. 411; (1881) *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113.

**[b] (Sup. 1841)**

A blank indorsement by a third person of nonnegotiable paper, or negotiable paper which has not been transferred by the payee, prima facie renders the indorsee liable as surety, provided the indorsement be made at the date of the contract; but this presumption may be rebutted by parol evidence.—*Wells v. Jackson*, 6 Blackf. 40.

[c] The legal effect of a blank indorsement of a promissory note, transferred in a regular course of business, cannot be controlled by parol evidence that the indorsement was without recourse.—(Sup. 1843) *Wilson v. Black*, 6 Blackf. 509; (1844) *Blair v. Williams*, 7 Blackf. 132; (1868) *Campbell v. Robbins*, 20 Ind. 271; (1871) *Lee v. Pile*, 37 Ind. 107.

**[d] (Sup. 1853)**

In an action on the assignment of a note indorsed in blank, evidence that when it was indorsed the assignor told the person to whom it was delivered "that he need not sue the maker, as he was poor; that he would see it paid,"—is inadmissible.—*Bowers v. Headen*, 4 Ind. 318.

**[dd] (Sup. 1855)**

In a suit by the obligee in a bond, even where the bond is, in its terms, joint and several, and wholly silent as to which is surety, the true situation of the parties as principal and surety may be shown, for the purpose of letting in any act of plaintiff tending to affect the collateral relations of defendants,—as the giving time to the principal without the surety's consent.—*Dickerson v. Board of Com'rs of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373.

**[e] (Sup. 1855)**

Parol evidence is admissible to show that a third person who indorsed a note, not negoti-

able, intended to make himself liable as surety.—*Harris v. Pierce*, 6 Ind. 162.

**[f] (Sup. 1856)**

The mere fact that a bill was drawn and indorsed for the accommodation of the drawee does not give rise to the relation of co-sureties between drawer and indorser; but in an action by accommodation indorser against accommodation drawer, the indorser having paid the bill, parol evidence is admissible to show the existence of such relation.—*Dunn v. Sparks*, 7 Ind. 400.

**[g] (Sup. 1856)**

Where the defendants, in making a note, assumed to act in their individual capacity, they cannot be permitted to show that they acted in any other capacity.—*Hiatt v. Simpson*, 8 Ind. 256.

**[h] (Sup. 1859)**

Where a note was indorsed by the payee, whose name was followed upon the back of the note by other parties who indorsed it in blank, parol evidence is inadmissible to show that they signed as makers instead of indorsers, since it would vary the legal effect of the indorsements as they appeared on the paper.—*Vore v. Hurst*, 13 Ind. 551, 74 Am. Dec. 268.

**[i] (Sup. 1861)**

Perhaps, where the payee of a note does not, but third parties do, indorse it at the time of execution, it may be allowable by parol evidence to rebut their prima facie liability as indorsers, and hold them as makers.—*Snyder v. Oatman*, 16 Ind. 265.

**[ii] (Sup. 1862)**

A payee of a note who indorsed it can in no sense be deemed a maker, and his contract as an indorser cannot be varied by extrinsic evidence.—*McGaughey v. Elliott*, 18 Ind. 121.

**[j] (Sup. 1862)**

Where a note is signed by one with the addition to his signature of the word "Agt.," parol evidence is not admissible in an action at law to show that the instrument was executed by him as agent for other parties, since the word "Agt." has no legal significance.—*Kenyon v. Williams*, 19 Ind. 44.

Where a note is signed by one with the addition to his signature of the letters "Agt.," parol evidence is admissible in an action in equity to support a suit against other parties as principals.—*Id.*

**[k] (Sup. 1863)**

In an action upon a note indorsed by third persons, against the indorsers, as makers or otherwise, parol evidence is inadmissible to prove that they by their indorsements intended to assume any other relations to the paper than those of indorsers.—*Drake v. Markle*, 21 Ind. 433, 83 Am. Dec. 358.

**[l] (Sup. 1866)**

As between the parties liable upon a promissory note or bill of exchange, the form of the

instrument is not conclusive, but their actual relations may be shown by parol to be other than they appear to be.—*Lacy v. Lofton*, 26 Ind. 324.

[m] (Sup. 1867)

In a suit on the assignment of a note executed by C. to the defendant, and by him assigned to the plaintiff by indorsement in blank, an answer that at the time of the indorsement the plaintiff represented to the defendant that he wished the defendant to indorse the note merely to enable him to collect the same, and not to make the defendant liable to the plaintiff, is bad as contradicting the legal effect of the assignment.—*Parker v. Morton*, 29 Ind. 89.

[n] (Sup. 1871)

Where, in an action by an indorsee against his indorser, the defendant averred a verbal agreement that the plaintiff should take the note as payment for property delivered to defendant, and should rely on the maker for payment, and that the defendant, being ignorant of the law governing his liability, indorsed the note simply to transfer his ownership, and that the words "Without recourse" were by mistake omitted from the indorsement, *held* not a good defense, as contradicting the written contract of indorsement.—*Lee v. Pile*, 37 Ind. 107.

[o] (Sup. 1872)

Where a note is endorsed by the payee, whose name is followed upon the back of the note by other names in blank, parol evidence will not be permitted to vary the legal effect of the indorsements thus appearing on the note.—*Roberts v. Masters*, 40 Ind. 461.

[p] (Sup. 1873)

In an action to enforce contribution by co-sureties, the complaint alleged that plaintiff signed the note as surety for the principal; that the latter afterwards presented it to defendants, who indorsed as accommodation indorsers and co-sureties with plaintiff, after which the principal discounted and sold the note to a bank; that, upon its nonpayment at maturity, the bank recovered judgment against all the parties; that, the principal maker being insolvent, execution was issued, and levied upon plaintiff's property, and he was compelled to pay the judgment. *Held* that, as between the parties who executed the paper before it had been negotiated or delivered by the principal, parol evidence was admissible to show the real character of the transaction.—*Harshman v. Armstrong*, 43 Ind. 126.

Complaint by A. against B. and C. for contribution, alleging that D., for the purpose of negotiating a loan from a bank in Lafayette, made his promissory note signed by himself as principal and said A. as surety payable at a bank in New York; that D. presented said note to B. and C., who severally, in order, indorsed it as accommodation indorsers thereon and as co-sureties with him, the said A.; that A., B., and C. had not any actual interest in the note or the loan sought to be secured thereby; that

it was signed by said A. and indorsed by said B. and C., to enable D. to procure a loan; that D. discounted and sold the note to the bank of Lafayette; that it was not paid at maturity; that the bank brought suit and recovered judgment against all the parties to the note; that execution was issued and levied upon the property of said A. and he was compelled to pay the judgment; that the principal maker was insolvent. *Held*, that no action could be maintained by the indorsee of the note against B. and C. as co-sureties. The terms of the writing and the indorsement fixed the liability of each signer, so as to render it unchangeable by parol evidence in such action.—*Id.*

[q] (Sup. 1877)

The liability of one who is apparently an indorser only on a promissory note, as between him and a surety thereon, may be shown by the latter, even by parol evidence, to be that of a co-surety.—*Nurre v. Chittenden*, 56 Ind. 462.

[r] (Sup. 1878)

Parol evidence is not admissible to show that payees in a note who place their names on the back thereof intended to contract a liability other than that of indorsers.—*Armstrong v. Harshman*, 61 Ind. 52, 28 Am. Rep. 665.

[s] (Sup. 1878)

Where a person other than the payee writes his name on the back of a promissory note at or before its delivery to the payee, he thereby *prima facie* assumes the liability of an indorser only; but it may be shown by parol evidence that his liability is that of a joint maker or of a guarantor.—*Browning v. Merritt*, 61 Ind. 425.

[t, u] (Sup. 1881)

While the liability of one indorsing commercial paper before the indorsement of the payee is *prima facie* that of a strict indorser, yet parol evidence is admissible to show that the liability mutually intended was that of a joint maker or surety.—*Kealing v. Vansickle*, 74 Ind. 529, 39 Am. Rep. 101.

[v] (Sup. 1881)

Where a note was indorsed by a third person before its indorsement by the payee, no implied contract is thereby created, and hence parol evidence is admissible to show what liability the parties intended should be assumed by such indorser.—*Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113.

While parol evidence is inadmissible to vary the contract of indorsement of a note regularly following that of the payee, such evidence is admissible to show that the indorsement was for the purpose of creating a trust, or for collection only, or that the instrument was indorsed as collateral security, or delivered as an escrow, or indorsed to an agent for a particular purpose.—*Id.*

Parol evidence is inadmissible to vary the apparent liability of one writing his name on the back of a promissory note after the payee.

by showing that the indorsement was made simply for the purpose of identifying the payee.—Id.

An indorsement of a note or bill regularly following that of the payee constitutes an unambiguous contract, which cannot be modified or contradicted by parol evidence.—Id.

[w] (Sup. 1882)

A note signed, "A., B., C., Trustees Perry Lodge," being the individual note of the signers, cannot be shown by parol evidence to have been intended as the note of the lodge.—Williams v. Second Nat. Bank of Lafayette, 83 Ind. 237.

[x] (Sup. 1886)

A regular indorsement of a promissory note cannot, as against the payee or subsequent holders, be contradicted or varied by parol evidence; but an irregular indorsement may, as between indorsers and sureties, be explained or varied by oral testimony.—Houck v. Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

[xx] (Sup. 1886)

Where the payee of a promissory note indorses it in regular course, he cannot be held as maker, and parol evidence is not admissible to extend his liability.—Smythie v. Scott, 106 Ind. 245, 6 N. E. 145.

[y] (Sup. 1886)

Parol evidence is admissible to prove that an indorsement of a note by the payee was made at the request of the plaintiff, to show that it had been paid.—Spencer v. Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35.

[yy] (Sup. 1893)

In an action to foreclose a mortgage the answer alleged that defendant was a married woman when the debt was incurred: that the loan was made for her husband's benefit; that the notes and mortgages were executed by her as surety for her husband; and that the mortgagee had relied for his security, not on the mortgage, but on a third person's indorsement of the note. *Held*, that parol evidence was admissible in behalf of the mortgagee to show that the third person had signed his name on the back of the note, not as indorser, but as a witness to the transaction.—Tombler v. Reitz, 134 Ind. 9, 33 N. E. 789.

[z] (Sup. 1903)

A mere recital or acknowledgment in a bill of lading that a reduction in the usual freight rate has been made and accepted in consideration of a qualification of the carrier's common-law liability is not conclusive, but the real transaction may be shown by parol.—Lake Erie & W. R. Co. v. Holland, 69 N. E. 138, 162 Ind. 406, 63 L. R. A. 948.

[zz] (App. 1904)

The mere form of a note does not necessarily determine the relations to the note of the parties whose names appear thereon, but such

relation may be shown by parol.—Helvie v. McKain, 70 N. E. 178, 32 Ind. App. 507.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1957-1965;  
7 CENT. DIG. Bills & N. §§ 1719-1727,  
1791-1797.

See, also, 17 Cyc. p. 706.

#### § 424. Effect of writing as to persons not parties thereto or privies.

[a] (Sup. 1855)

Where a written agreement, the real intent of which was different from that appearing on its face, comes up collaterally in the course of a trial, and is sought to be used to the injury of one of the parties, its true character may be shown by parol evidence.—Noble v. Epperly, 6 Ind. 408.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1906-1908.

See, also, 17 Cyc. p. 749.

#### § 425. Writings collateral to issues in general.

[a] (Sup. 1883)

The rule that parol evidence is not admissible to contradict or vary a written contract does not apply in an action between one of the parties to the contract and a stranger.—Burns v. Thompson, 91 Ind. 146.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. § 1862.

See, also, 17 Cyc. p. 741.

#### § 427. Evidence for purpose other than varying rights or liabilities dependent upon terms of writing.

[a] (Sup. 1907)

Contemporaneous oral declarations cannot be received to vary or contradict a written instrument, but declarations made during negotiations for a contract in effect a mortgage are admissible in a suit to redeem from such mortgage and for an accounting as showing the real intent of the parties respecting certain improvements made by the mortgagee in possession.—Ferguson v. Boyd, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. § 1861.

#### (B) INVALIDATING WRITTEN INSTRUMENT.

#### § 428. Grounds for admission of extrinsic evidence.

[a] (Sup. 1896)

Parol evidence is not competent to defeat the operation of a deed as a valid and effective grant.—Smith v. McClain, 45 N. E. 41, 146 Ind. 77.

#### FOR CASES FROM OTHER STATES.

See 17 Cyc. p. 694.

### § 429. Matters affecting validity in general.

#### [a] (Sup. 1884)

Parol evidence is inadmissible to show that the justice of the peace changed the docket entry after the expiration of 10 days from the rendition of the judgment, as the judgment was conclusive evidence of the facts stated, and no evidence was admissible to contradict or impeach it.—*Robinson v. Snyder*, 97 Ind. 56.

#### [b] (App. 1910)

Parol testimony is admissible to show that a written contract of sale never operated as an enforceable obligation between the parties.—*Buffalo Oolitic Limestone Quarries Co. v. Davis*, 90 N. E. 327.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1969–1971, 1973, 1974.

See, also, 17 Cyc. p. 694.

### § 431. Insufficiency or irregularity of execution or delivery.

#### [a] (Sup. 1856)

Three subscribed jointly to stock of a company to the amount of \$1,200. Afterwards, without the company's assent, they procured their names to be put down as individual subscribers, to \$400 each, on the copy of the articles recorded in the recorder's office. An action was brought against them jointly on the \$1,200 subscription, and a copy of the articles from the recorder's office was adduced in evidence, but the facts relating to the subscription were allowed to be shown by parol evidence. *Held*, that the defendants were jointly liable.—*Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1975–1980.

See, also, 17 Cyc. p. 701.

### § 432. Want or failure of consideration.

#### [a] (Sup. 1855)

In a suit on a note given in consideration of the assignment of a patent right, defendant offered the certificate of the commissioner of patents, under his seal of office, stating that no such patent had been issued. *Held*, that such evidence was inadmissible.—*Stoner v. Ellis*, 6 Ind. 152.

[b] Parol evidence is admissible to show that there was no consideration for a deed.—(Sup. 1859) *Andrews v. Andrews*, 12 Ind. 348; (1892) *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. 64, 19 L. R. A. 767; (1892) *Same v. Justice*, 132 Ind. 600, 31 N. E. 68; *Same v. Fernald*, Id.

#### [c] (Sup. 1861)

In an action against the surety on a note, it appeared that defendant had become security in consideration of a promise by plaintiff to release or procure his release from all liability on another note on which he was bound. *Held*, that it was competent for the surety to set

up and prove a failure on the part of plaintiff to perform his agreement, such defense not being in conflict with the legal effect of the contract.—*Campbell v. Gates*, 17 Ind. 126.

#### [d] (Sup. 1863)

Parol evidence is admissible to show that a written contract was made without consideration.—*Collier v. Mahan*, 21 Ind. 110.

[e] In an action on a note, between the original parties thereto, parol evidence is admissible to show a want or failure of consideration.—(Sup. 1863) *Collier v. Mahan*, 21 Ind. 110; (1881) *Pierce v. Hight*, 76 Ind. 355; (1882) *Bragg v. Stanford*, 82 Ind. 234.

#### [f] (Sup. 1881)

Where a deed expresses the consideration and contains an acknowledgment that the consideration has been paid, the acknowledgment is prima facie evidence of payment of the consideration, but it is not conclusive.—*Stockton v. Stockton*, 73 Ind. 510.

#### [g] (Sup. 1881)

Want or failure of consideration is a good defense to an action on a note, and may be proved by parol.—*Pierce v. Hight*, 76 Ind. 355.

#### [h] (Sup. 1882)

The consideration, or want of consideration, for a written contract, may be shown by parol; as, for instance, that a note was given by one in consideration of a gift to his wife.—*Bragg v. Stanford*, 82 Ind. 234.

#### [i] (Sup. 1901)

A release for personal injuries, reciting that it was made "in consideration of appellant's agreement to pay said fees and charges [to the physicians and hospital], and the amount herein mentioned as a cash payment," expresses a contractual consideration, and not a mere recital of a precedent or contemporaneous fact, and cannot be contradicted by parol evidence that no consideration was received.—*Indianapolis Union R. Co. v. Houlihan*, 60 N. E. 943, 157 Ind. 494, 54 L. R. A. 787.

#### FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 1981–1989; 11 CENT. DIG. Contracts, § 408.

### § 433. Mistake.

#### [a] (Sup. 1866)

It is not error, in a suit to foreclose a mortgage, to permit plaintiff, under proper averments in his complaint, to show by parol that there was a mistake in the description of one of the notes secured by the mortgage, and to identify the note intended to be secured.—*Ellis v. Kenyon*, 25 Ind. 134.

#### [b] (Sup. 1889)

Where the wrong corporation is named as grantee in a deed of a right of way, parol evidence of the facts attending the execution of the deed is admissible to show the mistake.—*Louis-*

ville, N. A. & C. R. Co. v. Power, 119 Ind. 260, 21 N. E. 751.

[c] (Sup. 1892)

Where there is fraud or mistake in executing or securing the execution of a conveyance for which no consideration is paid, parol evidence is admissible.—Ewing v. Smith, 31 N. E. 464, 132 Ind. 205.

[d] (App. 1903)

Where a parol agreement for the sale of a tract of land, of which the boundaries are pointed out on the ground by the vendor, is consummated by payment of the agreed purchase price and the giving of a deed which omits a portion of the tract to which the vendor had no title, oral evidence of such prior agreement is admissible to show that the deed did not convey the entire tract paid for.—Equitable Trust Co. of New London v. Milligan, 65 N. E. 1044, 31 Ind. App. 20.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1990-2004.

See, also, 17 Cyc. pp. 702-705.

§ 434. Fraud.

[a] (Sup. 1855)

Where a large amount of corn was sold by written contract, in which it was agreed that the corn should be measured by "the two-foot gauge," and not by weight, and the seller put rails, etc., among it, so as to deceive the purchaser by the false bulk, it was held that, in ascertaining the amount of the fraud, it was competent for the purchaser to show, and for a jury to consider, the actual weight of the corn received by him.—West v. Bradley, 6 Ind. 394.

[b] (Sup. 1857)

The rule excluding parol proof which tends to vary the terms of a writing does not apply where, by reason of fraud, the writing does not embody the contract of the parties.—Gatling v. Newell, 9 Ind. 572.

[c] (Sup. 1880)

Parol evidence is admissible to show that the execution of a contract was procured by fraud.—Hines v. Driver, 72 Ind. 125.

[d] (Sup. 1882)

Where the seller rescinds a sale for fraud, consisting in the failure of the buyer to notify him as to the identity of the maker of the note given for the purchase price, the buyer being aware that the seller supposed that it was the note of another than the maker, the buyer may testify that he believed that the note was the note of such other person.—Parrish v. Thurston, 87 Ind. 437.

[e] (Sup. 1884)

In replevin by plaintiff claiming under a conditional written contract alleged to be fraudulent by defendant, who claimed under a pre-

vious oral contract, evidence in reference to both contracts is admissible.—Baldwin v. Burrows, 95 Ind. 81.

[f] (Sup. 1896)

Fraud arising out of the negotiations leading up to the execution of a written contract is not merged therein, and, when fraud is the issue, evidence tending to prove the same is admissible, though it may vary, add to, or contradict the terms of the written contract.—Moore v. Harmon, 41 N. E. 599, 142 Ind. 555.

[g] (App. 1910)

Parol evidence is admissible to show that a written contract of sale was executed, through fraud.—Buffalo Oolitic Limestone Quarries Co. v. Davis, 90 N. E. 327.

[h] (App. 1910)

Fraud inducing the execution of a written instrument is not merged in the written contract.—American Building & Loan Ass'n v. Hughes, 92 N. E. 180.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2005-2020.

See, also, 17 Cyc. pp. 695-700.

§ 435. Duress.

[a] (Sup. 1878)

Parol evidence is admissible to show that the entry of satisfaction of a judgment was not voluntary.—Stewart v. Armel, 62 Ind. 593.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2021-2024;

30 CENT. DIG. Judgm. § 1717.

See, also, 17 Cyc. p. 695.

§ 436. Undue influence.

[a] (Sup. 1878)

Parol evidence is admissible to show that the entry of satisfaction of a judgment was not voluntary.—Stewart v. Armel, 62 Ind. 593.

[b] (Sup. 1892)

A son conveyed his land to his father in trust for himself, remainder to his personal representatives. The deed was without consideration, and made under undue influence, and the father afterwards reconveyed the land to the son who sold it. Held that, in ejectment by the personal representatives of the son, against his bona fide purchasers, it was competent for such purchasers to show, by parol evidence, fraud or mistake in the execution or in securing the execution of such trust deed.—Ewing v. Smith, 132 Ind. 205, 31 N. E. 464.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2007, 2021-2024.

§ 437. Illegality.

[a] (Sup. 1884)

In an action to set aside a sale under execution of exempt property, parol evidence is ad-

missible to prove the appraisal and identity of the property.—*Barkley v. Mahon*, 95 Ind. 101.

[b] (App. 1910)

Parol evidence is admissible to show that a written contract was based upon an illegal consideration.—*Buffalo Oolitic Limestone Quarries Co. v. Davis*, 90 N. E. 327.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2025-2029.

See, also, 17 Cyc. p. 700.

### (C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

Parol modification of lease, see LANDLORD AND TENANT, § 33.

### § 439. Grounds for admission of oral evidence.

[a] (App. 1907)

A contract between the lessees of certain grounds and a street railroad company for the purpose of constructing an electric park, stipulating that it is necessary that aid and assistance be extended to such lessees by such company, impliedly shows that the company is to make advances, and such an agreement for advances might rest in parol.—*Breing v. Sparrow*, 30 Ind. App. 455, 80 N. E. 37.

### § 440. Prior and contemporaneous collateral agreements.

As to mode of performance or enforcement, see post, § 465.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1719-1845, 1874-1890, 1929-1944, 2030-2051; 7

CENT. DIG. Bills & N. §§ 1760, 1761; 43 CENT. DIG. Sales, § 721.

See, also, 17 Cyc. pp. 713-721.

### § 441. — In general.

[a] (Sup. 1833)

Parol evidence is inadmissible to show that when a note was given it was agreed that no interest thereon would be charged.—*Stutsman v. Stutsman*, 3 Blackf. 231.

[aa] Where parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject-matter, varying, modifying, or contradicting the written agreement, is inadmissible.—(Sup. 1840) *Burge v. Dishman*, 5 Blackf. 272; (1842) *Graves v. Clark*, 6 Blackf. 183; (1851) *Harvey v. Lafin*, 2 Ind. 477; (1851) *Calhoun v. Davis*, Id. 532; (1851) *Railsback v. Liberty & A. Turnpike Co.*, Id. 656; (1853) *Clifford v. Smith*, 4 Ind. 377; (1854) *Columbia v. Amos*, 5 Ind. 184; (1856) *McClure v. Jeffrey*, 8 Ind. 79; (1856) *Mallett v. Page*, Id. 364; (1857) *Gatling v. Newell*, 9 Ind. 572; (1860) *French v. Turner*, 15 Ind. 59; (1862) *Oiler v. Bodkey*, 17 Ind. 600; (1863) *Snyder v.*

*Koons*, 20 Ind. 389; (1864) *Oiler v. Gard*, 23 Ind. 212; (1865) *Swank v. Nichols' Adm'r*, 24 Ind. 199; (1865) *Coleman v. Hart*, 25 Ind. 256; (1867) *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 Ind. 502; (1872) *Headrick v. Wisehart*, 41 Ind. 87; (1875) *Durland v. Pitcairn*, 51 Ind. 426; (1875) *Woodall v. Greater*, Id. 539; (1880) *Clodfelter v. Hulett*, 72 Ind. 137; (1882) *Johnston Harvester Co. v. Bartley*, 81 Ind. 406; (1882) *Schreiber v. Butler*, 84 Ind. 576; (1883) *Hall v. Pennsylvania Co.*, 90 Ind. 459; (1883) *Rhoads v. Jones*, 92 Ind. 328; (1885) *Ice v. Ball*, 102 Ind. 42, 1 N. E. 66; (1889) *Conant v. National State Bank of Terre Haute*, 121 Ind. 323, 22 N. E. 250.

[b] (Sup. 1846)

A written agreement cannot be controlled by setting up a contemporaneous verbal understanding of the parties inconsistent with it.—*Jacobs v. Finkel*, 7 Blackf. 432.

[bb] (Sup. 1846)

Parol evidence is not admissible to show that a promissory note, payable on its face on a certain day, was to be paid at that time only on a contingency mentioned in a written contract between the parties, made before the execution of the note.—*Miller v. White*, 7 Blackf. 491.

[c] (Sup. 1846)

Parol evidence of the understanding of the parties to a mortgage, at the time of its execution, that it should not prejudice the priority of lien of a subsequent mortgage, then about to be taken, is admissible to show the extent of the notice which the first mortgagee had of the pending negotiation as to the second mortgage.—*State v. Holloway*, 8 Blackf. 45; Id., 5 Ind. 212.

[cc] (Sup. 1862)

In an action on a note, parol evidence is inadmissible, in the absence of fraud or mistake, of an agreement contemporaneous with the note, whereby the payee agreed not to enforce payment from the maker.—*Withrow v. Wiley*, 3 Ind. 379.

[d] (Sup. 1856)

The written contract embodied in the subscription for stock of a corporation cannot be varied by parol evidence of prior or contemporaneous transactions or agreements of the parties. The writing speaks for itself, and all prior oral agreements are merged therein.—*Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547.

[dd] (Sup. 1856)

Where one directed another to execute and deliver a mortgage on his own property to a third person, he cannot, as against the mortgagee, show any contemporaneous understanding between himself and the mortgagor inconsistent with the terms of the mortgage.—*Mallett v. Page*, 8 Ind. 364.

[e] (Sup. 1858)

To a claim against a decedent's estate on a receipt, an answer that the money was to be

retained as an advancement from a tenant for life [a widow] to the remainder-man is not bad as setting up a verbal contemporaneous contract varying the terms of the receipt.—*Norman v. Norman*, 11 Ind. 288.

[ec] (Sup. 1859)

The terms of an indorsement on a note may be controlled by a contemporaneous written agreement.—*Zekind v. Newkirk*, 12 Ind. 544.

[f] (Sup. 1859)

Where a bill of lading contains an express stipulation that the goods shall be transported without unnecessary delay, parol evidence that the agent of the company told plaintiff that they should be shipped that night is inadmissible.—*Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 518.

[ff] It is not proper to prove a contemporaneous parol agreement to vary the effect of a blank indorsement of a negotiable note.—(Sup. 1859) *Vore v. Hurst*, 13 Ind. 551, 74 Am. Dec. 268; (1867) *Parker v. Morton*, 29 Ind. 89; (1868) *Campbell v. Robbins*, 29 Ind. 271.

[g] (Sup. 1860)

The written agreement being to pay cash, parol evidence of a contemporaneous agreement to take goods instead of cash is inadmissible.—*Thornburgh v. President of Newcastle & D. R. Co.*, 14 Ind. 499.

[gg] (Sup. 1860)

Plaintiff, a citizen of M., made a conditional subscription to the stock of a railroad company and paid it, the company promising that a branch should be made to M., which was not done at the time of suit. At the commencement of the suit to recover the money paid, the plaintiff held his certificate of stock without any offer to cancel or assign it to the company. *Held*, that a parol promise to construct the branch to M. could not be proven as a part of the written contract of subscription, and hence the money paid could not be recovered on the ground of a breach of contract.—*McAllister v. Indianapolis & C. R. Co.*, 15 Ind. 11.

[h] (Sup. 1860)

A contemporaneous parol agreement by which a note, absolute on its face, was to be paid out of the earnings of one of the makers, constitutes no part of the contract, and cannot be given in evidence to vary the terms of the note.—*Tucker v. Talbott*, 15 Ind. 114; *Nill v. Comparet*, Id. 243.

[hh] (Sup. 1860)

In an action against the surety of a note unequivocal in its terms, evidence by the surety of a parol agreement to the effect that the promisor was to be retained in the service of the payee, and payments on the note deducted from his wages until the note was paid, was inadmissible.—*Tucker v. Talbott*, 15 Ind. 114.

[i] (Sup. 1860)

Where land is conveyed with full covenants, but is at the time in possession of a tenant, a parol agreement to accept the deed and the tenant's possession as the possession of the purchaser may be shown.—Page v. *Lashley*, 15 Ind. 152.

It is the general rule that the covenants in a deed cannot be controlled in their legal effect by evidence of contemporaneous parol agreements; but an independent parol agreement, disconnected with the written contract, may in some cases be made contemporaneous with, and in all cases after, the written contract.—*Id.*

[ii] (Sup. 1860)

As between a mortgagee holding a mortgage on a machine shop and the realty, and a subsequent mortgagee, holding a chattel mortgage on the machinery, patterns, tools, and fixtures in the shop, an agreement between the mortgagor and the first mortgagee that the articles included in the second mortgage should not be embraced in the first mortgage may be proved by parol.—*Frederick v. Devol*, 15 Ind. 357.

[j] (Sup. 1863)

By written contract A. agreed to furnish to B. a certain number of hogs at a certain time, place, and price, which price B. agreed to pay. In B.'s suit for damages for nonperformance, it was *held* that A. could not introduce evidence of a verbal contemporaneous agreement on the part of B. to furnish him money to buy the hogs, for the purpose of varying the legal effect of the writing.—*Snyder v. Koons*, 20 Ind. 389.

[jj] (Sup. 1864)

Where a sale of real estate precedes the execution of the deed, a verbal reservation of anything that would legally pass by the deed will be presumed to be merged in the deed.—*Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449.

[k] (Sup. 1864)

An answer relying upon a verbal agreement, made at the time of execution of a note, changing the time of its payment, is bad.—*Bil-lan v. Hercklebrath*, 23 Ind. 71.

[kk] (Sup. 1865)

In a suit on a note, parol evidence is admissible on the part of the maker to show that there was an agreement between him and the payee that the said note should be substituted for a note on which the maker of this note was surety, and to show a breach of such agreement.—*Rawlings v. Fisher*, 24 Ind. 52.

[l] (Sup. 1866)

In an action for a breach of a covenant against incumbrances, parol evidence is admissible to show an agreement by the vendee to assume the incumbrance alleged as a breach.—*Pitman v. Conner*, 27 Ind. 337.



[ll] A parol agreement by the vendee to pay taxes or assessments, which are a lien upon the land, as a part of the consideration of the conveyance, is admissible in an action on the covenants.—(Sup. 1868) *Fitzer v. Fitzer*, 29 Ind. 468; (1872) *Carver v. Louthian*, 38 Ind. 530; (1886) *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274.

[m] (Sup. 1868)

In an action by a vendee of lands against the vendor for taxes which it is alleged should have been paid by the vendor, parol evidence is admissible to show that it was orally agreed at the time of the conveyance that the vendor should pay such taxes.—*Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674.

If, upon conveying land by warranty deed in exchange for other land, it is agreed by the parties that the taxes due upon the lands mutually exchanged shall be set off against each other, the taxes on the land so conveyed by warranty deed are part of the consideration for such deed, and therefore, in an action against the vendor by the purchaser, or one deriving title by warranty deed from the purchaser, to recover money paid by the plaintiff to remove the incumbrance of the taxes assumed by the purchaser, parol proof of such contract is admissible.—Id.

[mm] (Sup. 1871)

In an action to recover fixtures situated on real estate conveyed, parol evidence is admissible to show that such fixtures, which would otherwise pass by deed, were agreed to be regarded by the parties as personal property, and that they should not pass, since such evidence did not tend to show a verbal agreement or condition which would defeat the estate conveyed.—*Pea v. Pea*, 35 Ind. 387.

[mmm] (Sup. 1871)

Where a contract of purchase is reduced to writing and contains no warranty, one cannot be alleged and proved by parol.—*Johnson v. McCabe*, 37 Ind. 535.

[n] (Sup. 1873)

A charge asked by the defendant, which undertook to control the written contract by a contemporaneous parol agreement inconsistent with the terms of the writing, was properly refused.—*McAlister v. Howell*, 42 Ind. 15.

[nn] (Sup. 1874)

In an action of foreclosure by an administrator on a mortgage executed to his intestate, defendant answered that he was a Roman Catholic bishop, and according to the canons of his church the real estate of each congregation of his diocese was deeded to him in trust for such congregation; that the mortgage was on real estate purchased by one of his congregations; and that it and the note were given by him for money lent by the intestate to such congregation, with the agreement between the mortgagee and defendant that the congregation, and not defendant, was

to repay the loan. *Held*, that the verbal understanding between the mortgagee and defendant was not admissible against the written contract.—*Benoit v. Schneider*, 47 Ind. 13.

[nnn] (Sup. 1876)

Where a tenant under a lease executed by an administrator has by holding over rendered himself the tenant from year to year of a purchaser of the leased premises at the administrator's sale, he cannot, in a suit by such purchaser to recover the rent, introduce evidence of a parol agreement with the administrator, contemporaneous with the written lease, to the effect that, after the expiration of the written lease, the tenancy should continue only as one from month to month.—*Burbank v. Dyer*, 54 Ind. 392.

[o] (Sup. 1878)

A note cannot be defeated by parol evidence of a contemporaneous parol agreement that it should be applied on a debt due from a third person to the maker.—*McDonald v. Elfes*, 61 Ind. 279.

[oo] (Sup. 1878)

Where there is a written lease, parol evidence is not admissible to prove that the lessor, in consideration of the rent reserved, promised to make any other repairs or improvements than such as are stipulated for in the lease.—*Welshbillig v. Dienhart*, 65 Ind. 94.

[ooo] Land on which was a growing crop was sold by warranty deed without reservation of the crop, the grantor giving the grantee immediate possession. *Held*, that evidence of a parol reservation of the crop at the time of the sale of the land was admissible.—(Sup. 1879) *Harvey v. Million*, 67 Ind. 90, overruling *Chapman v. Long* (1858) 10 Ind. 465.

[p] (Sup. 1879)

Where defendant, in an action on a note for the purchase price of land and to foreclose the collateral mortgage, had proved that a growing crop, the value of which was set up as a counterclaim, was reserved as a part of the contract for the land, it was not error to allow plaintiff to prove the fact by parol.—*Benner v. Bragg*, 68 Ind. 338.

[pp] (Sup. 1879)

The fact of the tenancy or occupancy of real estate is a fact which exists independently of any written lease which the tenant may hold, and, as such, may be shown by parol evidence.—*Hammon v. Sexton*, 69 Ind. 37.

[ppp] (Sup. 1880)

Where there is no claim of mistake in a written contract of assignment, the terms of such contract cannot be varied by any parol promise or agreement of the parties made at the time of the execution of the contract, but it must be assumed that it as written expressed the entire agreement of the parties.—*Godfrey v. Wilson*, 70 Ind. 50.

[q] (Sup. 1880)

Terms of a written instrument cannot be controlled, varied, or defeated by a contemporaneous parol contract or agreement.—*Walterhouse v. Garrard*, 70 Ind. 400.

[qq] (Sup. 1881)

A premium note which is absolute and unconditional on its face cannot be contradicted by proof of an inconsistent verbal agreement or understanding that the policy should constitute a part of the contract, and that the rights of the parties should be determined by a reference to the policy and the company's charter.—*American Ins. Co. v. Gallahan*, 75 Ind. 168.

[qqq] (Sup. 1882)

Where, by a written contract, A. agreed to ship a certain quantity of ice, oral evidence is not admissible to show an agreement to ship only such as was then owned by him.—*Schreiber v. Butler*, 84 Ind. 576.

[r] (Sup. 1882)

Parol evidence is admissible to show an agreement between the indorser and indorsee of a note that he should not sue the maker until requested by the indorser, and that he should remain liable as such without suit until he gave such notice, since the evidence does not vary the effect of the indorsement, but merely fixes the degree of diligence required by the indorsee in order to bind the indorser.—*Schmied v. Frank*, 86 Ind. 250.

[rr] (Sup. 1885)

A contemporaneous oral agreement between the payee of a note, made payable without any condition expressed, and a maker, who signed as surety, that the payee would extend to the other maker such "further credit for goods as would enable him to carry on his business," and would credit on the note all sums which the other maker should pay him, cannot be proved to discharge the surety from liability; it being in contradiction of the terms of the note.—*Trentman v. Fletcher*, 100 Ind. 105.

Where a note calls for the payment of a definite sum of money at a time fixed, the surety thereon cannot show a contemporaneous oral agreement that it was to be paid by the principal from time to time until paid and satisfied, as such agreement varies the terms of the note.—*Id.*

[rrr] Negotiations and conversations leading up to a written contract are merged therein, and evidence of such conversations is inadmissible to contradict such contract.—(Sup. 1886) *Brown v. Russell & Co.*, 4 N. E. 428, 105 Ind. 46; (1889) *Hostetter v. Auman*, 20 N. E. 506, 119 Ind. 7; (1901) *Ralya v. Atkins*, 61 N. E. 726, 157 Ind. 331; (App. 1901) *Ayres v. Blevins*, 62 N. E. 305, 28 Ind. App. 101; (1904) *Henry School Tp. v. Meredith*, 70 N. E. 393, 32 Ind. App. 607.

[s] (Sup. 1886)

Where certain creditors signed an agreement on a stated consideration that the debtor would turn over his stock to a third person to be by him sold, and the proceeds distributed pro rata on the debts due the signers, and at the time the written agreement was executed a creditor held certain notes executed by a firm composed of such debtor and another, it cannot be shown as against such debtor that by a contemporaneous agreement the indebtedness evidenced by such notes was not within the terms of the written agreement.—*Fordice v. Scribner*, 9 N. E. 122, 108 Ind. 85.

[ss] (Sup. 1887)

Where a bill of lading for the shipment of goods to a point beyond the terminus of the line of the initial carrier is accepted before shipment by a shipper, the law imports into the contract, where it is silent, the provision that the carrier may select any customary and reasonably safe and direct route by which to forward the goods from the terminus of its line, and this cannot be contradicted by parol evidence of a prior verbal agreement specifying a certain route.—*Snow v. Indiana, B. & W. R. Co.*, 109 Ind. 422, 9 N. E. 702.

[sss] (Sup. 1887)

A written promise to pay a specified sum of money, on the completion of a named railroad, cannot be varied by evidence of an oral agreement that the railroad should be connected with other railroads, but it is competent to prove the route and termini of the railroad described in the contract.—*Low v. Studabaker*, 110 Ind. 57, 10 N. E. 301.

[t] (Sup. 1887)

It is well settled that a written contract cannot be controlled, diminished, or enlarged by any precedent or contemporaneous verbal agreement by or between the parties in relation to the subject-matter of the written contract.—*Carr v. Hays*, 11 N. E. 25, 110 Ind. 408.

[tt] (Sup. 1889)

A parol agreement that any damages which might be allowed, in pending condemnation proceedings, in favor of the property conveyed, should belong to the grantor, cannot be shown as against a deed executed at the same time.—*Bailey v. Briant*, 117 Ind. 362, 20 N. E. 278.

[ttt] (Sup. 1889)

In an action to recover for excessive freight charges, where the bill of lading does not specify the rate, in the absence of fraud, concealment, or mistake, evidence of an oral agreement controlling the implied provision that the rate shall be reasonable, and such as are ordinarily charged for like services, is inadmissible.—*Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244.

[u] (Sup. 1889)

Where there is a written instrument embodying the terms of a contract between buyer

and seller, an express warranty cannot be imported into it by parol evidence.—*Conant v. National State Bank of Terre Haute*, 22 N. E. 250, 121 Ind. 323.

[uu] (Sup. 1890)

An oral agreement by a vendor of land to pay off an existing incumbrance becomes ineffectual for any purpose, as an agreement, after the execution of a warranty deed.—*Chaplin v. Baker*, 124 Ind. 385, 24 N. E. 233.

[uuu] (Sup. 1890)

Parol evidence is inadmissible to show that a note bearing 10 per cent. interest by its terms was by agreement to bear only 6.—*Davis v. Stout*, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

[v] (App. 1891)

The rule that all antecedent and contemporaneous oral agreements of the parties are conclusively presumed to be merged in a written contract covering the subject-matter, when one is made, is applicable to the contracts of carriers.—*Pennsylvania Co. v. Clark*, 27 N. E. 586, 28 N. E. 208, 2 Ind. App. 146.

[vv] (Sup. 1893)

In proceedings to condemn land for a railroad right of way, the landowner and the company made an agreement, which, as incorporated in the judgment, required the company to put in and maintain a farm crossing at a point where a farm road crossed the land taken, but the judgment said nothing as to how the crossing should be constructed. *Held*, that the landowner could not compel the company to construct the crossing in direct line with the farm road, instead of at right angles with the railway, on the ground that such was the agreement, as the written agreement, as embodied in the judgment, cannot, in the absence of fraud or mistake, be varied by parol proof of contemporaneous agreement.—*Straub v. Terre Haute & L. Ry. Co.*, 135 Ind. 458, 35 N. E. 504.

[vvv] (Sup. 1894)

Where a written contract of warranty is made, oral warranties and implied warranties are all merged in the written contract, and by its terms the parties must be bound as in other cases of written agreements.—*Shirk v. Mitchell*, 36 N. E. 850, 137 Ind. 185.

[w] (App. 1897)

The buyer of a machine under a written contract of conditional sale, full in its terms, and free from ambiguity, cannot show by parol evidence that, just before the contract was executed, it was agreed that, if the buyer's husband should not be satisfied with the contract and sale, the seller was to return to her an old machine taken by him as a partial payment on the contract, and take the new one.—*Singer Mfg. Co. v. Sults*, 47 N. E. 341, 17 Ind. App. 639.

[ww] (App. 1898)

The provisions of a railroad ticket may be supplemented by parol to show a special ar-

rangement whereby the company agreed to stop a train at a point at which it was not scheduled to stop.—*Evansville & T. H. R. Co. v. Wilson*, 50 N. E. 90, 20 Ind. App. 5.

[www] (App. 1898)

A written contract limiting the liability of a carrier, signed by the parties several hours after the shipment, merges all prior agreements, and, in the absence of fraud or mistake, cannot be explained or added to by parol.—*Stewart v. Cleveland, C., C. & St. L. R. Co.*, 52 N. E. 89, 21 Ind. App. 218.

[x] (Sup. 1899)

Statements of an agent for the sale of machinery, to be propelled by power furnished by the prospective vendee, as to the adequacy of such power, not referring to machinery sold by his principal, and made several weeks before the contract was entered into, are inadmissible, since antecedent statements will not be received to impeach the terms of a written contract.—*Smith v. Barber*, 53 N. E. 1014, 153 Ind. 322.

[xx] (App. 1900)

In an action for the price of a machine made and delivered under a written contract, defendant's answer alleged a contract, partly written and partly oral, prior to the written contract sued on, by which plaintiff undertook to construct a machine competent to do certain work, and that defendant, relying on plaintiff's representations that the machine described in detail in the contract sued on would do such work, made the latter contract, but that the machine was not competent to do the required work. *Held*, that evidence of negotiations and agreements prior to the contract sued on was properly rejected.—*Buckeye Mfg. Co. v. Woolley Foundry & Machine Works*, 58 N. E. 1069, 26 Ind. App. 7.

[xxx] (App. 1901)

Where a written contract of warranty is made on the sale of a machine, oral warranties and implied warranties are all merged in the written contract, and by its terms the parties must be bound as in other cases of written agreements; and hence, in an action on a note for the purchase price of such machine, in which a breach of warranty is relied on, only the written warranty can be shown.—*McCormick Harvesting Mach. Co. v. Yoeman*, 59 N. E. 1069, 26 Ind. App. 415.

[y] (App. 1901)

An oral agreement between the insurer and the assured, that insurer should hold the policy until payment of the first quarterly premium, during which time it should be in full force, does not contradict the terms of the policy itself as to payment of premium in advance.—*Prudential Ins. Co. v. Sullivan*, 59 N. E. 873, 27 Ind. App. 30.

[yy] (App. 1902)

A promise of a landlord, before executing a lease, to make repairs, is unavailing, the

written lease containing no covenant to repair.—*Roehrs v. Timmons*, 63 N. E. 481, 28 Ind. App. 578.

[yyy] (App. 1909)

A contract reduced to writing presumptively contains the final agreement of the parties, and all prior or contemporaneous parol stipulations are presumptively merged therein.—*Wysong v. Sells*, 88 N. E. 954.

[z] (App. 1910)

Where a contract for the sale of a cash register provided that the order could not be countermanded, and that the soliciting agent had no authority to make any contract other than that expressed in the written order accepted and acted on by the seller, parol evidence that the selling agent orally agreed with defendant that he might keep the register on trial and return it within a reasonable time if he was not satisfied therewith was inadmissible as varying its terms.—*McCaskey Register Co. v. Curfman*, 90 N. E. 323.

When a contract is reduced to writing, the legal presumption is that the entire contract and all prior and accompanying negotiations or stipulations are merged therein.—Id.

[zz] (App. 1910)

Parol evidence of a contemporaneous oral agreement is not admissible to contradict or vary a written instrument.—*Buffalo Oolitic Limestone Quarries Co. v. Davis*, 90 N. E. 327.

Where a contract for the sale of land provided that the vendor should receive certain corporate stock as collateral security for the remainder of the price with the option of exchanging it for the same amount in cash, when such part of the price became due, or retaining the stock as a final payment, a parol agreement that the taking of the stock as collateral security should not be a waiver of the vendor's lien would vary the contract, and hence was inadmissible in an action to enforce the lien.—Id.

[zzz] (App. 1910)

An oral agreement between heirs for the settlement of an estate that all who signed a written agreement should be bound, whether or not all the heirs signed the written agreement, was not binding where such stipulation was not incorporated in the written contract contemporaneously executed.—*Becker v. Becker*, 91 N. E. 966.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1719-1845, 2030-2047; 11 CENT. DIG. Contracts, § 1616; 43 CENT. DIG. Sales, § 721.

See, also, 17 Cyc. p. 713.

#### § 442. — Completeness of writing.

[a] (Sup. 1864)

Where a note is executed by A. to B., which is absolute and unconditional on its face, and it is agreed between them at the time, by parol, that the note shall not be paid unless

a certain other note, then transferred by B. to A., can be set off by A. against C., the payor of the latter, whom A. owes at the time, and A. fails to secure the set-off against C., and B. sues A. on his note, such parol contract cannot be pleaded to show a failure of the consideration of the note of A.—*McClintic's Adm'r v. Cory*, 22 Ind. 170.

[b] (Sup. 1879)

A. sued B. on a note, and B. answered that A. was a wealthy farmer, and B. was his son; that, prior to the execution of the note, plaintiff gave him two horses, stating at the time that such horses were intended as an advance-ment; that he was then a minor, working on plaintiff's farm as a member of plaintiff's family; that, a few days after, plaintiff presented the said note to him for his signature, representing that it was never to be paid, but only to be held by plaintiff as evidence of such advance-ment; that, confiding in such representations and believing them to be true, he signed the note, and for no other purpose. *Held*, that a demurrer to such answer was improperly sustained.—*Harris v. Harris*, 69 Ind. 181.

[c] (Sup. 1886)

Where the consideration on which the several stipulations of a contract rest does not appear on the face of the writing, it is within the rule that where, in order to make a contract complete by supplying an essential part, resort to parol evidence is necessary, and the contract is to be regarded as in parol, except to the extent that it is controlled by Rev. St. 1881, § 4905.—*Higham v. Harris*, 8 N. E. 255, 108 Ind. 246.

[d] (App. 1892)

When a writing is obviously incomplete and does not of itself constitute an enforceable contract, it is not only proper, but necessary, to allege and prove extrinsic facts in order to give it legal effect. A writing may form part of an agreement, and, when this fact appears from the instrument itself, the whole agreement, including both written and parol parts, should be alleged.—*Kentucky & I. Cement Co. v. Cleveland*, 30 N. E. 802, 4 Ind. App. 171.

[e] (App. 1904)

Where a teacher's contract for a term of school commencing at a specified date does not specify the length of the term, parol evidence showing the length of the term is admissible.—*Henry School Tp. v. Meredith*, 70 N. E. 393, 32 Ind. App. 607.

[f] (App. 1907)

Where several writings taken together show a complete and unambiguous agreement, such agreement cannot be varied or contradicted by parol evidence of a contemporaneous parol contract.—*Pierse v. Bronnenberg*, 40 Ind. App. 662, 81 N. E. 739, 82 N. E. 126.

Where a contract for the sale of land free of incumbrances by the petitioner for the establishment of a public drain, before the collec-

tion of the assessments, and a deed containing a warranty against liens and incumbrances, were parts of the same transaction, and showed a complete and unambiguous agreement, evidence of a contemporaneous parol contract between the parties that, in event that the ditch was established and the assessment became payable, the grantee was to pay the same in addition to the cash consideration named in the contract and deed, was inadmissible as a defense against a claim for a breach of the warranty.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1874-1899.

See, also, 17 Cyc. p. 716.

#### § 443. — Relation of oral agreement to writing.

[a] (Sup. 1863)

The principle that a verbal contemporaneous agreement cannot be set up to vary the legal effect of a note applies only where the verbal agreement relates to instruments conceded to be on a valid consideration and operative.—*Beals v. Beals*, 20 Ind. 163.

[b] (Sup. 1868)

In action on a written guaranty of payment of the price of all clothes wringers sold by plaintiffs to one of the guarantors, parol evidence that certain wringers left in the possession of the guarantor were taken on trial, and were not purchased, does not vary a contract in the form of an order to send two dozen wringers of a certain number.—*Webster v. Metropolitan Washing Mach. Co.*, 29 Ind. 453.

[c] (Sup. 1871)

Where a person received sheep on his agreement that he would deliver a part of the wool annually and pay for the sheep at the end of the four years, and that, if the annual amount of wool was not delivered, the whole price, as well as the wool, should become due, evidence that at the time of the contract it was agreed that such person might sublet the sheep if he desired on the same terms and when sublet, he was to be credited for the same, and that he did sublet some of them, is inadmissible as varying the written contract.—*Smith v. Dallas*, 35 Ind. 255.

[d] (Sup. 1876)

In an action for breach of warranty it appeared that, on the sale of land by defendant to plaintiff, defendant gave plaintiff a separate instrument, agreeing that, if the land was not worth a consideration equal to a sum stated in the deed, he would make it worth such sum. Defendant claimed and testified that such instrument was executed and made after the completion of the sale, and not as a part of it. *Held*, that evidence was admissible to show defendant's declarations made to plaintiff prior to the sale as to the value of the land conveyed by him, and of his intention to execute such a warranty.—*Whitehall v. Conner*, 55 Ind. 354.

[e] (Sup. 1882)

In part consideration of a lease, the lessor made a parol contemporaneous agreement not to engage in a rival business in the same city. *Held*, that parol evidence of the agreement was admissible.—*Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747.

[f] (App. 1906)

Where an oral promise was made and accepted that if the vendee would give the vendor \$1,800 for land for which the vendee was willing to give \$1,200, and no more, the vendor would bequeath to the vendee the difference, with interest, and the agreement was subsequently reduced to writing, without the verbal promise to bequeath being incorporated therein, and the only consideration for the promise to bequeath was the execution of notes for the price of the land for \$1,800, instead of \$1,200, it could not be proved as a transaction independent of the written agreement.—*Gemmer v. Hunter*, 74 N. E. 586, 35 Ind. App. 501.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2048-2051.

#### § 444. — Condition precedent to obligation under writing.

[a] (Sup. 1838)

A contract under seal to deliver hogs at a certain price cannot be varied by proof of a contemporaneous parol agreement of the buyer to give up the contract if the seller is unable to secure the hogs at that price.—*Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49.

[b] (Sup. 1856)

At the time of making a note, the payee executed a written instrument setting forth that he had sold defendant certain corporation shares, and, if the company should reduce the amount of the old stock, he was to account to the maker for the amount so reduced. In an action on the note, plaintiff offered to prove by parol that the reduction was to take place on a particular consideration, and that none had been made for such consideration. *Held*, that the evidence was inadmissible.—*Ferris v. Ludlow*, 7 Ind. 517.

[c] (Sup. 1861)

Where a written agreement for the sale of land does not bind the grantor to convey until the whole purchase money has been paid and tendered the legal effect of the instrument in this respect cannot be controlled by an alleged verbal agreement to deposit the deed in the hands of a third party until payment.—*Moore v. Pendleton*, 16 Ind. 481.

[d] (Sup. 1870)

Where a note was signed by A. and B., the latter styling himself "collateral security," a subsequent parol agreement between the payee and B. that B. should pay the note only in case it could not be made from A. cannot be shown in defense to an action by the payee against B., where there is no consideration shown for

the parol agreement.—*Brush v. Raney*, 34 Ind. 416.

[e] (Sup. 1870)

Parol evidence is not admissible to show that a voluntary conveyance, though made without consideration and absolute on its face, was made in trust to the grantee, and that he was to reconvey at a future time on the happening of a certain contingency.—*Fouty v. Fouty*, 34 Ind. 433.

[f] (Sup. 1871)

The drawee of an order to pay certain claims out of the proceeds of a note in his hands belonging to the drawer accepted the same in writing "so soon as the maker pays the note." *Held*, that he would not be permitted to set up in defense that the drawer of the order was indebted to him in a sum less than the face of the note, to secure which the note had been assigned to him, and that it was understood by all parties when the acceptance was made that such indebtedness should be first paid out of the proceeds of the note, and that the maker of the note had not paid thereon more than the amount of such indebtedness, and was insolvent.—*Miller v. Goldthwait*, 37 Ind. 217.

[g] (Sup. 1873)

The liability of the assignor of a promissory note, where the indorsement is either in full or in blank, to pay the note if, after due diligence, it cannot be collected from the maker, cannot be varied or qualified by a parol agreement simultaneous with the indorsement.—*Holton v. McCormick*, 45 Ind. 411.

[h] (Sup. 1875)

An agreement between a judgment creditor and another person that, if the latter will become replevin bail, he shall be released from any liability on payment of one-half the judgment, is not binding on the judgment creditor, for the reason that the terms of the recognition of the replevin bail cannot be varied by a contemporaneous oral agreement.—*Smith v. Tyler*, 51 Ind. 512.

[i] (Sup. 1876)

It cannot be shown by parol, in defense to an action on a note, that if the payee should not, by performance of certain labor, pay a certain debt which he owed the maker and a certain third person, and which he had promised to pay, the consideration for which it was given, horses then sold by the payee to the maker should be regarded as paid for, and should be applied as a credit on the debt of the payee, and that no part of the labor had been performed.—*Parks v. Zeek*, 53 Ind. 221.

[j] (Sup. 1889)

It cannot be shown as a defense that when the note sued on was delivered the payee agreed to procure an additional signature, but has not done so; nor that at the time of the execution of the note (given by a member of a church society for moneys advanced to pay a church

debt) the payee agreed to collect subscriptions from other members and apply them on the note, but has not done so.—*Clanin v. Esterly Harvesting Mach. Co.*, 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863.

[k] (Sup. 1889)

Plaintiff corporation was organized for the purpose of acquiring and operating a cotton mill, a proposition by another corporation to sell its cotton mill and plant being at the time under consideration by the incorporators of plaintiff, and defendant subscribed to plaintiff's capital stock on condition that the subscription was not to be payable until the contract with the other corporation had been ratified by a majority of the stockholders. *Held*, in an action to enforce defendant's subscription, where he defended on the ground that the terms of contract between the two corporations had been changed, that it was competent for plaintiff to show that no contract had been consummated at the time of defendant's subscription, and that it was apparent that the contract referred to was only contemplated.—*Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298.

[l] (Sup. 1892)

A father made a contract to convey land to his son, and provided that the price should be paid to his "heirs" after his death. *Held* that, in a suit by his other children after his death to declare and enforce a vendor's lien, the son could not set up a contemporaneous parol agreement with his father whereby an accounting was to be had among the children and allowance made for advancements.—*Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898.

[m] (App. 1910)

The rule that a written contract as between the parties may be delivered to take effect only on the performance of a parol condition does not apply to a buyer purchasing a machine from an agent under a written contract evidencing an absolute sale, with a parol condition that the sale should be conditioned on the buyer's satisfaction with the machine after a trial, which the salesman had no authority to make.—*McCaskey Register Co. v. Curfman*, 90 N. E. 323.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1929-1944, 2049.

See, also, note, 128 Am. St. Rep. 600.

§ 445. Subsequent agreements.

As to mode of performance or enforcement, see post, § 465.

[a] (Sup. 1861)

Parol evidence is admissible to show that, subsequent to the time of reducing a contract to writing, the parties, by a new agreement on sufficient consideration, added some new stipulation or varied the terms of the written contract.—*Rigsbee v. Bowler*, 17 Ind. 167.

## [b] (Sup. 1880)

A written contract for the sale of goods at "cost price or current rates" is not varied by parol evidence of the prices agreed on by the parties in invoicing the goods.—*Sharp v. Radebaugh*, 70 Ind. 547.

## [c] (Sup. 1891)

The rule that parol negotiations are conclusively presumed to be merged in the written contract cannot apply to parol contracts made after the execution of the written contract, as a written contract may be changed or rescinded by parol at any time after its execution.—*Tolledo, S. L. & K. C. R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773.

## [d] (Sup. 1894)

The rule that a written contract cannot be varied by parol does not exclude oral agreements made and performed subsequent to the execution of the written contract or prior or contemporaneous agreements fully executed after the making of the written contract which have thereby become subsequent agreements.—*Collins v. Stanfield*, 38 N. E. 1091, 139 Ind. 184.

## [e] (Sup. 1905)

A salesman, sued by his employer on a written contract under seal which made the salesman responsible for collection of accounts for sales made by him, may prove a subsequent oral contract relieving him from that liability; he, by virtue of performance of the subsequent agreement, having been placed in a position where he could not collect the accounts, the title thereto having been vested in the employer, so that the contract under seal should be treated as equitably discharged.—*American Food Co. v. Halstead*, 76 N. E. 251, 165 Ind. 633.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2052-2065;  
43 CENT. DIG. Sales, § 721.

See, also, 17 Cyc. pp. 734-736.

## (D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

Contracts within statute of frauds, see FRAUDS, STATUTE OF, § 158.

Expert testimony, see post, § 518.

Extrinsic evidence to aid construction of statute, see STATUTES, § 221.

Extrinsic evidence to aid construction of will, see WILLS, §§ 485-490.

Parol evidence of custom to explain contract, see CRIMINAL LAW, § 15.

To aid in construction of charitable gift or devise, see CHARITIES, § 32.

## § 448. Grounds for admission of extrinsic evidence.

## [a] (Sup. 1862)

To elucidate an ambiguity in a written contract, evidence of conversations and cir-

cumstances attending the negotiation of the agreement is admissible.—*Cross v. Pearson*, 17 Ind. 612.

## [b] (Sup. 1877)

A writing, dated and signed, reciting that a certain amount had been received in levee orders at 80 cents on the dollar, is subject to explanation by parol.—*Pauley v. Weisart*, 59 Ind. 241.

## [c] (Sup. 1894)

Where there is no equivocation in the language of the description in a deed and there are present objects, monuments, lines, streets or places answering the call in the deed, no ambiguity exists, and the rule applies that the effect of a written instrument cannot be varied by extrinsic evidence.—*Reid v. Klein*, 37 N. E. 967, 138 Ind. 484.

When anything exists to meet the call in a deed conveying land, an ambiguity cannot be present so as to admit extrinsic evidence.—Id.

## [d] (App. 1899)

In an action on a claim against a decedent's estate, the testimony of a witness explanatory of the letter written by the firm of which plaintiff was a member to decedent was properly stricken out, the letter being unambiguous and the evidence stricken not being explanatory thereof, but a mere statement of the witness' conclusion that the contents of the letter did not concern the action.—*Shirts v. Rooker*, 52 N. E. 629, 21 Ind. App. 420.

## [e] (Sup. 1906)

The plain meaning of the language used in a written contract cannot be varied by parol, but oral evidence is admissible to clear up indefiniteness or ambiguity.—*Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582.

Where prior letters are relied on to explain ambiguities in a written offer, the writing containing the offer must in some way refer to them.—Id.

Where a writing does not contain a direct or express reference to other writings explanatory thereof, the other writings may be admitted to explain an ambiguous offer contained therein if in view of the facts and by comparison they are connected therewith, and a general reference may be presumed to relate to the only writing produced by either party.—Id.

## [f] (App. 1910)

Though a written contract cannot be varied or contradicted by parol evidence, such evidence is admissible to explain obscurities and ambiguities.—*Ames v. Ames*, 91 N. E. 509.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2066-2082,  
2084.

See, also, 17 Cyc. p. 662.

### § 449. Nature of ambiguity or uncertainty in instrument.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2066-2082, 2084-2101.

See, also, 17 Cyc. pp. 675-682.

### § 450. — In general.

[a] (Sup. 1857)

Where the language of a mortgage offered to show title in the claimants as against execution creditors does not conclusively import a joint indebtedness, which might be inferred from some of the facts alleged, evidence of such facts is admissible to aid in the interpretation of the language.—*Ileaston v. Squires*, 9 Ind. 27.

[b] (Sup. 1858)

Where it is manifest that the parties either disregarded the written agreement, or intended and understood it to mean something different from what the language, somewhat obscure, would imply, evidence as to the value of the service performed is admissible in an action for the price, as are mutual acts, some at the time of signing, in reference to the fulfillment, to show the understanding of the parties.—*Bates v. Dehaven*, 10 Ind. 319.

[c] (Sup. 1866)

In an action on a hotel lease, including all furniture necessary to run the same, parol evidence of the acts of the parties in reference to fulfillment of the contract after it was made is admissible, as showing their intention as to the construction of the language used.—*Bell's Adm'x v. Golding*, 27 Ind. 173.

[d] (Sup. 1882)

An instrument, "This will certify that I do give to J. \$100, the money to be paid as soon as my financial condition will allow; and, if I do not live to pay it, I wish it paid out of my estate,"—is not so ambiguous as to depend on extrinsic facts for construction.—*Johnston v. Griest*, 85 Ind. 503.

[e] (Sup. 1895)

A receiver obtained an order to make claims held by certain persons "preferred claims upon said claimants releasing mortgages to secure same, and are made preferred claims next to those who may loan receiver money to carry on the business," and further authorizing him "to borrow \$10,000 for that purpose, said sum to be a prior claim upon the articles manufactured," and the proceeds thereof. *Held*, that such order was not so ambiguous as to justify the admission of previous or contemporaneous oral negotiations, stipulations, and understandings of the parties interested to explain it.—*Blythe v. Gibbons*, 141 Ind. 332, 35 N. E. 557.

[f] (App. 1898)

A written application for a policy, providing that insured "does not now and will not practice any pernicious habit that ob-

viously tends to shorten life," is not ambiguous, so as to permit parol evidence that the agent of insurer explained to insured at the time the application was written that said clause included the habit of drinking intoxicating liquors.—*Masons' Union Life Ins. Ass'n v. Brockman*, 20 Ind. App. 206, 50 N. E. 493.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2066-2082, 2084.

See, also, 17 Cyc. p. 675.

### § 451. — Patent ambiguity.

[a] (Sup. 1846)

Parol evidence is inadmissible for the purpose of explaining a patent ambiguity in written contract.—*Richmond Trading & Mfg. Co. v. Farquar*, 8 Blackf. 89.

[b] (Sup. 1858)

An official entry on a record, void for uncertainty, cannot be explained by extrinsic evidence.—*Porter v. Byrne*, 10 Ind. 146, 71 Am. Dec. 305.

[c] (Sup. 1863)

Where the description of property contained in a decree for the enforcement of a mechanic's lien is radically deficient, parol evidence is inadmissible to cure the defect, or to identify it with that claimed by the purchaser under a sheriff's deed.—*Munger v. Green*, 20 Ind. 38.

[d] (Sup. 1874)

In an action for specific performance of a contract to exchange a woolen mill for "six hundred and forty acres of land in Anderson county, Kansas, and one thousand dollars cash," etc., parol evidence was inadmissible to describe the real estate intended, and then to apply such description.—*Baldwin v. Kerlin*, 46 Ind. 426.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2085-2092.

See, also, 17 Cyc. pp. 680-682.

### § 452. — Latent ambiguity.

[a] (Sup. 1826)

A bond conditioned to return certain property taken on a search warrant by the obligor, provided the obligee shall, on a proper and legal trial at law, prove the property to be his, presents such a latent ambiguity as will make parol evidence admissible to show that the parties intended that a pending criminal prosecution should constitute the fair and legal trial referred to in the bond.—*Simpkins v. Oakley*, 1 Blackf. 537.

[b] (Sup. 1859)

A latent ambiguity in a deed may be removed by parol evidence.—*Symmes v. Brown*, 13 Ind. 318.

[c] (Sup. 1877)

A contract to furnish materials for a building provided that the amount of such materi-



als should be determined by mason's measurements. *Held* that, in an action to recover for materials so furnished, evidence as to the nature of such rule of measurements, as applied by plaintiff in the measurement of buildings subsequently erected, was inadmissible.—*Killian v. Eigenmann*, 57 Ind. 480.

[d] (*App.* 1901)

A contract for the sale of a tile factory spoke of only one mill, though there were two on the premises, one of which was outside the factory. The purchasers knew that there were two mills, and were told by the seller that he would not sell the outside mill; and when they came to clean up the seller moved it to one side without objection. *Held* that, as such contract clearly embraced but one mill, the seeming latent ambiguity as to which mill was intended was properly explained by parol evidence that the mill inside was the one intended.—*Thomas v. Troxel*, 59 N. E. 683, 26 Ind. App. 322.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2003-2101.

See, also, 17 Cyc. pp. 676-678.

#### § 454. Meaning of words, phrases, signs, or abbreviations.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2104-2108.

See, also, 17 Cyc. pp. 682-689; note, 122 Am. St. Rep. 545.

#### § 455. — In general.

[a] (*Sup.* 1886)

Parol evidence is admissible to explain abbreviations in description of land in a tax duplicate.—*Barton v. Anderson*, 104 Ind. 578, 4 N. E. 420.

[b] (*App.* 1893)

Where abbreviations are made in making a ditch assessment, they may be explained by parol evidence where the explanations are not inconsistent with the written terms.—*Lake Erie & W. R. Co. v. Bowker*, 36 N. E. 864, 9 Ind. App. 428.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2104.

See, also, 17 Cyc. p. 682.

#### § 456. — Peculiar sense of terms in common use.

[a] (*Sup.* 1861)

It may be proved by a witness residing in the neighborhood, and acquainted with the technical terms used in the construction of railroads, that "waste ground" signified the earth, etc., excavated from the roadbed and placed on the adjoining land.—*Prather v. Ross*, 17 Ind. 495.

[b] (*Sup.* 1878)

In an action based on a contract to erect a building for manufacturing purposes, there

is no error in permitting witnesses to testify to the meaning of the term "engaged in the business of manufacturing," as to whether it required the person so engaging, in order to be engaged, to be the preparer from the raw material of all the parts entering into the complete article manufactured; such testimony being what every person of ordinary information knows of his own general knowledge, and therefore harmless.—*McLaughlin v. Child*, 62 Ind. 412.

[c] (*Sup.* 1882)

Proof that the words "north part of" a lot, as used in a deed, meant the north half of it, is inadmissible, where it is not shown that they have a peculiar or technical meaning.—*Langohr v. Smith*, 81 Ind. 495.

[d] (*Sup.* 1886)

When the construction of a contract containing incomplete and peculiar terms is doubtful, evidence tending to explain the sense in which the parties were in the habit of using the particular words and phrases, or to show the construction given by them to similar contracts, is admissible; but a party cannot testify as to his intention in using them.—*Jaqua v. Witham & Anderson Co.*, 106 Ind. 545, 7 N. E. 314.

[e] (*App.* 1909)

Where defendant wired plaintiff to ship 10 cars of coal, and plaintiff wired in reply: "Wire received; will have prompt attention; shipment in any equipment available"—the latter telegram was a part of the contract, and evidence that the word "car" in the order referred to ordinary sized coal cars, and not to hopper-bottom cars, which plaintiff used for shipping the coal, was inadmissible.—*Fowler Utilities Co. v. Chaffin Coal Co.*, 43 Ind. App. 438, 87 N. E. 689.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2105, 2106.

#### § 457. — Technical, trade, or local terms.

[a] (*Sup.* 1887)

Where words of ordinary signification are found in a contract, it is for the court to give an interpretation to such words as well as to the whole contract. It is only where a word or phrase as used in a particular trade or calling has a meaning peculiar to such trade, and different from the ordinary sense in which it is used, that evidence may be heard to explain the use of the word. Even then such evidence will not be heard to contradict the contract or explain away its obligation.—*Seavey v. Shurick*, 11 N. E. 507, 110 Ind. 494.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2104, 2107, 2108.

See, also, 17 Cyc. p. 685.

### § 458. Relation and application of language to facts in general.

[a] (Sup. 1866)

In an action on a lease of a hotel, and "all the furniture used in running the same," parol evidence is admissible to show what articles were required for use in the management of the hotel, for the purpose of showing the application of the language of the lease to the property affected by it.—*Bell's Adm'r v. Golding*, 27 Ind. 173.

[b] (Sup. 1899)

Parol evidence may be admitted to show the position, situation, and surroundings of the parties at the time writings alleged to constitute a trust are executed, in order that they may be construed in the light of the circumstances of the case.—*Ransdel v. Moore*, 53 N. E. 767, 153 Ind. 303, 53 L. R. A. 753.

[c] (Sup. 1906)

In an action based on a written contract, parol evidence is admissible of prior and concurrent conversations explaining the circumstances, showing the real consideration, the identity of the subject-matter referred to, and to give effect to the contract.—*Ditchey v. Lee*, 167 Ind. 267, 78 N. E. 972.

[d] (App. 1910)

Parol evidence is admissible to apply the terms of a contract to the subject-matter.—*Ames v. Ames*, 91 N. E. 500.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2083.

### § 459. Identification of parties.

[a] (Sup. 1880)

If the name in which a contract is made imply a corporation *prima facie*, while, in fact, the company assume to be only a partnership, the fact may be shown.—*Hubbard v. Chappel*, 14 Ind. 601.

[b] (Sup. 1874)

Where a letter is written, in the name of partners, by one employed to act for them, it is competent for them to show by whom and under what circumstances it was written.—*Lingenfelter v. Simon*, 49 Ind. 82.

[c] (Sup. 1878)

In an action a decedent's estate to enforce a note alleged to have been given by decedent and a third person as partners, it was competent for the estate to show that, while such note was executed under the firm name by such third person, he and the decedent had theretofore had a full and complete settlement and adjustment of the partnership, as tending to show that the note was not in reality a partnership note.—*Floyd v. Miller*, 61 Ind. 224.

[d] (App. 1894)

A note signed, "Nat. F. & I. Co., M. S. President," is ambiguous, and extrinsic evidence is admissible, under proper averments,

to show that it is the note of M. S.—*Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536.

[e] (App. 1899)

When a note purports to be the personal obligation of the maker, except that it is signed by him as president of a company, parol evidence is inadmissible to show that it was intended by the parties to make the obligation that of the company.—*Prescott v. Hixon*, 53 N. E. 391, 22 Ind. App. 139, 72 Am. St. Rep. 291.

[f] (App. 1899)

Evidence, by the agent negotiating a loan, as to who employed him, from whom he got the money, and what he did with it, introduced to prove that the real signer of a note was other than the person whose name appears thereon, was not incompetent, as varying a written instrument by parol.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

[g] (Sup. 1900)

A note was signed, "R. J. B., President," and above the note, on the paper on which the note was written, appeared the name of a corporation. *Held*, that the presumption that the note was the individual obligation of the signer was not conclusive, but it could be shown by parol that it was the contract of the corporation.—*Second Nat. Bank v. Midland Steel Co.*, 58 N. E. 833; 155 Ind. 581, 52 L. R. A. 307.

[h] (Sup. 1904)

Parol evidence is admissible to show that a contract executed by one who affixes descriptive words to his name is not a contract of the person signing it, but that of another.—*Taylor v. Angel*, 71 N. E. 49, 162 Ind. 670.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 1906-1910, 2100-2114.

See, also, 17 Cyc. p. 711.

### § 460. Identification of subject-matter.

Showing intent of parties as to subject-matter, see post, § 461.

[a] Where a description of land is imperfect, but not void for uncertainty, the defect will be cured by parol evidence to identify the premises.—(Sup. 1837) *Harris v. Doe ex dem. Barnett*, 4 Blackf. 369; (1883) *Scheible v. Slagle*, 89 Ind. 323.

[b] (Sup. 1854)

Where a line is left uncertain in the description of land, parol evidence is admissible to show the line contemplated by the parties.—*Hunt v. Francis*, 5 Ind. 302.

[c] (Sup. 1858)

Parol evidence is admissible to give effect to a written instrument by applying it to the subject-matter, by proving the circumstances under which it was made, whenever without the aid of such evidence the application could not

be made in the particular case.—*Evansville, I. & C. Straight Line Co. v. Shearer*, 10 Ind. 244.

[d] (Sup. 1866)

In an action on a lease of a hotel and "all furniture used in running the same," parol evidence is admissible to identify the property, to show what was intended to be included by the term "furniture used in running the same."—*Bell's Adm'x v. Golding*, 27 Ind. 173.

Every material fact which would aid the court in applying a contract of sale of furniture in a hotel and in identifying property which was the subject of it, and which would tend to place the court in the situation of the parties, was admissible in evidence in an action there-in.—*Id.*

[e] (Sup. 1867)

An ambiguity in the description of the premises demised in a lease required to be in writing under the statute of frauds may be explained and the premises identified by parol evidence.—*Guy v. Barnes*, 29 Ind. 103.

[f] (Sup. 1868)

On an issue as to the location of a boundary fixed by commissioners of partition, parol evidence is admissible to explain an ambiguity arising from their omission to describe the monument at one corner, and from an erroneous statement of one distance.—*Hedge v. Sims*, 29 Ind. 574.

[g] (Sup. 1871)

Plaintiff filed a claim against an estate on the following contract: "Peter Longlois v. Antony Hedson. Partition. I have a contingent fee in this case, to be paid in land by said Longlois in a recovery against Hedson. Now, if that fee amounts to 100 acres of land, [plaintiff], for his services in a compromise between said parties, is to have 25 acres of it; but, if it only amounts to 75 acres, then he is to have 10 acres, or its equivalent in money,"—signed by decedent. The compromise had been already effected, and the services performed by plaintiff, but it had been represented to him by decedent that the land amounted to 300 acres, and of that number decedent was to receive 75 acres, and he hoped to change the compromise so as to receive 100 acres. In this he failed, and actually received one-fourth of 288 acres. *Held*, that parol evidence was admissible to give effect to the instrument, by applying it to the subject-matter and proving the circumstances under which it was made.—*Mace v. Jackson*, 38 Ind. 162.

[h] Parol evidence is admissible to identify chattels embraced in a mortgage, but not particularly described, and to separate them from other property of a similar kind.—(Sup. 1873) *Duke v. Strickland*, 43 Ind. 494; (1878) *Holmes v. Hinkle*, 63 Ind. 518; (1879) *Burns v. Harris*, 66 Ind. 536.

[i] (Sup. 1874)

In a suit for specific performance of a contract to exchange a woolen mill for 640

acres of land in Anderson county, Kan., parol evidence is not admissible to show what lands were intended, as there is no description of the land or mode agreed on by which they should be identified, since to allow such evidence would be to make a different contract from that executed by the parties.—*Baldwin v. Kerlin*, 46 Ind. 426.

[j] (Sup. 1876)

A deed to a canal and its towpaths, margins, basins, appurtenances, etc., without describing them by metes and bounds, may be explained by parol evidence of what constituted such appurtenant properties.—*Indiana Cent. Canal Co. v. State*, 53 Ind. 575.

[k] (Sup. 1881)

While parol evidence is admissible to aid in the identification of property covered by a chattel mortgage, yet it cannot supply as against a bona fide purchaser of the mortgaged property a fatal insufficiency in such description.—*Tindall v. Wasson*, 74 Ind. 495.

[l] (Sup. 1881)

Parol evidence is admissible to apply a guaranty contract to its subject-matter.—*Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279.

[m] (Sup. 1881)

Where the description of land contained in a mortgage furnished no means of identification, and it was impossible to determine therefrom where in the section specified the 27 acres attempted to be conveyed were located, and in what shape they were, such description could not be aided by parol proof.—*Craven v. Butterfield*, 80 Ind. 503.

[n] (Sup. 1883)

It is a familiar rule that parol evidence is competent for the purpose of applying a contract to its subject-matter, and within this rule fall cases where a mill and appurtenances are conveyed by a general description.—*Scheible v. Slagle*, 80 Ind. 323.

[o] (Sup. 1884)

A mortgage was executed on land, excepting "twenty acres from the northeast corner of said above-described tract of land, formerly deeded to William Davis and Emeline M. Davis." *Held* that, in an action to recover the said 20 acres, parol evidence was admissible to show that the 20 acres intended to be excepted was not in the northeast corner but off the south end.—*Lanman v. Crooker*, 97 Ind. 163, 49 Am. Rep. 437.

[p] (Sup. 1884)

Parol evidence is admissible to give effect to a written instrument by applying it to the subject-matter by proving the circumstances under which it was made, and, where there are equivocal expressions used in a written instrument, parol evidence is admissible to show in what sense they were used by the parties.—*Martindale v. Parsons*, 98 Ind. 174.

[q] (Supp. 1885)

To enable the court to enforce a mortgage on particular land under the averment of extrinsic facts, the extrinsic matter must not contradict the mortgage or produce a description of other property than that described therein, but it must merely explain the description in the mortgage and point out the property by the means of identification indicated in the mortgage.—Hannon v. Hilliard, 101 Ind. 310.

[r] (Supp. 1890)

In an action on a contract for the sale of "Cooley Hay Stackers," parol evidence is admissible to identify the kind of articles contracted for, and thus apply the contract to its subject-matter.—Clark v. Crawfordville Coffin Co., 125 Ind. 277, 25 N. E. 288.

[s] (App. 1896)

In an action on an insurance policy, parol evidence is admissible to identify the property insured.—Etna Ins. Co. v. Strout, 44 N. E. 934, 16 Ind. App. 100.

[t] (App. 1896)

The fact that a written contract of agency states that it contains all the contract between the parties, and that no verbal agreement shall be binding, will not prevent the agent from proving by parol that a transaction between them was not within the contract.—Springfield Fertilizer Co. v. Tompkins, 45 N. E. 615, 16 Ind. App. 403.

[u] (Supp. 1898)

Parol evidence is admissible to aid in identifying the property described in a chattel mortgage.—Baldwin v. Boyce, 51 N. E. 334, 152 Ind. 46.

[v] (App. 1906)

Parol evidence is admissible to complete the description, "the land north and west of the graveyard," in a contract of sale.—McFarland v. Stansifer, 76 N. E. 124, 36 Ind. App. 486.

[w] (Supp. 1906)

It is always competent, except to the extent that the statute of frauds enters into the question, to apply words of general description in a contract to the subject-matter by evidence of the situation and circumstances of the parties.—Warner v. Marshall, 75 N. E. 582, 106 Ind. 88.

Parol evidence is admissible to apply the description in the deed to the subject-matter.—Id.

Where decedent and plaintiff carried on a correspondence beginning in March and culminating in an offer and acceptance in August, the court may look to the prior correspondence to determine the subject-matter of the offer.—Id.

Where the reference to prior letters contained in a letter embodying an offer is general or indefinite, parol evidence is admissible to identify the prior letters.—Id.

[x] (Supp. 1906)

Parol evidence is admissible to apply a written contract to its subject-matter.—Howard v. Adkins, 167 Ind. 184, 78 N. E. 065.

[y] (App. 1908)

Parol evidence is admissible to identify property covered by a chattel mortgage indefinitely describing it.—Rudisell v. Jennings, 77 N. E. 959, 78 N. E. 263, 38 Ind. App. 403.

[z] (App. 1908)

Two city lots numbered 33 and 34 abutted upon an alley extending between them their entire length; lot 33 being north of the other. Lot 34 was conveyed to one person, and was described "as lot numbered 34 as shown on the original plat of the town of Lowell." The width of the lot on the plat was stated to be 66 feet, which did not include any of the alley. Several other lots including lot 33 on the south were conveyed in two tracts to other persons; the tracts being described in the deeds as bounded on the south by the south line of lot 33. Held that, as a lot adjoining a public alley extends to the middle line of the alley, that line was the south line of lot 33, and the north line of lot 34, and the descriptions were sufficiently exact to designate the land conveyed without resort to parol evidence.—Bergan v. Co-Operative Ice & Fuel Co., 41 Ind. App. 647, 84 N. E. 833.

In the absence of fraud or mistake, oral evidence is inadmissible to show that the grantor of a lot did not include in his deed to such lot the land to the middle of an adjoining alley.—Id.

[zz] (App. 1910)

Where the description given in a written instrument is consistent, but incomplete, and its completion does not require an alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property.—Ames v. Ames, 91 N. E. 509.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2115-2128;

9 CENT. DIG. Chat. Mtg. §§ 102, 109.

See, also, 17 Cyc. p. 724.

#### § 461. Showing intent of parties as to subject-matter.

Identification of subject-matter, see ante, § 460.

[a] (Supp. 1838)

The intention of the parties must govern in the construction of covenants, where that intention can be ascertained from the instrument itself; and, where there is no ambiguity, parol evidence is inadmissible to explain it.—Foley v. Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.

[b] (Supp. 1858)

Parol evidence of the circumstances surrounding a contract in writing, as well as of the mutual acts of the parties in its fulfillment, is admissible to explain the meaning of the parties in the use of language otherwise obscure.—Bates v. Dehaven, 10 Ind. 319.

[c] (*Sup.* 1873)

The force and effect of a written instrument cannot be explained away or destroyed by evidence as to what it was called.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

[d] (*Sup.* 1881)

In an action to reform a mortgage, the preliminary verbal contract is admissible in evidence to show the intention of the parties.—*Jones v. Sweet*, 77 Ind. 187.

[e] (*Sup.* 1883)

Where a mill site was conveyed, parol evidence was admissible, in an action for the purchase money wherein the defense was made that defendant had been evicted from maintaining the original height of the dam, to show at what height the dam was being maintained when the deed was made, and that the right to so maintain it was what the plaintiff warranted by his deed.—*Scheible v. Slagle*, 89 Ind. 323.

[f] (*Sup.* 1888)

Where the intention of the parties in respect to the width of a right of way granted to a railroad does not appear on the face of the writing, it is competent to remove the ambiguity by admitting parol evidence of their contemporaneous acts and negotiations, so as to apply the contract to the subject-matter and ascertain their intention as regards the particular right of way mentioned.—*Indianapolis & V. R. Co. v. Reynolds*, 19 N. E. 141, 116 Ind. 356.

[g] (*Sup.* 1891)

Where a complaint proceeded on the theory that the parties made a parol contract for the lease of lands and afterwards undertook to reduce their agreement to writing, but failed to sufficiently describe the land, the court holding the complaint good properly permitted witnesses to state what the parties to the lease said to each other prior to the execution of the written agreement which led to its execution.—*Weaver v. Shipley*, 27 N. E. 146, 127 Ind. 526.

[h] (*Sup.* 1905)

The language of a written contract cannot be explained, or its construction affected, by evidence of the secret intention of one of the parties differing from that fairly expressed by the language used and by his acts and declarations at the time.—*Warner v. Marshall*, 75 N. E. 582, 106 Ind. 88.

[i] (*App.* 1906)

Where a contract provided that goods were to be shipped currently between certain dates as might be specified and ordered by plaintiff as its requirements might demand them, testimony of one of plaintiff's officers that at the time of making the contract he had a conversation with defendant's agent as to the time when plaintiff's factory would be completed so that plaintiff could use the goods, and told the agent that it would be impossible to use the goods before that time, and that plaintiff would not want any of them shipped until a certain date, at the earliest, was admissible to explain the

meaning of the contract.—*Semon, Bache & Co. v. Coppes, Zook & Mutschler Co.*, 74 N. E. 41, 35 Ind. App. 351, 111 Am. St. Rep. 171.

[j] (*App.* 1907)

Where, in a deed, two descriptions intended to apply to the same land, were not reconcilable, evidence of extrinsic facts was admissible to show intention of the parties.—*Hornet v. Dumbeck*, 39 Ind. App. 482, 78 N. E. 691.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2129-2133;  
14 CENT. DIG. Covenants, § 219.

See, also, 17 Cyc. pp. 670, 671, 724-734.

#### § 462. Showing purpose of writing.

[a] (*Sup.* 1871)

Where defendant, a railroad company, had set up that a draft on one officer of the company, accepted by another officer and delivered to plaintiff, was not delivered or received as payment of an account claimed due by plaintiff, parol evidence should be admitted concerning the circumstances surrounding the acceptance and delivery.—*Chicago, C. & L. R. Co. v. West*, 37 Ind. 211.

[b] (*Sup.* 1872)

Where one who is not a party to a note places his name on the back thereof before or concurrently with the indorsement by the payee, his actual relation to the maker and payee, as between themselves, may be shown by parol evidence, though as to the holder he is liable as indorser.—*Houston v. Bruner*, 39 Ind. 376.

[c] (*Sup.* 1877)

Parol evidence is not admissible to determine the question whether a proposal in writing from plaintiff to defendant, and a telegram from defendant to plaintiff, constitute a contract.—*Robinson Mach. Works v. Chandler*, 56 Ind. 575.

[d] (*Sup.* 1878)

It is competent to show by parol evidence that the indorsement of a note was intended not to transfer the note absolutely, but as collateral.—*Hazzard v. Duke*, 64 Ind. 220.

[e] (*Sup.* 1880)

An assignment of stock in a building association, though absolute in terms, and required by the rules of the association to be made so, may still be shown to have been for the purpose of collateral security only.—*Ginz v. Stumph*, 73 Ind. 200.

[f] (*Sup.* 1881)

While parol evidence is inadmissible to vary the contract of indorsement of a note regularly following that of the payee, such evidence is admissible to show that the indorsement was for the purpose of creating a trust, or for collection only, or that the instrument was indorsed as collateral security, or delivered as an escrow, or indorsed to an agent for a particular purpose.—*Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113.

## [g] (Sup. 1884)

Where a policy of insurance was assigned as security for an indebtedness and the holder after the death of the assignor assigned it to his administrator for collection, it was competent for her to show by the attorney who made the assignment what was the purpose of such assignment, and what was the understanding as to whether the assignment was absolute, or only for collection, such evidence being admitted to show what was not apparent on the face of the assignment; that is, as to the object and intention of the parties to its execution.—Hight v. Taylor, 97 Ind. 392.

## [h] (Sup. 1886)

Where a receipt given for personal property on its face did not show whether the transaction constituted a contract of sale or a bailment, resort may properly be had to extrinsic evidence.—Lyon v. Lenon, 7 N. E. 311, 106 Ind. 567.

## [i] (Sup. 1886)

Parol evidence is admissible to prove that an indorsement of a note by the payee was made at the request of plaintiff, to show that it had been paid.—Spencer v. Sloan, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35.

## [j] (App. 1895)

Where a writing contains no information as to whether it was intended as payment of another obligation, it is proper to admit parol evidence that such was the intention of the parties.—Keck v. State ex rel. National Cash Register Co., 39 N. E. 899, 12 Ind. App. 119.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2134–2139.

## (E) SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION.

## § 465. Agreement as to performance or enforcement.

## [a] (Sup. 1881)

A note absolute and unconditional in its terms cannot be varied by proof of a contemporaneous verbal agreement that only the interest and such parts of the principal were to be paid as were necessary to support the payee and his wife for life, and that it is not yet due, although purporting to be on its face.—Foglesong v. Wickard, 75 Ind. 253.

## [b] (App. 1910)

Evidence that, after the execution of a written contract for the sale of staves, it was orally agreed that the staves should be inspected at the point of shipment was admissible as showing a superadded term not inconsistent with the written contract, and was not objectionable under the rule that all oral negotiations are merged in the writing.—Gandy v. Seymour Slack Stave Co., 90 N. E. 915.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1784, 1899, 2044, 2065.

## § 466. Release or other discharge without performance.

## [a] (Sup. 1834)

Evidence of a subsequent parol agreement is inadmissible to rescind a contract under seal.—Sinard v. Patterson, 3 Blackf. 353.

## [b] (Sup. 1851)

That a contract is in writing does not prevent the parties afterwards, and before a breach, from dissolving it, waiving it, or qualifying it by a new parol contract.—Rhodes v. Thomas, 2 Ind. 638.

## [c] (Sup. 1896)

An executed parol agreement to accept the assignment of a judgment in payment of a note may be proven even as against the note.—First Nat. Bank of Indianapolis v. New, 45 N. E. 597, 146 Ind. 411.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2145; 7 CENT. DIG. BILLS & N. § 1799.

See, also, 17 Cyc. p. 691.

## § 467. Estoppel or waiver.

## [a] (Sup. 1882)

Parol evidence is admissible to show that the indorser of a note waived suit against the maker.—Schmied v. Frank, 86 Ind. 250.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 1858, 2146.

See, also, 17 Cyc. p. 692.

## § 468. Performance.

## [a] (Sup. 1871)

In an action on a subscription to aid in constructing a railroad, defendant answered that when the instrument was executed it was agreed that if the railroad was located through his farm he should have the choice of paying the subscription or giving a right of way to the company, and that he had given such right of way, which had been accepted by the company. Held, that the answer did not violate the rule excluding parol agreements made contemporaneously with a written contract.—Evansville, T. H. & C. R. Co. v. Wright, 38 Ind. 64.

## [b] (Sup. 1880)

Plaintiff leased a machine at a monthly rental; the lease providing that she might buy the machine at any time, and have the total rentals paid applied on the purchase price. Held, that in replevin for the machine against one who obtained possession for the lessor, plaintiff may show that she purchased the machine of an agent, who agreed that the price might be paid by boarding him, and that price was fully paid in that manner.—Isbell v. Brinkman, 70 Ind. 118.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[c] (*Sup.* 1887)

In an action on a note, the answer alleged that prior to its execution the plaintiff had instituted bastardy proceedings against defendant, and that the note was given as security that defendant would perform his promise of marrying plaintiff on her dismissing the bastardy proceedings; that defendant had fulfilled his promise, and had married plaintiff, which under the terms of the agreement was to be accepted as a complete satisfaction of the note. *Held* to constitute a good defense; the effect of the averments and proof thereunder not being to vary, contradict, or add to the note, but to show that according to the terms of the agreement the note had been satisfied.—*Tucker v. Tucker*, 113 Ind. 272, 13 N. E. 710.

In such a case the testimony of the agent of plaintiff who negotiated the settlement with defendant is admissible, to show that the agreement which subsequently resulted in the execution of the note was not only that defendant would marry plaintiff and take care of her, but also that he would treat her as a husband should, which had been violated by the inhuman treatment of defendant, even though such testimony tended also to prove a settlement made by defendant and plaintiff's agent before the note was executed; it being proposed, also, to show that plaintiff had accepted the note in satisfaction of the settlement previously made.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2147.

See, also, 17 Cyc. p. 691.

#### § 469. Payment.

[a] (*Sup.* 1835)

Parol evidence is admissible to show payment of a judgment.—*Morrison v. King*, 4 Blackf. 125.

[b] (*Sup.* 1873)

Payment of an obligation under a writing may be shown by parol.—*Ketcham v. Hill*, 42 Ind. 64.

[c] (*Sup.* 1831)

A party purchased mortgage property of the mortgagor, agreeing to assume the mortgage, which he afterwards claimed to have satisfied, but which was not discharged of record. Wishing to raise money on the property, and to procure a release of the mortgage, he made a note to the mortgagee for the amount of a balance alleged by him to be due on the mortgage note, on the agreement that the note so given was to be surrendered if the mortgage note had been in fact paid. *Held* that, in suit by the mortgagee, on such note, evidence tending to prove that the mortgage note had been fully paid when the note sued on was given was admissible.—*Smith v. Boruff*, 75 Ind. 412.

[d] (*App.* 1899)

Where, under a plea of payment, certain checks were introduced in evidence which purported to be in full payment for certain serv-

es therein named, testimony tending to contradict the terms of such checks was properly excluded.—*Shirts v. Rooker*, 52 N. E. 629, 21 Ind. App. 420.

[e] (*App.* 1909)

Where defendant, claiming an interest in land as lessee under an oil and gas lease which plaintiff claimed was forfeited for nonpayment of rent, alleged that its assignor had made the payments before defendant procured the lease, evidence was admissible to show that the lease in question was but a substitution for a prior one between plaintiff and defendant's assignor, and that, when the later lease was made, the assignor was paying rent under the former one, and it was agreed between plaintiff and the assignor that the payments should continue under the later lease, and that the payments in question were made on the prior lease and not on the later one.—*Erie Crawford Oil Co. v. Jones*, 43 Ind. App. 187, 86 N. E. 1027.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2148.

See, also, 17 Cyc. p. 691.

### XII. OPINION EVIDENCE.

Fees of expert witnesses, see WITNESSES, § 28. Form, requisites, and sufficiency of instructions as to weight and effect of opinion evidence, see TRIAL, § 235.

Impeachment of testimony by evidence of opinion expressed by witness, see WITNESSES, § 379.

In criminal prosecutions, see CRIMINAL LAW, §§ 448-491.

Instructions as to testimony of experts, see CRIMINAL LAW, § 757.

On proceedings for discovery, see DISCOVERY, § 41.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, § 1048.

Sufficiency and scope of objections to opinion evidence, see TRIAL, § 84.

#### (A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

Effect, see post, § 568.

Right to impeach witnesses in reference to conclusions and matters of opinion, see WITNESSES, § 384.

Sufficiency and scope of objections to admission of opinion evidence, see TRIAL, § 84.

#### § 470. Grounds for admission.

[a] (*Sup.* 1837)

The rule which allows the opinions of non-expert witnesses on the issue of the sanity of a testator in a suit to contest a will is a rule of necessity, and rests upon the proposition that there may be something about the looks, deportment, etc., of a person which may contribute to the conclusion that he is of unsound mind,

which cannot be described in words by the witness.—*Cline v. Lindsey*, 11 N. E. 441, 110 Ind. 337.

[b] (App. 1897)

Where the facts have been fully placed before the jury, and they are such that the jurors can draw their own conclusions, opinion evidence based on them is incompetent.—*Elkhart & W. R. Co. v. Waldorf*, 46 N. E. 88, 17 Ind. App. 29.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2220.

See, also, 17 Cyc. pp. 25–62.

§ 471. Conclusions and matters of opinion or facts.

Expert testimony, see post, § 505.

[a] (Sup. 1859)

Where plaintiff alleged that a release of damages due him by the railroad company for the location of its road on his land was obtained by fraudulent representations in regard to the location of the road, the mere opinion of witnesses in regard to what they believed the location of the road would be previous to the execution of the release was not admissible.—*Ohio & M. R. Co. v. Bath*, 11 Ind. 538.

[b] (Sup. 1859)

A witness stated his recollection of certain facts, but was not allowed to state his belief and understanding as to their bearing on an alleged agreement.—*Williams v. Dewitt*, 12 Ind. 309.

[c] (Sup. 1877)

On the issue whether property delivered to a partner was delivered upon an agreement that it should be sold by the firm on commission, or whether the partner receiving it took it upon his own individual account, the attorney for the defendant was allowed to ask one of the partners, as a witness in behalf of the firm, to state "what the fact is about yourself at any time authorizing plaintiff, either by word or act, to deliver" such property to the partner, who received it "for shipment on commission or for pay, and to charge either" the partnership or the partner individually therefor. *Held*, that the evidence sought to be elicited by the question was incompetent, as calling for the witness' construction of or conclusion from such words and acts.—*Jackson v. Todd*, 56 Ind. 406.

[d] (Sup. 1881)

In an action on notes given by the sureties of an ex county treasurer for defalcation, questions asked of him as to whether at the time he surrendered possession of his office or afterwards, and prior to the time of the execution of the notes he paid over and accounted for all moneys in his hands as treasurer; whether at the expiration of his office he paid over to his successor all moneys that he had collected as treasurer and had not before that time disbursed as such; whether during the continuance of

his office or afterwards he converted to his own use any of the funds belonging to the county that he had collected for or held as county treasurer; and whether he retained any of the money so collected in his hands after he surrendered possession of his office were properly excluded as calling for general conclusions without stating facts on which such conclusions were based.—*Caldwell v. Board of Com'rs of Fayette County*, 80 Ind. 99.

[e] (Sup. 1884)

A witness may be asked on cross-examination whether she had not held a certain conversation, in which she had expressed an opinion of plaintiff's rights; this being entirely different from asking the witness her opinion.—*Ledford v. Ledford*, 95 Ind. 283.

[f] (Sup. 1887)

A question which asked a witness for a statement of an agreement between parties does not call for a conclusion.—*Vogel v. Harris*, 14 N. E. 385, 112 Ind. 494.

[g] (Sup. 1889)

Evidence by a justice of the peace that testator conducted a case before him "well and shrewdly" is not admissible, as it is merely an opinion.—*Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

[h] (Sup. 1889)

In an action on a note, defendant alleged an agreement with plaintiffs by which he was to receive a discount upon sums paid before the maturity of the note. *Held*, that testimony by defendant that he had made such payments to plaintiffs' agent, who allowed the discount, saying he was so instructed, was improper, where the agent himself had testified as to his authority, as it was simply as to his conclusions.—*Hargrove v. John*, 120 Ind. 285, 22 N. E. 132.

[hh] (Sup. 1889)

A witness may not state whether a creek appeared, from his examination of it, to be sufficient to drain certain land, as the question calls for his opinion only.—*Bohr v. Neuenchwander*, 120 Ind. 449, 22 N. E. 416.

[i] (Sup. 1890)

From the statement of a witness that decedent got off the track four feet before the engine came along, "the suction or force of the train drew him back," and he fell in front of the engine, it was proper to strike out the words quoted, as also another answer, that he got off as far as he could before the train sucked him under, as these were mere expressions of opinion.—*Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. 273.

[ii] (Sup. 1890)

To ask plaintiff what effort, if any, he made to prevent falling, on alighting from a moving train, is not objectionable, as calling for matter of opinion.—*Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. Rep. 330.



## [j] (Sup. 1890)

Where plaintiff claimed to have assigned certain fees to defendant in satisfaction of a judgment, testimony on behalf of defendant that, before the fees were assigned to him, fee bills were issued on all of them which were believed to be solvent, by plaintiff, and that nothing could be collected on them, is not admissible to show that the fees were worthless, since such testimony could only be an expression of the witness' opinion.—*Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358.

## [jj] (Sup. 1891)

An owner of land, worth \$2,500, conveyed it to plaintiff in payment of a debt owing to the latter's brother. A judgment creditor of the brother, claiming that the land had been conveyed to plaintiff in fraud of the brother's creditors, had the land sold in satisfaction of the judgment, and defendant became the purchaser. Plaintiff then brought an action to quiet title, claiming that the conveyance to him had been made in entire good faith, and that, as part of the same transaction, he had agreed to cancel a debt of \$650 which his brother owed him, and that, in addition, he had assumed the payment of other debts of his brother, not including the judgment debt, aggregating a sum equal to the value of the land. *Held*, that testimony by the original landowner that he had conversed with the parties freely concerning the deed, and that it was made with the understanding that plaintiff should pay \$2,500 for it by the payment of his brother's debts, is not objectionable as being the mere statement of a conclusion.—*McCormick v. Smith*, 127 Ind. 230, 26 N. E. 825.

## [k] (Sup. 1891)

It is improper to ask a witness whether, at the time of giving a quitclaim deed to certain land, he claimed to be the owner of the land, since the question calls for the witness' conclusion rather than for the facts.—*Dickey v. Shirk*, 128 Ind. 278, 27 N. E. 733.

## [kk] (Sup. 1892)

In highway proceedings, the opinion of a witness is not called for by a question whether or not the proposed highway will be a convenience to the land of the person claiming damages, and to those residing on it so far as travel in a certain direction is concerned, as the question relates to a question of fact.—*Hire v. Kniseley*, 29 N. E. 1132, 130 Ind. 295.

## [l] (Sup. 1892)

A witness was called to prove that A. was of unsound mind, and she testified to several remarks by him tending to show the condition of his mind. On cross-examination she was asked: "What did you hear him say imputing that any one had stolen his tobacco?" *Held* not incompetent, as calling for the opinion of the witness.—*Haxton v. McClaren*, 132 Ind. 235, 31 N. E. 48.

## [ll] (App. 1892)

In an action for the alienation of the affections of plaintiff's wife, plaintiff, who had testified in chief that he had witnessed certain acts and conduct between his wife and defendant, was asked on cross-examination whether he meant to say that his wife and defendant on such occasion committed adultery. *Held* properly excluded, as calling for a conclusion.—*Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

## [lll] (App. 1893)

In an action against a street-car company for injuries received by a passenger while attempting to board a car in motion, defendant sought to show by a witness that "people were not in the habit of trying to get on cars at the rate of speed" the car in question was going. *Held*, that the evidence was properly excluded, as it called only for a conclusion of witness as to the speed of the car.—*Citizens' St. R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446.

## [lm] (Sup. 1896)

A question whether there had ever been a time in witness' knowledge of street railroading when the company "had a custom" of stopping on curves to let passengers off was not objectionable, as calling for a conclusion.—*Conner v. Citizens' St. R. Co.*, 146 Ind. 430, 45 N. E. 662.

## [lmm] (App. 1896)

In an action by a servant for injuries caused by the falling of part of the roof of a coal mine in which he was working, evidence that the part which fell could have been propped up, so as to prevent its falling, was admissible.—*Island Coal Co. v. Neal*, 15 Ind. App. 15, 42 N. E. 953, 43 N. E. 463.

## [ln] (Sup. 1897)

A question as to whether a certain building was within the city limits is not objectionable as asking the opinion of the witness.—*Shea v. City of Muncie*, 46 N. E. 138, 149 Ind. 14.

## [lno] (App. 1897)

On an issue as to negligence resulting in a collision between defendant's electric car and a locomotive, a witness testified that after the collision the conductor asked whether any one was hurt. The witness was then asked whether "this inquiry was loud enough for all to hear it." *Held*, that the question was properly excluded, as calling for a conclusion.—*Hammond, Whiting & E. C. Electric R. Co. v. Spyzchalski*, 46 N. E. 47, 17 Ind. App. 7.

## [lo] (App. 1897)

When a witness is asked to give a conversation had at some previous time with another person, he must give the conversation as it occurred, or the substance of it, and leave the court or jury to determine what the parties intended.—*Elkhart & W. R. Co. v. Waldorf*, 46 N. E. 88, 17 Ind. App. 29.

[oo] (Sup. 1898)

Testimony that the time limited for completing a paving contract was too short is an opinion on a question of fact, and hence inadmissible.—*Maier v. Board of Public Works of City of Evansville*, 51 N. E. 233, 151 Ind. 197.

[p] (App. 1898)

A horse approaching a railway crossing, where, on the side of the highway, was a pile of cross-ties, became frightened and uncontrollable on the appearance of a hand car. *Held* that testimony of the driver that, if the road had not been obstructed, he could have turned around, and, if the car had been stopped, he could have controlled the horse, was mere opinion, and inadmissible, there being no evidence that he had ever tried to control the horse when frightened.—*Lake Erie & W. R. Co. v. Juday*, 49 N. E. 843, 19 Ind. App. 436.

[pp] (App. 1899)

Evidence that witnesses knew of the condition of the pavement, and of a foundation wall abutting on the pavement, at the time of alleged injury, and that they knew of the holes in the pavement and in the wall, is not inadmissible as a matter of opinion.—*City of Jeffersonville v. McHenry*, 53 N. E. 183, 22 Ind. App. 10.

[q] (App. 1900)

Where the relatrix on a trial for bastardy testified that the acts of intimacy occurred in a room where a husband and his wife were sleeping, and the wife testified for defendant, who slept in an adjoining room, that she did not hear him, a question asked of the wife and her husband, whether she was easily awakened after she had gone to sleep, was not improper, as calling for an opinion.—*State ex rel. Closson v. David*, 58 N. E. 83, 25 Ind. App. 297.

[qq] (App. 1900)

In an action for the death of deceased by the caving of a trench, the fact that a fellow workman, in answer to a question as to a conversation with defendant's foreman stated that the foreman wanted him to dig bell holes in the bottom of the trench, but he refused to do so because it was not safe, did not render the question objectionable as calling for an opinion of the witness, since, in the form given, it did not call for an opinion, and was competent to show knowledge on the part of the foreman of the dangerous condition of the trench.—*City of Ft. Wayne v. Patterson*, 58 N. E. 747, 25 Ind. App. 547.

[r] (Sup. 1901)

Where decedent was employed by the city in excavating a water-pipe trench under the direction of the city inspector, and was killed by the caving in of the banks owing to digging of bell holes in the bottom and sides of the trench, in an action to recover for such death the permitting of a witness to be asked what he said to the inspector about the trench being dangerous, or in a dangerous condition to dig the bell holes, was not objectionable as calling for an

expression of opinion.—*City of Ft. Wayne v. Christie*, 59 N. E. 385, 156 Ind. 172.

[rr] (Sup. 1901)

With relation to the manner in which an engineer was obeying the signals of his fireman, the question, "State whether or not he was acting properly or improperly, or promptly or not promptly," does not ask for an opinion.—*Pittsburgh, C., C. & St. L. R. Co. v. Martin*, 61 N. E. 229, 157 Ind. 216.

[s] (Sup. 1901)

In an action against a street railway company by a husband for injuries to his wife, caused by a defective board in the platform at one of the company's stations, evidence that the crowd of people on the platform prevented the wife from seeing the hole in the platform is not inadmissible as being the statement of a conclusion, and not of a fact.—*Indianapolis St. R. Co. v. Robinson*, 61 N. E. 936, 157 Ind. 414.

[ss] (App. 1901)

In an action to recover for injuries caused by a charge of powder blowing out a wall of coal in a mine, a question asking plaintiff to tell what duty the mining boss had to perform in looking after the rooms and entries, and seeing that the walls were kept a proper thickness, is not objectionable as calling for a conclusion.—*Eureka Block Coal Co. v. Wells*, 61 N. E. 236, 29 Ind. App. 1, 94 Am. St. Rep. 259.

In such action, the party who put in the charge having testified that he did it to knock down coal, a subsequent witness was asked if he knew of any case in which it would be proper to place a charge of powder in a pillar of coal and fire it off after the room was widened and the pillar left between the room and entry, except for the purpose of making a break through. *Held* that such question was objectionable, as calling for an opinion, and since it was immaterial what miners at other times or in other places would do.—*Id.*

[t] (App. 1903)

In an action by a boy for assault and false imprisonment, his mother, in testifying as to what happened when she went to obtain his release, concluded, "And I never got him until these men [whom, she testified, came in reply to her call for help] came into the front door." *Held*, that the statement was not objectionable as a conclusion of the witness.—*Gollibart v. Sullivan*, 66 N. E. 188, 30 Ind. App. 428.

[tt] (App. 1903)

A witness' statement that the consideration of the assignment of a contract for the purchase of land was the payment of notes given therefor was a statement of fact, and not a conclusion.—*Baltes Land, Stone & Oil Co. v. Sutton*, 69 N. E. 179, 32 Ind. App. 14.

[u] (App. 1905)

Plaintiff, in an action for injury received by him while a passenger on a street car, having pleaded that he was compelled to ride on

the running board because there was no room elsewhere on the car, and having testified that passengers said, "Look out for the poles!" and that he tried to get between the seats to avoid them, may testify, as a reason why he did not get in the car, that it was so crowded it was impossible for him to get there before he was hurt, this not being the statement of a mere conclusion.—*Indianapolis St. R. Co. v. Haverstick*, 74 N. E. 34, 35 Ind. App. 281, 111 Am. St. Rep. 163.

[uu] (App. 1906)

In an action for negligence, where witnesses had fully stated the facts relative to the position of the cars and the location of the tracks under consideration, further questions as to "whether or not there was anything unusual in what you did that night, in the way you handled that car," "whether the way in which the cars were put in was the customary way of doing," "whether it is not often necessary to leave cars temporarily so that they are not in the clear," and other kindred questions, were properly excluded, as calling for the conclusions of the witnesses on the question of negligence.—*Cleveland, C. & St. L. R. Co. v. Osgood*, 73 N. E. 285, 36 Ind. App. 34.

[v] (Sup. 1906)

In a proceeding for the establishment of a public drain, a question as to whether the construction of a bigger or larger ditch would have more effect in taking off the water than if the existing ditch were cleaned out was objectionable as calling for the witness' opinion.—*Beery v. Driver*, 76 N. E. 967, 167 Ind. 127.

[vv] (App. 1906)

Plaintiff, a railroad fireman, claimed that he was injured in a collision between two engines, caused by the negligence of defendant's engineer. In answer to a question whether he knew of anything to prevent the engineer from seeing down the track prior to the accident, he answered that he did not know why he did not see the approaching train, that if he had been looking he could have seen the engine, and that he (plaintiff) could have seen if he had been on that side of the engine. *Held*, that plaintiff's answer was merely a statement that there was nothing to prevent the engineer from seeing the approaching locomotive, if he had looked, and was not, therefore, objectionable as an opinion of the witness.—*Southern Indiana R. Co. v. Osborn*, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067.

[w] (Sup. 1907)

In an action against a railroad company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, the question whether, if the switchman had been facing the west with his left hand holding the grabiron, with his lantern in his right hand, he could, by the light of the lantern, have seen the car on the spur, was improper, for the answer depended on the knowledge of the witness of the power of the lantern,

the strength of the switchman's vision, the density of the darkness, etc.—*Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

In an action against a railroad company for the death of a switchman caught between an engine and a car kicked onto a spur, a question whether it was the duty of the switchman to determine, when a car was set on a spur, whether it was sufficiently in on the spur so that an engine might pass with safety to the crew, was objectionable, as calling for a conclusion of law, or ultimate fact, since the duty to set the car in a particular manner to meet particular emergencies depended on the character of the employment and the rules thereof.—*Id.*

In an action against a railroad company for the death of a switchman, a question whether there were at the time of the accident any written rules of the company governing switchmen was properly excluded, as the rules should be exhibited, identified, and introduced, and their interpretation was not for the witness.—*Id.*

[ww] (App. 1907)

In an action for injury to a growing tree, resulting from trimming it, a question calling on a witness to describe the manner the boughs were cut off, whether or not in a symmetrical manner or otherwise, only asked the witness to give a description of the tree after its limbs had been cut off, and was not objectionable as calling for his conclusion.—*Delaware & M. Counties Tel. Co. v. Fiske*, 40 Ind. App. 348, 81 N. E. 1100.

[x] (App. 1907)

An objection to a question whether a certain track was regularly used for switching was properly sustained as calling for a conclusion by the witness.—*Grand Trunk Western R. Co. v. State*, 40 Ind. App. 695, 82 N. E. 1017.

[xx] In an action for personal injury to an arm, it was proper to permit plaintiff's mother to state what effect medical treatment had upon the arm, where the mother had witnessed the treatment and observed the visible effects; the question not being objectionable as calling for a conclusion.—(App. 1907) *Cleveland, C. & St. L. R. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025; (Sup. 1908) *Id.*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527.

In an action for personal injuries, it is proper to ask a witness what effect medical treatment had on plaintiff's injured arm.—*Id.*

[y] (App. 1908)

In an action on an insurance policy in which the question whether the insured's impaired vision was obvious or not to the agent who took his application, was an issue, the question, "Tell the jury the condition and facial expression of the" insured on a specified date, is not objectionable as calling for an

opinion of the witness.—United States Health & Accident Ins. Co. v. Clark, 41 Ind. App. 345, 83 N. E. 700.

[yy] (App. 1909)

A question to a director of a telephone company "whether the company either by direction of the directors or otherwise contemplated going across the land belonging to plaintiff with any wires at any time" was objectionable, as calling on witness to state his own conclusions, possibly from incompetent matters.—Majenica Tel. Co. v. Rogers, 43 Ind. App. 306, 87 N. E. 165.

[z] (App. 1909)

A question asked a nonexpert witness with reference to a street railway track, "Now, from the way the curve was there, you may state what that indicated to you as to how the accident happened," was properly excluded as calling for a conclusion.—Cincinnati, L. & A. Electric St. R. Co. v. Cook, 88 N. E. 76.

[zz] (App. 1909)

The question, "State whether or not there was any person on there that was not entitled to ride beyond this railroad crossing," was objectionable, as calling for a legal opinion from witness.—Indianapolis & M. Rapid Transit Co. v. Walsh, 90 N. E. 138.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2149-2185;  
50 CENT. DIG. Witn. §§ 833-836, 988.  
See, also, 17 Cyc. pp. 62-80, 209-219.

§ 472. Matters directly in issue.

Expert testimony, see post, § 506.

[a] (Sup. 1867)

In an action on a note where defendant, by way of set-off, pleaded damages resulting from the nonperformance of a contract relating to the same subject-matter, a question asking defendant to state, "What was the damage to you by reason of his not cutting and putting up the hay in proper order?" was properly excluded.—Mitchell v. Allison, 29 Ind. 43.

[b] (Sup. 1871)

The naked opinion of a witness, not an expert, as to a testator's soundness of mind, is not competent evidence.—Turner v. Cook, 36 Ind. 129.

[c] (Sup. 1880)

In an action for injuries, testimony of plaintiff as to the amount of damages he sustained by the injuries he had described was inadmissible.—Ohio & M. R. Co. v. Nickless, 71 Ind. 271.

[cc] The opinion of a witness as to the public utility of a proposed highway is inadmissible.—(Sup. 1883) Loshbaugh v. Birdsell, 90 Ind. 466; (1883) Dillman v. Crooks, 91 Ind. 158; (1884) Thompson v. Deprez, 96 Ind. 67.

[d] (Sup. 1884)

Witnesses in a proceeding for the construction of a ditch cannot be permitted to state their opinions as to the public utility of the proposed ditch.—Yost v. Conroy, 92 Ind. 464, 47 Am. Rep. 156.

[dd] (Sup. 1889)

In an action against a carrier for injuries to a passenger, whether the engineer was acting in the line of his duty on the occasion of the accident was a question to be determined by the jury from the facts proven, and not from the opinion of witnesses given on a supposable state of facts.—Grand Rapids & J. R. Co. v. Ellison, 20 N. E. 135, 117 Ind. 234.

[e] (Sup. 1892)

Where plaintiff was injured by falling over a barrel left on a sidewalk, evidence as to whether a person could walk between the barrel and the building with safety was inadmissible, as the answer required an expression of opinion as to the negligence of both parties, which was a question for the jury.—Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732.

[f] (App. 1892)

It is proper to exclude the opinion of a witness as to whether or not the fencing of the track at the point in question, by putting in cattle guards and wing fences, would endanger the safety of the company's employés, as it is for the jury to determine that fact from the evidence.—Toledo, St. L. & K. C. R. Co. v. Jackson, 5 Ind. App. 547, 32 N. E. 793.

[g] (Sup. 1896)

The question to be determined by a jury being the public utility of a proposed change in a highway, it was error to permit a witness to state his opinion thereon.—Johnson v. Anderson, 42 N. E. 815, 143 Ind. 493.

[h] (App. 1896)

In proving the damages to real estate with and without changes as to its condition, a witness may give his opinion as to its value with and as to its value without, but he has no right to give his opinion as to the damages; that being a question for the jury.—Sunnyside Coal & Coke Co. v. Reitz, 39 N. E. 541, 43 N. E. 46, 14 Ind. App. 478.

[i] (App. 1899)

Where the measure of damages is the difference between the value of a house and its value had a contractor furnished such material as he agreed to, it is error to permit a witness to state the difference in value merely without giving its actual value and its value had the proper material been furnished, since thereby the witness is permitted to estimate the amount of damages, which should be assessed by the jury.—Elwood Planing Mill Co. v. Harting, 52 N. E. 621, 21 Ind. App. 408.

[j] (App. 1900)

In an action on a contract whereby plaintiff agreed to erect one monument, of the best quality of Westerly granite, it was for the ju-

ry to determine from all the evidence whether the shades of color in the monument erected were the shades produced by the quality of granite called for by the contract ; and it was proper to refuse to allow a witness to state to what extent the shade of color of the granite ought to be the same, to make a monument of the best Westerly granite, of the dimensions specified in the contract.—*Githens v. McDonnell*, 56 N. E. 855, 24 Ind. App. 395.

[k] (App. 1901)

Where, in an action for insurance, the witnesses have described all the circumstances and conditions existing as they saw them at the building at the time of the fire, they cannot give their opinions as to whether the goods could have been removed from the building, such question being for the determination of the jury.—*Insurance Co. of North America v. Osborn*, 59 N. E. 181, 26 Ind. App. 88.

[l] (App. 1902)

Where plaintiff's bookkeeper testifies without objection, in a suit to foreclose a building and loan mortgage, that a certain pass book shows the correct payments made by defendant, and also testifies to the present value of the stock, it is not error, as being a matter for the court to determine, to allow the witness to state the amount due and unpaid on the note as shown by the books, after giving credit for the withdrawal value of the stock.—*Plank v. Indiana Mut. Building & Loan Ass'n*, 62 N. E. 652, 28 Ind. App. 259.

[m] (App. 1904)

Refusal of the court to permit a witness for defendant to state what the duty of a man was who operated the particular kind of machine on which plaintiff was injured was proper, all of the facts connected with the operation of the machine, and the conduct of plaintiff and defendant as master and servant with reference thereto, having been detailed to the jury.—*Blanchard-Hamilton Furniture Co. v. Colvin*, 69 N. E. 1032, 32 Ind. App. 398.

[n] (App. 1904)

Where, in an action for injuries sustained by a servant by reason of falling into an unguarded pit while passing along a walk over the pit, all the surroundings could have been shown, from which the jury could have determined whether there was any necessity for the servant to pass along the walk, the refusal to permit a witness to state whether there was a necessity therefor was not erroneous.—*Ætna Powder Co. v. Earlandson*, 71 N. E. 185, 33 Ind. App. 251.

[o] (App. 1904)

Evidence as to the distance required to stop a street car is not objectionable as an invasion of the province of the jury as to the question of what is ordinary care.—*Indianapolis St. R. Co. v. Seerley*, 72 N. E. 169, 1034, 35 Ind. App. 467.

A witness cannot testify what is or what is not ordinary care, such question being exclusively for the jury.—*Id.*

[p] (Sup. 1905)

In an action for breach of contract by which defendant agreed to pay plaintiff wages, doctor bills, and expenses until his recovery from injuries resulting from defendant's negligence while in its employ, it was proper to exclude the answer of defendant's district foreman to the question as to whether or not he "had authority from defendant to enter into a contract with plaintiff whereby defendant would be bound to pay plaintiff \$40 a month until he had recovered from the injury," such question being the real issue, and the ultimate fact to be determined by the jury.—*American Telephone & Telegraph Co. v. Green*, 73 N. E. 707, 164 Ind. 349.

[q] (Sup. 1906)

The opinion of a witness on facts and conditions which may be fully placed before the jury is not admissible in evidence.—*Indianapolis Traction & Terminal Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143.

[r] (Sup. 1907)

A witness will not be allowed to express an opinion on a subject of which the jury is as well prepared to judge as the witness.—*New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

[s] (App. 1909)

In an action for injuries caused by permitting a bare grounded wire, which he took up a telegraph pole with him to test the telegraph wires to come into contact with lighting wires strung thereon, it was error to permit a witness to give his opinion whether a lineman of ordinary caution and experience would have taken the bare wire up the pole without taking precaution to prevent contact with the lighting wires.—*Ambre v. Postal Cable Co.*, 43 Ind. App. 47, 86 N. E. 871.

[t] (App. 1910)

Where, in an action for injuries to plaintiff's wife, in a collision between defendant's street car and plaintiff's team, the evidence showed just how the wagon approached the railroad track, a question, asking a witness to state what the appearance of the tracks leading to the street railroad would indicate to him as to how the horses got on the railway track, was objectionable as calling for the witness' opinion on a subject on which the jury were equally competent to judge.—*Cincinnati, L. & A. St. R. Co. v. Cook*, 90 N. E. 1052.

FOR CASES FROM OTHER STATES.

SEE 20 CENT. DIG. Evid. §§ 2186-2195, 2248.

See, also, note, 36 L. R. A. 64.

### § 473. Inferences or impressions from collective facts.

[a] (Sup. 1854)

Where a witness has had any acquaintance with the testator, and has given the materials from which a conclusion may be drawn as to the state of his mind, such as his manner, conversations, etc., at or near the time of the execution of the will, the witness may be asked what impression the facts stated made on him as to the soundness of the testator's mind.—*Kenworthy v. Williams*, 5 Ind. 375.

[b] (Sup. 1878)

On a will contest on the grounds of testamentary incapacity and undue influence, a witness who has testified to his acquaintance with the testatrix and his knowledge of her mental condition may properly state that, like all old people, she appeared childish.—*Coffman v. Reeves*, 62 Ind. 334.

[c] (Sup. 1889)

Where a witness has testified that testator's health failed during the last year of his life, and that there was a change in him, it is improper to ask the witness if he would have taken testator's note during the last year of his life, and if he had ever heard any one else question testator's sanity.—*Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

[d] (Sup. 1886)

Testimony as to facts and circumstances tending to establish insanity is not rendered incompetent by the failure to ask or obtain the opinion of the witness as to the testator's sanity.—*Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2220-2233.

See, also, 17 Cyc. pp. 81-209; note, 38 L. R. A. 733.

### § 474. Special knowledge as to subject-matter.

Determination of question as to competency of witness, see post, § 498½.

[a] (Sup. 1837)

In an action for the breach of a warranty of a horse, a person not a farrier, but professing to understand, by trying, whether the eyes of a horse are good or not, may state his opinions as to defects in the eyes of the horse sold.—*House v. Fort*, 4 Blackf. 293.

[b] (Sup. 1860)

A witness cannot be allowed to estimate the value of the injury inflicted by flogage, unless he be an expert.—*Sinclair v. Roush*, 14 Ind. 450.

[bb] (Sup. 1865)

In an action for damages for killing a horse, a witness for plaintiff stated that he was acquainted with the value of horses, but had never seen the horse in controversy. The witness was then asked, "What, on the 10th day

of May [the day of the killing], was the average price of a horse 15 or 16 hands high, 3 or 3½ years old, and sound, except the ringbone on the hind foot, which had been killed?" *Held*, that the court erred in permitting the witness to answer the question.—*Toledo & W. R. Co. v. Smith*, 25 Ind. 288.

In an action to recover damages for killing a horse, the value of the horse at the time of his death being the measure of damages, it was competent for defendant to show the condition of the horse by witnesses who had seen him at any reasonable time before the killing, ranging within three months, and then, after proving by other witnesses that his condition was unchanged, the former might testify to the value of the horse at the time of the killing, on the hypothesis that his condition was the same as when they saw him.—*Id.*

[c] (Sup. 1870)

Where the execution of the instrument sued on is in issue, witnesses not shown to be experts, who have never seen the defendant write, and who are not otherwise acquainted with his handwriting, should not be permitted to examine his signature, admitted to be genuine, and on comparison with the signature in question give their opinion as to the genuineness of the letter.—*Chance v. Indianapolis & W. Gravel Road Co.*, 32 Ind. 472.

Where the genuineness of handwriting is in issue, a witness not an expert called to testify thereto must speak from his knowledge of having seen the party write, or from authentic papers received in due course of business.—*Id.*

[cc] (Sup. 1871)

There was no error in excluding a witness' evidence as to the value of services rendered by an attorney in a case, from his knowledge of what the services were, where he stated that he could not say what a reasonable fee would be.—*McNiell v. Davidson*, 37 Ind. 336.

[d] (Sup. 1872)

The opinions of witnesses who are not medical experts as to the mental capacity of the testator to execute a will are relevant, where such opinions are based upon their knowledge and observations of the testator.—*Leach v. Prebster*, 39 Ind. 492.

[dd] (Sup. 1872)

The subscribing witnesses to a will may give their opinions of the sanity of the testator.—*Call v. Byram*, 39 Ind. 499.

[e] (Sup. 1873)

The genuineness of a handwriting may be proved by the testimony of a witness who has acquired knowledge of the handwriting of the person by correspondence with him, or from his admission, by word or course of dealing, of the genuineness of papers with which the witness has been conversant.—*Burdick v. Hunt*, 43 Ind. 381.

[ee] (Sup. 1875)

On the trial of a proceeding to appropriate land for the way of a railroad, and to assess the damages to the landowner resulting from the appropriation, a witness who has a personal knowledge of the land, and who possesses the necessary information to enable him to form a proper estimate of its value, may state his opinion as to the value of the residue of the land after the appropriation; and it is not necessary that he should know of sales of such tracts of land.—*Frankfort & K. R. Co. v. Windsor*, 51 Ind. 238.

[f] (Sup. 1877)

The opinion of a witness as to the soundness of mind of a testator is not admissible where it appears that, within the last three years of testator's life, the witness had not seen any actions of, or had any conversations with, testator from which he could have formed an opinion as to the soundness of his mind.—*Sutherland v. Hankins*, 36 Ind. 343.

[ff] (Sup. 1878)

A motion to suppress a deposition giving evidence as to the quality of goods in controversy, on the ground that the witness is not "shown to be competent," should be overruled where the deponent has seen and examined the goods, and has testified, without contradiction, that he is a judge of the quality of such goods.—*Myers v. Murphy*, 60 Ind. 282.

[g] (Sup. 1879)

Upon an issue as to the condition of a certain cellar, one of the parties offered as a witness one who had never seen the cellar, but who had once owned a house within a square of the house in question, and would testify, from his knowledge of his own cellar and descriptions given by witnesses of the cellar in question, that water could not be kept out. *Held* incompetent.—*Cook v. Fuson*, 66 Ind. 521.

[gg] (Sup. 1881)

A witness may state the value of another's services, where he has knowledge of the matter in controversy, and is acquainted with the value of the services in question.—*Bowen v. Bowen*, 74 Ind. 470.

[h] (Sup. 1882)

One not an expert, but a neighbor of testator, who had long known and often dealt with him, and conversed with him before and after the execution of his will, is a competent witness on the question of the testator's soundness of mind.—*Ryman v. Crawford*, 86 Ind. 262.

[hh] (Sup. 1885)

One not an expert may testify, on a question of land damages, as to the probable cost of making a fill on a railroad line.—*Terre Haute & L. R. Co. v. Crawford*, 100 Ind. 550.

[i] (Sup. 1887)

One of the plaintiffs testified that he was one of the owners of the mill injured by the overflow, was engaged in operating it, and had

a knowledge of the structure and the injury done to it by the overflow. *Held*, that he was competent to give an opinion as to the length of time that would be required to repair the mill.—*City of Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.

[ii] (Sup. 1888)

A witness need not be an expert to give an opinion as to the value of land. It is enough if he shows himself to be acquainted with the value of land in the vicinity, and this may be presumed of persons living in the neighborhood.—*City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1.

[j] (Sup. 1889)

A person who has personally examined real property, and made inquiry of qualified persons concerning its value, is competent to testify as to its value, though he does not live in the city where it is located.—*Jones v. Snyder*, 117 Ind. 229, 20 N. E. 140.

[jj] (Sup. 1891)

In an action against a railroad company for injuries to a passenger, one who lives in sight of defendant's road is competent to testify as to the speed of the train on which the plaintiff was injured, he having seen the accident, although he is not an expert.—*Louisville, N. A. & C. Ry. Co. v. Hendricks*, 128 Ind. 462, 28 N. E. 58.

[k] (Sup. 1891)

In proceedings to appropriate lands for railroad purposes, a witness testifying to a knowledge of the property involved is competent to testify to his opinion of its value, basing such opinion upon the facts already testified to, without showing special knowledge relating to the value of lands in that locality.—*Evansville & R. Co. v. Fettig*, 29 N. E. 407, 130 Ind. 61.

In a proceeding to condemn land for railroad purposes, a witness testified that he knew the land, and its location and shape; that it was cleared and fenced, and had no buildings on it; and that it was good to lay out in town lots, but had not been platted. *Held*, that his opinion as to the value of the land before the road was built was competent when the opinion was based on the facts testified to.—*Id.*

[kk] (App. 1891)

A school commissioner and superintendent for the county, and a person who has followed farming in summer and taught school in the winter in the township in which the purchased supplies sued for were to be used, are competent to testify as to the usefulness and necessity of such supplies in the township.—*Litten v. Wright School Tp.*, 1 Ind. App. 92, 27 N. E. 329.

[l] (App. 1891)

The value of services may be proved by witnesses who do not live at the place where the services were rendered, where the witnesses are cautioned by the judge that the question embraces the value of services at the place

where rendered, which might include the place where the witnesses lived, if there was no difference in the value of such services at the two places.—*Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731.

[ll] (Sup. 1892)

In proceedings to condemn a railroad right of way, witnesses who testify that they are acquainted with the value of lands in the locality are competent to testify as to the value of the land before and after the railroad ran through it, without first disclosing knowledge of the location, grades, and cuts of the road, since knowledge of such matters goes to affect merely the weight of their testimony.—*Ohio Val. Railway & Terminal Co. v. Kerth*, 130 Ind. 314, 30 N. E. 298.

[m] (App. 1892)

In an action to recover for services rendered while a minor living on a farm with defendant, farmers of experience, having knowledge of the value of labor on a farm, and having observed plaintiff at work on defendant's farm, at various times, are competent to testify to the value of his services.—*Loy v. Petty*, 3 Ind. App. 241, 29 N. E. 788.

[mm] (App. 1892)

Where a witness testified that she nursed a person during the last few days before his death, and further testified as to his appearance, actions, and conversation, it is competent for her to give an opinion as to his sanity during his illness, in that her testimony shows that she had sufficient opportunities of observation and means of knowledge on which to base an opinion.—*Mull v. Carr*, 5 Ind. App. 491, 32 N. E. 591.

[n] (App. 1892)

A witness does not show sufficient knowledge to testify as to the genuineness of a signature where his knowledge was derived from the signature attached to a notice addressed to him, purporting to be signed by the same person, but he did not see it signed, never saw her write, and it did not appear that she had acknowledged the signature to be hers, or that witness acted on it.—*Talbott v. Hedge*, 5 Ind. App. 555, 32 N. E. 788.

[nn] (Sup. 1893)

In an action involving the issue whether a person is of "unsound mind and incapable of managing his estate," presented by Rev. St. 1881, § 2545, a witness may state his opinion as to the mental unsoundness of the person or the manifestations thereof, but not as to whether the degree of incapacity has been reached; that being the question for determination of the jury.—*Hamrick v. State ex rel. Hamrick*, 134 Ind. 324, 34 N. E. 3.

[o] (App. 1893)

It was not error, in an action for nursing a sick man, to permit plaintiff's husband, after detailing the character of the services, and the

extent to which they were required, to testify to their value, against the objection that "the witness has not shown any special knowledge on the subject."—*Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. 644.

In such case it is not necessary that a witness should be an expert, to enable him to testify to the value of such services, the weight of his testimony being for the jury.—Id.

[oo] (Sup. 1894)

A fireman who "thinks" they had made other "running switches" than the one in question is not competent to testify to the engineer's practice when running switches were being made.—*Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246.

[p] (App. 1894)

A witness, who is not an expert, may give his opinion as to the value of property, where he is acquainted with values in the vicinity; and he need not have personal knowledge of the particular thing to whose value he testifies.—*Terre Haute & I. R. Co. v. Jarvis*, 9 Ind. App. 438, 36 N. E. 774.

[pp] (Sup. 1895)

The fact that a witness had only become acquainted with the handwriting of a person whose signature to an instrument is disputed since the opening of the trial is not in itself enough to make his evidence as to the genuineness of the handwriting incompetent.—*Tucker v. Hyatt*, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

[q] (Sup. 1895)

A nonexpert shown to be familiar with the extent and character of the particular service may testify what it would be worth to effect a sale of an electric plant.—*Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

[qq] (Sup. 1896)

Where witnesses simply state that they know the general market value of horses such as are described in the complaint in the action, they are not competent to give their opinion as to "the value of the horses in question as brickyard horses."—*Loesch v. Koehler*, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682.

[r] (App. 1896)

One who has lived in the vicinity for a number of years, and was acquainted with the character of the hay destroyed, may not testify as to its value.—*Burke v. Howell*, 14 Ind. App. 296, 42 N. E. 952.

[rr] (App. 1896)

Witnesses who testified that they lived in the vicinity of, had been upon, and were personally acquainted with, certain land that had been damaged by fire, were competent to give in evidence their opinion as to the value of such land before and after the fire.—*Chicago & G. T. R. Co. v. Burden*, 14 Ind. App. 512, 43 N. E. 155.



## [s] (App. 1896)

In an action for injuries, a witness who testified that she had taken care of the injured party after the injuries was permitted to give her opinion as to what it was worth per day to take care of her, which was objected to on the ground that it was not shown that the witness was acquainted with the value of such services at that place or anywhere else. *Held*, that the testimony was admissible.—*Wahl v. Shoulders*, 43 N. E. 458, 14 Ind. App. 605.

## [ss] (App. 1896)

In an action for board and domestic services rendered, it is not necessary that witnesses called to give their opinion of the value thereof should show that they possessed any special knowledge upon that subject.—*Hufford v. Neher*, 15 Ind. App. 306, 44 N. E. 61.

## [t] (App. 1897)

The objection that a witness who testified that she had seen plaintiff perform services for decedent (specifying their character), and knew the value thereof, was permitted to state their value, without showing that witness knew the value of such services in the neighborhood, cannot be sustained, where the record shows that witness and decedent lived at different places, but does not disclose whether the two places are in the same neighborhood.—*Boyd v. Starbuck*, 47 N. E. 1079, 18 Ind. App. 310.

## [tt] (App. 1898)

Where there was evidence that witness was a pianist; had had experience in the use of pianos, and had been requested to, and did, select the piano when it was purchased, her testimony as to its value is admissible.—*Fredericks v. Sault*, 49 N. E. 909, 19 Ind. App. 604.

## [u] (App. 1898)

The extent of a witness' knowledge of a subject-matter about which he testifies as to values goes to the weight of his testimony, and not to its competency.—*Fox v. Cox*, 50 N. E. 92, 20 Ind. App. 61.

## [uu] (App. 1899)

A witness who testified that he resided in the same county with plaintiff, and knew the land claimed to have been injured by fire, that he had passed and repassed it for a number of years, and had been over it after the fire, is qualified to testify as to the value of the land before and after the fire.—*Pennsylvania Co. v. Hunsley*, 54 N. E. 1071, 23 Ind. App. 37.

## [v] (App. 1900)

In an action on a fire insurance policy, to recover the loss of a barn, farmers who had built barns and knew their value, and were familiar with the one in question before and after the fire, are competent to testify to the value of the property destroyed.—*Home Ins. Co. v. Sylvester*, 57 N. E. 991, 25 Ind. App. 207.

## [vv] (App. 1900)

A witness experienced in handling derricks, and having knowledge of a particular rope used

on a derrick, the time that it had been used, its size, and its condition from use may express an opinion as to its sufficiency in strength for the use to which it was subjected on such derrick.—*Consolidated Stone Co. v. Williams*, 57 N. E. 558, 26 Ind. App. 131, 84 Am. St. Rep 278.

## [w] (Sup. 1901)

Where the witness stated that he had seen the subscribing witnesses to a will write, the fact that he also testified that he had compared their signatures with those attached to the will did not disqualify him to give his opinion as to the genuineness of the signatures to the will.—*Miller v. Coulter*, 59 N. E. 853, 156 Ind. 290.

## [ww] (Sup. 1901)

One of the witnesses, in a proceeding to secure the probate of a will, as to the genuineness of the signatures on the will, the witnesses thereto being dead, showed that he was a nephew of the testator and neighbor of the subscribing witnesses, and testified that he had seen each of the latter write, had received letters from his uncle, and was acquainted with the handwriting of all. Another witness showed herself to be a daughter of one of the subscribing witnesses, had seen him write many times, and was acquainted with his handwriting. *Held*, that such witnesses showed sufficient qualifications to entitle them to an opinion as to the genuineness of the signatures of all.—*Morell v. Morell*, 60 N. E. 1092, 157 Ind. 179.

## [x] (Sup. 1901)

Where, in a suit against a railroad for injuries to land caused by fire escaping from the right of way, a witness had resided for years in the neighborhood of the lands, and had been allowed, without objection, to testify as to the value of such lands before they were burned, an objection to the admission of his testimony as to their value after they were burned, on the ground that he had only been on a small portion of the lands since the fire, was to the weight, rather than the competence, of the evidence, and its admission was not error.—*Chicago, I. & L. R. Co. v. Brown*, 60 N. E. 343, 157 Ind. 544.

## [xx] (App. 1902)

Evidence that witness had seen an insane ward milking and straining milk one Sunday morning, and that the witness knew the value of the services of farm hands at that time, and of another witness that he had seen the ward hoeing corn once during the period in question and several times prior thereto, does not show that either witness is qualified to testify as to the value of the ward's services.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

## [y] (App. 1905)

A witness who has testified as to his knowledge of land in question is competent to give his opinion as to its value before and after ap-

propriation of a right of way through it, basing his opinion on the facts to which he has testified, though he shows that he is not familiar with the value of lands in the neighborhood, and knows of only one transfer.—*Consolidated Traction Co. v. Jordan*, 75 N. E. 301, 36 Ind. App. 156.

[yy] (Sup. 1906)

The rule excluding opinions was not violated in admitting the testimony of witnesses experienced in the line of work covered by the testimony and possessing special knowledge and skill in that behalf.—*Pittsburgh, C., C. & St. L. R. Co. v. Nicholas*, 76 N. E. 522, 165 Ind. 679.

[z] (Sup. 1906)

On the issue of the mental capacity of testator, a witness who had testified to an acquaintance with testator for 25 years, to his appearance, walk, manner of conversation, habits, disposition, and memory, was competent to express an opinion upon these facts as to his mental condition.—*Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25.

On the issue as to whether or not testator was of unsound mind, a witness who had testified to an acquaintance with testator for 10 years, and to his habits of using intoxicating liquors and other habits, was competent to state whether or not such habits had grown and become more pronounced.—*Id.*

[zz] In a personal injury action, it was proper to show plaintiff's elocutionary ability by her father; he being prima facie qualified to give an opinion thereon.—(App. 1907) *Cleveland, C., C. & St. L. R. Co. v. Hadley*, 40 Ind. 731, 82 N. E. 1025; (Sup. 1908) *Id.*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527.

[zzz] (Sup. 1909)

A witness testifying to his experience in the use of derricks and to his knowledge of a particular derrick and its use is competent to base his opinion as to the capacity of such derrick.—*Romona Oolitic Stone Co. v. Shields*, 88 N. E. 595.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2196-2219;  
49 CENT. DIG. Wills, § 116.  
See, also, note, 39 L. R. A. 715.

§ 474½. Subjects of opinion evidence in general.

[a] (Sup. 1856)

In an action for debauching plaintiff's wife, the opinion of a physician who attended plaintiff's wife, as to her fondness for defendant, is inadmissible against him.—*McVey v. Blair*, 7 Ind. 590.

[b] (Sup. 1857)

In an action for slander, the opinions of witnesses well acquainted with the parties and

circumstances to whom the words were spoken are admissible in evidence to show that the party was the person referred to, but the grounds of such opinions are open to inquiry on cross-examination.—*Smawley v. Stark*, 9 Ind. 386.

[c] (Sup. 1858)

Testimony that the witness does not remember the contents of the lost paper, but thinks it contained just what he understood was required by law, is not admissible.—*Wiggins v. Holley*, 11 Ind. 2.

[d] (Sup. 1861)

In an action for seducing the wife of the plaintiff, the opinion of a witness that she was not furnished with a house suitable to live in was incompetent.—*Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 480.

[e] (Sup. 1882)

A witness cannot be asked his opinion whether a person heard words addressed to him in witness' hearing.—*Dyer v. Dyer*, 87 Ind. 13.

[f] (App. 1892)

In an action against a railroad company for the killing of cattle by defendant's train, where one of plaintiff's witnesses, who did not see the cattle on the track, testified to indications along the track after the injury, and there was opportunity to test his knowledge by cross-examination, the court properly permitted him to give his opinion as to which direction the animals were thrown when struck by the train, as bearing on the direction the train was running.—*Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 108, 80 N. E. 427.

[g] (Sup. 1898)

On an issue whether a contract for a municipal improvement was obtained through fraud, the opinion of a witness that the contract was not honest is inadmissible.—*Maier v. Board of Public Works of City of Evansville*, 51 N. E. 233, 151 Ind. 197.

[h] (App. 1899)

It was not error to exclude testimony as to whether a high-gear bicycle was a fast or slow running bicycle, the witness not being shown to be a bicycle expert.—*F. W. Cook Brewing Co. v. Ball*, 52 N. E. 1002, 22 Ind. App. 656.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2220-2233.

§ 475. Personal identity and characteristics.

Conclusions and matters of opinion or facts, see ante, § 471.

Special knowledge as to subject-matter, see ante, § 474.

[a] (Sup. 1884)

To prove fickle-mindedness, a witness well acquainted with the person, though not an ex-

pert, may testify.—*Mills v. Winter*, 94 Ind. 329.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2234, 2235.

See, also, 17 Cyc. p. 132.

**§ 476. Age.**

Conclusions and matters of opinion or facts, see ante, § 471.

Special knowledge as to subject-matter, see ante, § 474.

[a] A witness who has testified to the personal appearance of a defendant who pleads infancy at the time of making the contract sued on may be allowed to state his opinion as to the age of the defendant.—(Super. 1874) *McFadden v. Benson*, Wils. 527; (Sup. 1875) *Benson v. McFadden*, 50 Ind. 431.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2236.

See, also, 17 Cyc. p. 98.

**§ 477. Bodily appearance or condition.**

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, § 509.

Special knowledge as to subject-matter, see ante, § 474.

[a] (Sup. 1888)

In an action for damages for injuries incurred while a passenger on defendant's train, a witness testified that she had seen the plaintiff several times just after the injury, and then again after an interval of about a month. *Held* that, after describing the condition of the plaintiff, it was competent for the witness to express the opinion that the plaintiff had grown worse in the interval.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[b] (Sup. 1889)

The injury sued for was the breaking of plaintiff's limb by catching her foot in a hole in the sidewalk. Plaintiff's husband, having testified as to going to plaintiff's assistance, taking off her shoe, and to the doctor's setting her foot, was asked, "Do you know what was the matter with it?" and answered, "I think it was broken." *Held*, that the question was properly allowed.—*City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

[c] (Sup. 1897)

A nonexpert witness may, after giving as far as possible the facts on which his conclusion is based, state the condition of health of a person whom he has observed, where such condition is incapable of adequate expression except by stating a conclusion.—*Cleveland, C., C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675.

[d] In a personal injury action, it was proper to ask plaintiff's father whether her injured arm was better or worse than it was six months

before, where he had testified as to her condition at the times covered by the question, and it was important to determine whether the injury was permanent.—(App. 1907) *Cleveland, C., C. & St. L. Ry. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025; (Sup. 1908) *Id.*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2237–2241.

See, also, 17 Cyc. p. 87.

**§ 478. Mental condition or capacity.**

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, § 510.

Facts forming basis of opinion, see post, § 501.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

Testimony of subscribing witnesses to will as to testator's mental capacity, see *WILLS*, § 294.

[a] (Sup. 1893)

In an action involving the issue whether a person is of "unsound mind and incapable of managing his estate," presented by *Rev. St. 1881, § 2545*, a witness may state his opinion as to the mental unsoundness of the person, or the manifestations thereof.—*Hamrick v. State ex rel. Hamrick*, 134 Ind. 324, 34 N. E. 3.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2242–2244;

49 CENT. DIG. *Wills*, §§ 113–115.

See, also, 17 Cyc. pp. 91, 136–152, 197; notes, 36 L. R. A. 64, 38 L. R. A. 721.

**§ 481. Due care and proper conduct.**

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, §§ 512–514.

Facts forming basis of opinion, see post, § 501.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

[a] (Sup. 1883)

Upon the question of whether plaintiff was guilty of negligence in attempting to drive over a certain defective road, the opinions of witnesses are inadmissible.—*Town of Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230.

[b] (App. 1892)

The answer of a witness who measured an opening in a sidewalk, in response to a question as to the care used in taking the measurements, that he "was called to go and measure it, therefore [he] was careful in measuring it," although a conclusion, is not a ground for rejecting his evidence, when other evidence given by him informed the jury how the measurements were made.—*Pennsylvania Co. v. Frund*, 4 Ind. App. 469, 30 N. E. 1116.

## [c] (App. 1897)

It is error to allow a witness who did not see the accident, but was at the scene immediately afterward, to illustrate to the jury how he had at that time shown to others what his opinion then was as to the manner in which the accident might have happened.—*Chicago & E. R. Co. v. Lee* (Ind. App.) 46 N. E. 543, 17 Ind. App. 215.

## [d] (App. 1904)

Defendant asked its witness what the prices plaintiff received would indicate as to the place of delivery, and asked another witness, who had testified to his knowledge of the manner in which plaintiff had got out the ties in question, whether that treatment of the ties was a careful way of handling them. *Held*, that objections to these questions were properly sustained.—*T. J. Moss Tie Co. v. Huff*, 70 N. E. 86, 32 Ind. App. 466.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2248-2254.

See, also, 17 Cyc. p. 94.

## § 483. Nature, condition, and relation of objects.

Conclusions and matters of opinion or facts, see ante, § 471.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

## [a] (Sup. 1868)

In an action for damages caused by a defectively constructed sewer, a witness who is not an expert, but who knows the facts, may give an opinion that the sewer would not carry the water in time of flood.—*City of Indianapolis v. Huffer*, 30 Ind. 235.

## [b] (Sup. 1878)

In an action for stock killed by a railroad, caused by their entering the right of way over an insecure fence, plaintiff may inquire of competent witnesses whether the fence was such as good husbandmen usually kept.—*Louisville, N. A. & C. R. Co. v. Spain*, 61 Ind. 460.

## [c] (Sup. 1884)

The opinions of witnesses as to whether a railroad could be properly fenced at a certain place are not admissible in an action to recover for stock killed at such place.—*Indiana, B. & W. R. Co. v. Hale*, 93 Ind. 79.

## [d] (Sup. 1898)

A witness may give his opinion that a worm gearing in an elevator is a safe appliance for hauling freight, where he has observed such gearings, though he is not an expert, since the facts cannot be placed before the jury.—*Sievers v. Peters Box & Lumber Co.*, 50 N. E. 877, 52 N. E. 390, 151 Ind. 642.

## [e] (Sup. 1906)

In an action for injuries to a pedestrian by being struck by a street car, questions "that would not prevent it, would it?" and "she could

step off, could she not, and prevent the collision?" relating to the condition of the street adjacent to the track on which plaintiff was walking at the time of the accident, were objectionable in form as calling for an opinion of the witness.—*Indianapolis Traction & Terminal Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2256-2266.

## § 485. Value.

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, §§ 521-525.

Facts forming basis of opinion, see post, § 501.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2271-2274.

See, also, 17 Cyc. pp. 108-131.

## § 486. — In general.

## [a] (Sup. 1876)

The fact that a witness who testifies to the value of board is not an expert cannot constitute an objection to his evidence.—*Chamness v. Chamness*, 53 Ind. 301.

## [b] (App. 1891)

On questions of value, a nonprofessional or ordinary witness may testify by opinion.—*Grave v. Pemberton*, 29 N. E. 177, 3 Ind. App. 71.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2271, 2283-2289.

See, also, 17 Cyc. p. 108.

## § 487. — Services.

## [a] (Sup. 1880)

In a suit on an account for services, where there had been mutual dealings between the parties, *held* not error to permit a witness familiar with the facts to testify as to the relative value of services and commodities which entered into such mutual account.—*Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep. 152.

## [b] (Sup. 1885)

The opinion of a nonexpert witness is competent evidence as to the cost of the work in making a fill by a landowner along a right of way appropriated by a railroad.—*Terre Haute & L. R. Co. v. Crawford*, 100 Ind. 550.

## [c] (App. 1893)

It was not error to permit plaintiff, in an action for nursing a sick man, after describing the services rendered, to testify as to their value.—*Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. 644.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2272.

See, also, 17 Cyc. pp. 116, 121, 126, 130.

**§ 488. — Real property.**

[a] In a proceeding to condemn land, the opinions of competent witnesses as to value of the land taken are admissible.—(Sup. 1875) *City of Logansport v. McMillen*, 49 Ind. 493; (1882) *Indianapolis, D. & S. R. Co. v. Pugh*, 85 Ind. 279.

[b] (Sup. 1881)

In an action against a railroad company for damages for appropriating land for a right of way, the opinion of a witness that no land in the neighborhood could be bought for less than a certain sum is inadmissible.—*Union Railroad Transfer & Stockyard Co. v. Moore*, 80 Ind. 458.

[c] (Sup. 1904)

In an action for pollution of the waters of a stream, where witnesses testified from their own observations that before the establishment of defendant's mill the stream flowed pure and clear water, and that after the defendant began operating the mill the water was turbid and polluted, their opinions were admissible as to what the rental value of the plaintiff's premises would have been during the years the pollution was charged to have continued if the stream had flowed pure water, and as to their value in the condition which prevailed from the time the pollution began till the beginning of the suit.—*Muncie Pulp Co. v. Martin*, 72 N. E. 882, 164 Ind. 30.

[d] (Sup. 1906)

In an action for damages resulting from a deprivation of lateral support to land, it was proper for qualified witnesses to give their opinion of the value of plaintiff's land before and after the injury.—*Schmoe v. Cotton*, 167 Ind. 364, 79 N. E. 184.

[e] (App. 1910)

In an action by an abutting owner against a railroad for damages from the construction of its road along a street, it appeared that defendant laid its track in December, 1905, but that the road was not connected up and cars running over the same till July, 1906. Numerous witnesses for plaintiff testified without objection to their opinion of the value of his property before the road was constructed and its value thereafter when cars were running. After this testimony was admitted without objection, plaintiff was permitted, over objection, to give his opinion on the state of facts. *Held*, that this was not error, as the measure of his damages was the difference caused in the market value of his property by the construction of the road, and it was not constructed till its parts were connected so that cars could run over it, and proof of market value immediately before commencing construction, and market value after the road's completion and operation, tended to show how it was affected by the construction, and if the evidence tended in any degree, however small, to establish the fact, it was competent.—*Indianapolis Southern R. Co. v. Shea*, 90 N. E. 329.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2273.

See, also, 17 Cyc. pp. 115, 119, 124, 129.

**§ 489. — Personal property.**

[a] (App. 1898)

A witness who had some knowledge of the value of mill machinery, and of the machinery in question, was competent to testify as to its value, although he was not an expert.—*Fox v. Cox*, 50 N. E. 92, 20 Ind. App. 61.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2274.

See, also, 17 Cyc. pp. 113, 116, 124, 129.

**§ 491. Time.**

Conclusions and matters of opinion or facts, see ante, § 471.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

[a] (Sup. 1881)

While the question as to what constitutes a reasonable time where the facts are undisputed is one of law for the court, the court may receive evidence of persons having peculiar knowledge concerning the matter out of which the situation arises as to what would constitute a reasonable time under the circumstances of the case.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 500.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2269.

See, also, 17 Cyc. p. 107.

**§ 492. Rate of speed.**

Competency of experts, see post, § 539½.

Conclusions and matters of opinion or facts, see ante, § 471.

Special knowledge as to subject-matter, see ante, § 474.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2270.

See, also, 17 Cyc. p. 105.

**§ 493. Cause and effect.**

Conclusions and matters of opinion or facts, see ante, § 471.

Expert testimony, see post, §§ 526-528.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

[a] (Sup. 1842)

In a case of trespass for an assault and battery, it was *held* that the plaintiff had no right, on the trial, to ask a witness whether, in his opinion, the fight would have occurred if defendant had informed the plaintiff that he had a knife.—*Reese v. Bolton*, 6 Blackf. 183.

[b] (Sup. 1881)

In an action for damages for raising a milldam, so as to back water on and drown plaintiff's wheel, a witness, not an expert, may

state what effect the backwater produced upon the power of the wheel.—*Williamson v. Yingling*, 80 Ind. 379.

[c] (Sup. 1882)

A nonexpert witness who is familiar with the facts and who states them to the jury may express an opinion, where the case is one in which it is proper to admit opinion evidence, as, where a witness had stated in detail the number of acres in the vicinity of a ditch and had given its size and location, it was proper to permit him to state what effect, if any, the drainage of the wet land would have on the public wealth of the community.—*Bennett v. Meehan*, 83 Ind. 566, 43 Am. Rep. 78.

[d] (Sup. 1885)

The opinions of a petitioner's witnesses as to whether or not the proposed drain would be of public utility, benefit any highway, or benefit or damage the land of her remonstrator is incompetent.—*Meranda v. Spurlin*, 100 Ind. 380.

[e] (App. 1900)

In an action for damages caused by a fire communicated from a fire on a railroad right of way to a building, an opinion of a witness as to what set the building on fire is inadmissible.—*Chicago & E. I. R. Co. v. Ross*, 56 N. E. 451, 24 Ind. App. 222.

[f] (App. 1906)

In proceedings for the laying out of a highway a witness was asked as to whether certain land would be affected by the highway—whether it would be made better or worse—and the witness answered that he thought it would advance the price. *Held*, that such question and answer were improper.—*Pichon v. Martin*, 73 N. E. 1009, 35 Ind. App. 167.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2275-2282.

See, also, 17 Cyc. p. 99.

§ 494. Damages.

Competency of experts, see post, § 543½.

Conclusions and matter of opinion or facts, see ante, § 471.

Expert testimony, see post, §§ 530-534.

Facts forming basis of opinion, see post, § 501.

Matters directly in issue, see ante, § 472.

Special knowledge as to subject-matter, see ante, § 474.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2283-2289.

§ 495. — In general.

[a] (Sup. 1871)

A witness, ordinarily, may not be asked to state the amount of damage suffered.—*Bissell v. Wert*, 35 Ind. 54.

[b] (Sup. 1878)

In an action to recover damages for a tort, the opinion of a witness as to the amount

of damages resulting from the tort is inadmissible. The jury must make the estimate from the facts proved.—*Noah v. Angle*, 63 Ind. 425.

[c] (App. 1906)

In an action for damages for a nuisance consisting of a sewer and reservoir, it was error for the court to permit a witness to answer a question, "What was the damages sustained by reason of that sewer?" and state that the witness would put the damage at \$1,000.—*City of Huntington v. Stemen*, 77 N. E. 407, 37 Ind. App. 553.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2283.

§ 496. — Injuries to the person.

[a] (Sup. 1880)

A verdict of \$2,000 was set aside, where plaintiff was allowed to state his estimate of the amount of damages he had sustained on account of the injuries received, although he placed such estimate at \$5,000.—*Ohio & M. R. Co. v. Nickless*, 71 Ind. 271.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2284.

§ 497. — Injuries to property.

[a] In proceedings to assess damages caused by the appropriation of land for railroad purposes, the opinions of witnesses as to the amount of damages sustained by a landowner are incompetent.—(Sup. 1858) *Evansville, I. & C. Straight Line R. Co. v. Fitzpatrick*, 10 Ind. 120; (1858) *Same v. Stringer*, Id. 551; (1877) *Baltimore, P. & C. R. Co. v. Johnson*, 59 Ind. 247.

[b] (Sup. 1858)

Where persons are shown to be familiar with the value of the particular piece of land across which the railroad has been built, they may testify as to the value of such tract immediately before the location of the road, and the value thereof immediately afterwards.—*Evansville, I. & C. Straight Line R. Co. v. Cochran*, 10 Ind. 500.

[c] (Sup. 1862)

In an action to recover from a railroad company damages for injury to defendant's ferry caused by the construction of defendant's road and bridge, evidence of a witness as to what, in his opinion, was the amount of damage occasioned to defendant's ferry by reason of bars produced by the piers of defendant's bridge, and by reason of obstructions caused by the piers and abutments of the bridge to the passage of the ferry boat, is inadmissible, as a conclusion.—*New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

[d] (Sup. 1870)

On the trial of an action for waste, the value of the farm as an inheritance in its dilapidated condition, and what its value would

have been had it been kept in a proper state of repair and cultivation, were properly shown by the opinions of witnesses who from personal knowledge of the farm were qualified to judge.—*Ferguson v. Stafford*, 33 Ind. 162.

[e] (Sup. 1875)

On the trial of a proceeding by a city to condemn certain land for the purposes of a street, it is improper to ask a witness the value of the strip of land appropriated, considered with reference to the manner the appropriation affected the remainder of the land.—*City of Logansport v. McMillen*, 49 Ind. 493.

In proceedings to condemn lands, the opinion of a witness as to the damages to the residue of the land is inadmissible.—*Id.*

[f] (Sup. 1877)

In proceedings to assess damages caused by the appropriation of land for railroad purposes, a question which asks a witness how much less a farm would be worth by reason of the construction of a railroad across it is improper, as an indirect mode of obtaining the opinion of the witness as to the amount of damages.—*Baltimore, P. & C. R. Co. v. Johnson*, 59 Ind. 247.

[g] (Sup. 1877)

In a proceeding to assess damages for appropriation of land to a railroad company, the owner cannot, in testifying, give his opinion as to the amount of damages.—*Baltimore, P. & C. R. Co. v. Johnson*, 59 Ind. 480; *Same v. Stoner*, *Id.* 579.

[h] (Sup. 1881)

In an action for setting fire to land, a witness cannot state that the damage amounted to a certain number of dollars per acre.—*Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111.

[i] (Sup. 1882)

In proceedings to condemn land for highway purposes, the opinions of witnesses are inadmissible to show the benefits or damages which may result therefrom, or to show the different values of lands with and without the highway.—*Hagaman v. Moore*, 84 Ind. 496.

[j] (Sup. 1882)

In fixing the difference in the value of horses at a particular time as compared with the period a few weeks before, when they were injured, witness may be asked to state the difference.—*Bowlus v. Brier*, 87 Ind. 391.

[k] (Sup. 1884)

In an action for damages to land sustained by the construction of a drain, the opinion of a witness acquainted with the land as to its value with or without the drain is admissible.—*Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156.

[l] (Sup. 1888)

In an action for damages against a municipal corporation for injuries sustained by rea-

son of the change of grade of a street, the opinions of witnesses as to the value of the property before and after the change are admissible.—*City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1.

[m] (Sup. 1888)

A qualified witness may state the difference in value between a car as it was after it was repaired and as it was before it was injured.—*New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 116 Ind. 60, 18 N. E. 182.

[n] (Sup. 1892)

In highway proceedings, the opinions of witnesses as to the market value of a remonstrant's land, abutting thereon, without the road, and its market value with it, are admissible.—*Hire v. Kniseley*, 130 Ind. 295, 29 N. E. 1132.

[o] (App. 1893)

Opinion evidence is admissible as to damages to land whose soil is burned by fires negligently set by a railroad company.—*Chicago & E. R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241.

[p] (App. 1895)

In an action against a railroad for injuries to land, caused by its negligence in constructing drains across its roadbed, so as to cause surface water to back on plaintiff's land, the value of the land before and after such injury may be proven by the opinions of witnesses.—*Louisville, N. A. & C. R. Co. v. Sparks*, 12 Ind. App. 410, 40 N. E. 546.

In an action for injuries to plaintiff's crops, the measure of damages is the difference in the value of the crops with and without the injuries, and therefore it is error to permit a witness to state his opinion as to the extent, in dollars and cents, of such "injuries," as in arriving at his conclusion he may have considered matters not lawfully elements of damages.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2285-2288.

#### § 498. — Breach of contract.

[a] (Sup. 1867)

It was not competent for witness to state what damages resulted from the omission of the defendant to perform a contract sued on, that being a conclusion which the jury is to draw from the facts.—*Mitchell v. Allison*, 29 Ind. 43.

[b] (Sup. 1871)

Where damages are claimed for a breach of a contract by reason of the unskillful sowing of clover, it is not competent to ask a witness the amount of damages sustained by such unskillful sowing, as the witness must state the facts, from which the court or jury may determine the damages.—*Bissell v. Wert*, 35 Ind. 54.

[c] (App. 1898)

On an issue as to damages from failure of a lessor to make certain repairs, the lessee and her husband cannot give their opinions as to what the damage was.—*Ross v. Stockwell*, 49 N. E. 50, 19 Ind. App. 86.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2289.

#### § 498½. Determination of question of competency.

[a] (Sup. 1868)

On the trial of an action by commission merchants for overadvances, the court suppressed the answer to the following question in a deposition: "State what would be the duty of a commission merchant in this city, by the custom of trade here, in reference to the sale of a lot of lard, upon the receipt from the owner of such letters as are hereto attached, and marked, 'Exhibits A and B,'" No such letters as were set forth in the exhibits were introduced on the trial. *Held*, that this was sufficient to justify the court in excluding the answer, even if there were no legal objection to a witness placing a construction upon a written paper.—*Huston v. Roots*, 30 Ind. 461.

[b] (App. 1898)

Unless there is no evidence tending to prove the qualification of witness to testify as to value, or a palpable abuse of discretion, the court's conclusion as to the admissibility of her testimony thereof will not be disturbed.—*Fredericks v. Sault*, 49 N. E. 909, 19 Ind. App. 604.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2290, 2291.

#### § 499. Examination of witnesses.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2290-2307.

See, also, 17 Cyc. pp. 242-253; note, 39 L. R. A. 305.

#### § 500. — Testimony in general.

[a] (Sup. 1871)

In a contest of a will on the ground of insanity or unsoundness of mind of the testator, a witness who had testified that he had known the testator intimately for many years, that he had officiated at the marriages of all the testator's children but one, that he knew him in church and had been with him many times, was asked the following questions: "What impression did the facts stated by you make upon you as to the soundness of the testator's mind? Answer. From the facts which I have detailed there was no impression made on my mind as to the testator's sanity. Second. From the facts stated by you, what is your opinion as to the soundness of the testator's mind?" There was no answer to this question in the record. "Third. At the time of your intercourse with the testator what was your opinion of the soundness of his mind, judging from the facts

you have stated to the jury? Answer. I had formed no other opinion than that he was a man of sound mind." *Held*, that the questions were all proper.—*Rush v. Megee*, 36 Ind. 69.

[b] (Sup. 1880)

Where, in replevin proceedings, the witness has testified as to the value of the property in controversy, he may be asked a hypothetical question for the purpose of testing the accuracy of his judgment as to the value of the property.—*Geisendorff v. Eagles*, 5 N. E. 743, 106 Ind. 38.

[c] (Sup. 1885)

A witness may not be asked how a machine works, in comparison with other machines not seen by the jury, nor admitted to be true standards of excellence.—*McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285.

[d] (App. 1891)

In an action for work and labor performed, it is proper for plaintiff to put to ordinary witnesses hypothetical questions in regard to the value of the services alleged to have been performed.—*Grave v. Pemberton*, 3 Ind. App. 71, 29 N. E. 177.

[e] (App. 1896)

Plaintiff paid his fare, and received a rebate ticket from the conductor, and when again asked for a fare he refused to pay; but he did not show the rebate ticket, and he was ejected. *Held*, that the question, "Don't you know that if you had produced that ticket it would have stopped all trouble between you?" was objectionable as calling for plaintiff's opinion as of the time of the trial.—*Louisville, N. A. & C. R. Co. v. Goben*, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2290, 2291.

#### § 501. — Facts forming basis of opinion.

[a] (Sup. 1839)

The opinion of a witness, not being a medical man, as to a person's insanity, is not admissible evidence, unless the facts on which it is based have come under his own observation, and unless he state those facts to the jury.—*Doe ex dem. Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 406.

[b] Opinions of nonexpert witnesses as to the mental capacity or sanity of another must be accompanied by a statement of the facts on which such opinions are based.—(Sup. 1854) *Kenworthy v. Williams*, 5 Ind. 375; (1879) *State ex rel. Nave v. Newlin*, 69 Ind. 108; (1890) *Burkhart v. Gladish*, 24 N. E. 118, 123 Ind. 337; (1896) *Rarick v. Ulmer*, 42 N. E. 1099, 144 Ind. 25.

[c] (Sup. 1870)

In replevin, it is error to permit a witness to give his opinion as to the amount of damages suffered by plaintiff by reason of the



detention of the property by defendant, without stating any facts upon which he based such opinion.—*Kirkpatrick v. Snyder*, 33 Ind. 169.

[d] (Sup. 1876)

Where the value of property is an issue in a cause, any witness acquainted with such property may testify as to its value, stating also the facts upon which he bases his opinion.—*Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

[e] (Sup. 1885)

A nonexpert witness must, in giving an opinion, state the facts upon which that opinion is based, as far as possible.—*Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 633.

[f] (Sup. 1888)

Witnesses not experts may give their opinions as to the sanity of one with whom they were not intimately acquainted, where they disclose the facts on which their opinions are based, and may relate acts and declarations of the person alleged to be insane; but such declarations should not have any effect, except on the issue of sanity.—*Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129.

[g] (Sup. 1890)

A witness, whatever may be his experience, cannot testify as to whether or not the maintenance of a cattle guard at a particular place would, in his opinion, increase the danger to the company's trainmen, without first giving the facts on which the opinion is based.—*Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. 1065.

[h] (Sup. 1891)

A nonexpert witness cannot, for the purpose of proving that a person was conscious, be asked to state whether or not such person, when conversing with him, appeared conscious of what he was talking about, but should be first asked to state the facts on which his opinion is based, and then the question should be framed so as to call for an opinion based on such facts.—*Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860.

[i] (Sup. 1893)

In estimating the damage caused to a farm by establishing a highway across it, it is proper to allow proof of the market value of the entire farm without the highway and such value with the highway, without first having the witnesses state the basis on which they estimate such values, since such basis may be ascertained on cross-examination.—*Goodwine v. Evans*, 134 Ind. 262, 33 N. E. 1031.

[j] (App. 1894)

Plaintiff was properly permitted to state to the jury that his farm was worth \$1,200 less after than before the fire, and to give the reasons for his opinion.—*Chicago & E. R. Co. v. Kern*, 9 Ind. App. 505, 36 N. E. 381.

[k] (Sup. 1895)

Nonexpert witnesses may give their opinions, in an action for personal injuries, as to the industrious habits and physical ability of plaintiff before the injury, where they state, as far as possible, the facts and observations on which they are based.—*Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343.

A nonexpert witness may give his opinion if he states as far as possible the facts and observations on which it is based.—*Id.*

[l] (Sup. 1895)

Conversations with testator on the subject of wills, had four years before the execution of the will in controversy, are admissible as the basis of opinion of a nonexpert, testifying as to the testamentary capacity of the testator.—*Bower v. Bower*, 142 Ind. 194, 41 N. E. 523.

[m] (Sup. 1895)

On an issue of the mental condition of a person, opinion evidence is admissible when the facts on which the opinion is based are given, and such facts show that witness is acquainted with, has had opportunity to observe, and has observed, such person.—*Stumph v. Miller*, 142 Ind. 442, 41 N. E. 812.

[n] (App. 1895)

A nonexpert witness may give an opinion as to the general health and physical condition of another, if the facts on which the opinion is based are within his personal knowledge, and have been first stated.—*Louisville, N. A. & C. R. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107.

[o] (App. 1895)

In an action on an insurance policy by the assignee of the insured property and the policy, it is not error to allow a witness to be asked if he knew whether a sale had been made to plaintiff, and to state how he knew it, since the facts on which his knowledge is based may be brought out on cross-examination.—*Indiana Ins. Co. of Indianapolis v. Glenn*, 13 Ind. App. 534, 40 N. E. 151; *Indiana Ins. Co. of Ft. Wayne v. Same*, 13 Ind. App. 696, 40 N. E. 152.

[p] (Sup. 1906)

On the issue of the mental capacity of testator, a question asked a witness, "From what you have stated, from what you have seen of [testator], will you tell the jury as to what you think as to his being of sound or unsound mind during those 10 years you knew him?" was intended to elicit the opinion of the witness upon the facts gathered from his acquaintance with and observation of the testator for 10 years, and detailed to the jury in his previous testimony, and did not violate the rule that an opinion sought must be limited to the facts and appearances detailed to the jury.—*Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25.

In an action to contest a will it is proper to instruct that lay witnesses can give opinions as to testator's sanity only on facts de-

tailed by them, and that the jury are not bound by such opinions, but may examine the facts stated and reach their own conclusion.—Id.

[q] (App. 1910)

A nonexpert may give his opinion as to the mental condition of a person in connection with a statement of facts on which it is based, provided the facts show him to be acquainted with the person and to have had an opportunity to, and did, observe him, and from these statements of facts the jury must determine what weight shall be given to the testimony of the witness.—*Wiseman v. Gouldsberry*, 91 N. E. 616.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2292-2305; 49 CENT. DIG. Wills, § 118.

See, also, 16 Cyc. p. 1159, 17 Cyc. pp. 249, 250; note, 38 L. R. A. 733.

## § 502. — Cross-examination and re-examination.

[a] (Sup. 1886)

Where a witness gave his opinion as to the age of plaintiff, it was proper on cross-examination to allow him to be asked to guess at the age of the bystander, and then to call such bystander to prove what his age actually was.—*Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

[b] (App. 1909)

Where a witness, on his examination in chief, testified to his acquaintance with a deceased grantor, to conversations had with him, and on such facts expressed an opinion as a nonexpert as to the mental soundness of the grantor, a question on cross-examination whether the fact that the grantor had deeded all his real estate to his two sons, leaving four daughters and a grandchild without anything, would make an impression on the mind of a witness as to the mental soundness of the grantor, was improper cross-examination, because not related to facts given in the examination in chief.—*Conklin v. Dougherty*, 89 N. E. 893.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2306, 2307.

## (B) SUBJECTS OF EXPERT TESTIMONY.

Effect of expert testimony, see post, § 571.  
In criminal prosecutions, see CRIMINAL LAW, §§ 468-475.  
Scope and sufficiency of objections to admission of expert testimony, see TRIAL, § 84.

## § 505. Matters of opinion or facts.

[a] (Sup. 1884)

An expert may not only give opinions, but may state facts which are the result of scientific knowledge or professional skill.—*Jones v. Angell*, 95 Ind. 376.

[b] (Sup. 1900)

The negative answer of an expert witness to a question as to whether, on the day of his execution of his will, such testator was or was not "laboring under an insane delusion, or anything of that kind," is not objectionable as being a statement of fact, and not the expression of an opinion.—*Stevens v. Leonard*, 56 N. E. 27, 154 Ind. 67, 77 Am. St. Rep. 446.

[c] (App. 1906)

In an action for personal injuries, the testimony of a physician that, as he observed it, the person injured suffered quite a good deal, was not objectionable as a conclusion of the witness.—*Indianapolis & M. R. T. Co. v. Reed-er*, 76 N. E. 816, 37 Ind. App. 262.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2308.

## § 506. Matters directly in issue.

[a] (App. 1901)

It was proper, in an action for injuries due to the breaking of a pulley, to permit an expert to testify that a pulley exhibited to him, and similar to the alleged insufficient pulley, was not suitable for certain work, the sufficiency of the pulley being only one of several questions before the jury.—*Indiana Bituminous Coal Co. v. Buffey*, 62 N. E. 279, 28 Ind. App. 108.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2309.

## § 507. Matters of common knowledge or observation.

[a] (Sup. 1881)

In an action against a city for injuries caused by a defective street, questions as to where a certain line was run, and whether it included a certain house and land, could be answered by any one cognizant of the facts.—*City of Huntington v. Mendenhall*, 73 Ind. 460.

[b] (App. 1891)

The opinion of a witness is not admissible where the facts upon which it is founded can be stated to, and intelligently comprehended by, the court or jury trying the case, and where from such facts men in general are capable of drawing reasonably correct conclusions.—*Grave v. Pemberton*, 29 N. E. 177, 3 Ind. App. 71.

[c] (Sup. 1892)

Where the facts can be fully placed before the jury, opinion evidence, even from experts, is incompetent if the facts are of such a nature that jurors are as well qualified to form an opinion on them as the witnesses.—*Brunker v. Cummins*, 32 N. E. 732, 133 Ind. 443.

[d] (App. 1894)

The opinion of an experienced railroad man, that the cattle guard could not be maintained at the place where the accident occurred without endangering the lives of the company's employes in operating its trains at night, was properly excluded, it being possible for the wit-

ness to describe the tracks, the cattle guard, management of the trains, and the duties required of employes, from which the jury could form an opinion as well as the witness.—*Cleveland, C., C. & St. L. R. Co. v. De Bolt*, 10 Ind. App. 174, 37 N. E. 737.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2310.

See, also, 17 Cyc. pp. 229, 230.

**§ 508. Matters involving scientific or other special knowledge in general.**

[a] (Sup. 1884)

The opinion of an expert in any art, trade, or profession may be given where it is proper for the decision of a question relating to the issues in the case.—*Jones v. Angell*, 95 Ind. 376.

[b] (App. 1892)

Expert testimony is admissible to show the probable expectation of life of a person of a particular age.—*Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

[c] (Sup. 1893)

The evidence of experts is admissible to show the balances discovered from multifarious accounts.—*Equitable Acc. Ins. Co. v. Stout*, 33 N. E. 623, 135 Ind. 444.

[d] (App. 1902)

In a suit for damages caused by the explosion of gas alleged to have leaked from defendant's pipes, defendant proved that an excavation was made along its pipes shortly after the accident, and no discoloration of the earth found. *Held*, that expert testimony that gas might pass through the earth without discoloring it, except at the point of escape, was competent in rebuttal.—*Logansport & W. V. Natural Gas Co. v. Coate*, 64 N. E. 638, 29 Ind. App. 299.

[e] (App. 1903)

The questions as to how long it would take to assess a township for taxation, and how much of such work could be done in a day, are not subjects for expert testimony.—*Board of Com'rs of Clay County v. Redifer*, 69 N. E. 305, 32 Ind. App. 93.

[f] (App. 1909)

Whether sewers constructed by a city were of sufficient capacity to drain the area they were called on to serve was a question on which expert civil engineers might give an opinion.—*City of Garrett v. Winterich*, 87 N. E. 161, rehearing denied 88 N. E. 308.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2311.

See, also, 17 Cyc. pp. 228–241.

**§ 509. Bodily condition.**

Competency of experts, see post, § 537.

[a] (Sup. 1886)

It is competent to ask a medical witness as to the character of an injury.—*Louisville,*

*N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

[b] (Sup. 1889)

In an action for personal injury, testimony of a surgeon who had examined the injury, as to what bone was fractured, and as to the character of the fracture, was admissible.—*City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2312, 2313.

**§ 510. Mental condition or capacity.**

Competency of experts, see post, § 537.

[a] (Sup. 1878)

On a will contest on the grounds of testamentary incapacity and undue influence, it is proper to admit testimony of the attending physician of testator that the fact that he had judiciously managed his estate before he made his will tended to show that he was subject to no delusion while making it.—*Coryell v. Stone*, 62 Ind. 307.

[b] (Sup. 1906)

On the issue of the mental capacity of a testator a medical expert witness may explain the distinctive peculiarities of a mind suffering from insane delusions and the symptoms of dementia.—*Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25.

It is competent for a physician in a will contest to explain "mania," "monomania," and other technical terms.—*Id.*

On the issue of mental capacity of a testator, a medical expert may explain the effect resulting to the brain, nervous system, and body of a man from the excessive use of alcohol.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2314.

See, also, 17 Cyc. p. 237; note, 39 L. R. A. 305; note, 6 Am. Dec. 59.

**§ 511. Handwriting.**

Comparison by experts, see post, §§ 561–566.

Evidence of expert as to genuineness of signatures as proper evidence in rebuttal, see TRIAL, § 62.

Waiver of objection to testimony of expert as to signatures, see TRIAL, § 75.

[a] (Sup. 1862)

The question whether or not a figure in a promissory note has been changed is a proper subject for the opinion of experts.—*Nelson v. Johnson*, 18 Ind. 329.

[b] (Sup. 1882)

An expert may state whether the writing in question is, in his opinion, in a feigned hand.—*Cox v. Dill*, 85 Ind. 334.

[c] (Sup. 1898)

An expert cannot testify that a forger, in imitating and disguising handwritings, is more

particular at the beginning than at the close of the effort.—*Miller v. Dill*, 49 N. E. 272, 149 Ind. 326.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2315.

### § 512. Due care and proper conduct in general.

[a] (App. 1893)

In an action against a railroad company for loss of services of plaintiff's minor son, it appeared that deceased went under an engine to tighten a boiler plug which was leaking, and was so scalded that he died. Defendant's foreman testified that he informed deceased of the dangerous character of the work. *Held*, that evidence of an expert engineer that the conduct of deceased was careless was inadmissible.—*Louisville, E. & St. L. Consol. R. Co. v. Berry*, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Where all the facts of a cause are susceptible of being placed before the jury, and from them the jury are as much or more capable of determining whether one was guilty of negligence as was an expert witness, there was no error in excluding the expert testimony.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2316.

### § 513. Construction and repair of structures, machinery, and appliances.

Competency of experts, see post, § 539.

[a] (Sup. 1886)

Facts as to the construction and equipment of cars coupling with single deadwoods, and with double deadwoods, and the relative danger in coupling cars with each, may, in an action by an employé to recover for personal injuries, be testified to by expert witnesses as such.—*Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594.

[b] (Sup. 1887)

In an action against a railroad company for preventing the performance of a contract to do certain work for it within a specified time, under the direction of the company's engineer, time being expressly made of the essence of the contract, evidence of experienced railway builders or experts, that but for delays caused by the engineer the work could have been completed within the time, is admissible.—*Louisville, E. & St. L. R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153.

[c] (Sup. 1895)

In an action for injuries resulting from the breaking of a county bridge over which plaintiff was passing, experienced bridge builders, who examined the bridge immediately after the accident, and described to the jury the bridge and its plan of construction, could give their opinion as to whether, if it had been kept in repair as originally constructed, the bridge

would have safely sustained a much larger load than that under which it broke.—*Bonebrake v. Board of Com'rs of Huntington County*, 141 Ind. 62, 40 N. E. 141.

[d] (App. 1895)

In an action against a railroad company for stock killed through a defective cattle guard, an expert witness cannot testify that such guard was the best cattle guard to turn stock generally and at the same time not injure the lives of the employes and the traveling public.—*New York, C. & St. L. R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. 1058.

[e] (App. 1899)

There being evidence to which the questions and their hypotheses were pertinent, an expert, in an action for a fire set by defendant's locomotive on premises adjacent to defendant's right of way, might testify as to how large a spark or cinder would be that could be seen from 10 to 20 rods, in the daytime, passing from the smoke-stack of a locomotive, and whether a locomotive equipped in a certain way would emit sparks with such life that they would carry fire to points 50 to 100 feet from the track, if it was being operated in weather ordinarily prevailing in March, and whether a locomotive was suitably equipped which would, in going six miles, set out as many different fires at different points from 50 to 100 feet from the track.—*Chicago & E. R. Co. v. Kreig*, 53 N. E. 1033, 22 Ind. App. 393.

[f] (App. 1900)

In an action for the price of a machine of complex construction, opinions of experts were properly admitted in evidence on the question whether the machine would do the work required or not.—*Buckeye Mfg. Co. v. Woolley Foundry & Machine Works*, 58 N. E. 1069, 26 Ind. App. 7.

[g] (App. 1900)

Though in an action for damages caused by leaking gas, an expert may be asked to what extent it is practicable to construct a gas plant so as to wholly avoid leakage in its system of pipes, he cannot be asked the opinion of others on the subject.—*Indiana Natural & Illuminating Gas Co. v. Anthony*, 58 N. E. 868, 26 Ind. App. 307.

[h] (Sup. 1907)

In railroad right of way condemnation proceedings, an expert witness was properly permitted to state whether a certain sized tile, if set at the bottom of a drainage ditch over which the railroad embankment was constructed, would suffice to pass the volume of water that the ditch would carry down to the embankment.—*New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

#### FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2317, 2318.

See, also, note, 59 Am. Rep. 176.

### § 514. Management and operation of vehicles, machinery, and appliances.

Competency of experts, see post, §§ 539, 539½.

#### [a] (Sup. 1888)

A competent expert may give an opinion as to the distance at which it is safe to stop a train before going on the crossing of another road.—*New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.*, 116 Ind. 60, 18 N. E. 182.

#### [b] (Sup. 1889)

The court properly refused to allow a witness to answer a question calling for his opinion, upon a supposable state of facts, as to whether the engineer was acting within the line of his duty at the time of a railroad accident.—*Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135.

#### [c] (App. 1896)

In an action for personal injuries sustained by the breaking of a cable and the falling of a cage in which plaintiff was descending into a mine, plaintiff was entitled to prove, by experts, how far a cage would drop before its descent ought to be checked and stopped by approved safety catches.—*Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594, 43 N. E. 242.

#### [d] (App. 1899)

In an action for causing death by frightening horses by unnecessarily blowing a locomotive whistle, an opinion of an engineer, as an expert, that the whistle was blown unnecessarily, is inadmissible.—*Chicago & E. R. Co. v. Cummings*, 53 N. E. 1026, 24 Ind. App. 192.

#### [e] (App. 1900)

On a trial for injuries sustained by a railway passenger in a collision, the testimony of experienced railroad men as to the danger of running trains backward was admissible as expert testimony.—*Chicago & E. I. R. Co. v. Grimm*, 57 N. E. 640, 25 Ind. App. 494.

#### [f] (App. 1904)

The distance within which a street car in motion may be stopped by the use of the brake is a question on which an expert witness may properly give an opinion.—*Indianapolis St. R. Co. v. Seerley*, 72 N. E. 169, 1034, 35 Ind. App. 467.

#### [g] (Sup. 1906)

In an action for injuries to a railroad brakeman, alleged to have resulted from the negligence of the conductor in giving the engineer a signal to stop without having uncoupled the car on which plaintiff was riding, and which was being placed on a side track, it was proper to allow experienced railroadmen to testify as to the duties of the conductor, and that "the stop signal should not be given until the car is cut off."—*Pittsburgh, C., C. & St. L. Ry. Co. v. Nicholas*, 76 N. E. 522, 165 Ind. 679.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2319-2323.

See, also, 17 Cyc. pp. 64-80, 232.

### § 518. Construction of written instruments.

#### [a] (Sup. 1881)

In an action for breach of contract to act as agent for an insurance company "for a reasonable time," the testimony of an insurance agent, as expert, as to what was a reasonable time, was competent.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2326.

### § 519. Nature, condition, and relation of objects.

#### [a] (Sup. 1883)

Expert evidence is admissible as to whether a railroad was finished at a certain date.—*Hilton v. Mason*, 92 Ind. 157.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2328.

### § 521. Value.

Competency of experts, see post, § 543.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2330-2333.

See, also, 17 Cyc. pp. 128-130.

### § 523. — Services.

#### [a] (Sup. 1880)

In a suit for one-half of the proceeds of a crop raised by plaintiff on defendant's land, the testimony of an expert as to the relative values of the labor necessary to produce such a crop and that required to prepare it for shipment is immaterial, and its exclusion is not erroneous.—*Kelly v. Northington*, 73 Ind. 152.

#### [b] (Sup. 1906)

An injured person may testify what his services in the profession for which he had fitted himself, and which was his regular calling were fairly and reasonably worth.—*Lake Shore & M. S. Ry. Co. v. Teeters*, 77 N. E. 593, 166 Ind. 335, 5 L. R. A. (N. S.) 425.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2331.

See, also, 17 Cyc. p. 130; note, 74 C. C. A. 257.

### § 525. — Personal property.

#### [a] (Sup. 1881)

In an action for damages for killing plaintiff's cows, persons who have kept cows, or had experience in buying or selling them, are competent to testify as to the value of the cows killed, merely from a description of them given by other witnesses.—*Smith v. Indianapolis & St. L. R. Co.*, 80 Ind. 233.

#### [b] (App. 1893)

In an action to recover damages for the unlawful termination of a farm lease and loss of crops, an expert may give his opinion as to the value of a clover crop, in answer to a hypo-

thetical question.—Huber v. Beck, 6 Ind. App. 484, 33 N. E. 985.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2333.

See, also, 17 Cyc. p. 129.

**§ 526. Cause and effect.**

Competency of experts, see post, § 544.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2334-2338.

**§ 527. — In general.**

[a] (App. 1891)

In an action against a railroad company for stock killed on its track, a witness, although qualified as an expert, cannot testify whether or not, in his opinion, the placing of cattle guards on a track within 300 feet of a certain switch would endanger employes in handling trains at that point.—Pennsylvania Co. v. Lindley, 2 Ind. App. 111, 28 N. E. 106.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2334, 2335.

**§ 528. — Injuries to the person.**

[a] (Sup. 1881)

The opinion of a physician, as an expert witness, as to the permanent effects of an injury complained of, is competent.—Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 142, 40 Am. Dec. 224.

[b] (Sup. 1885)

It is proper for an attending physician to testify as to the nature of the injuries received by another physician, their probable duration, and whether, by reason of them, he will be permanently unable to practice his profession, to his damage.—Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 1 N. E. 304, 52 Am. Rep. 653.

[c] (Sup. 1886)

In an action for personal injuries, a physician can testify as to the probable permanence of the injuries received.—Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

[d] (Sup. 1888)

In an action for personal injuries sustained by the plaintiff, a medical witness who had examined the plaintiff, and described her condition, was asked what, in his opinion as a medical expert, produced the symptoms he saw in her case. Held, that the testimony was admissible.—Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[e] (Sup. 1889)

A physician may testify as an expert as to the effect of an injury.—Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. Rep. 865.

[f] (App. 1892)

In an action to recover damages for personal injuries, a medical witness may state his

opinion as to the probable cause of the injuries.—Pennsylvania Co. v. Frund, 4 Ind. App. 469, 30 N. E. 1116.

[g] (App. 1895)

A medical expert, who has testified fully as to plaintiff's condition as he had found it on examination after the accident, may give his opinion as to the cause of the injuries.—Louisville, N. A. & C. R. Co. v. Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

A medical expert, after he has testified as to the facts showing his knowledge of the injuries, may give his opinion as to whether they are permanent.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2335-2337.

**§ 530. Damages.**

Competency of experts, see post, § 543½.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2339-2342.

**§ 534. — Breach of contract.**

[a] (Sup. 1882)

In determining the probable value of the commissions of an insurance agent, wrongfully discharged, from premiums on renewals of policies obtained by him, the testimony of witnesses skilled in insurance matters and familiar with the value of renewals is competent.—Ætina Life Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2342.

**(C) COMPETENCY OF EXPERTS.**

In criminal prosecutions, see CRIMINAL LAW, §§ 477-481.

Sufficiency and scope of objections to admission of expert testimony, see TRIAL, § 84.

To compare handwriting, see post, § 563.

**§ 536. Knowledge, experience, and skill in general.**

[a] (App. 1891)

Where a man has had large experience with the pedigrees of horses by being in the horse business for 40 years, and by publishing and editing several works relating to horses, he is qualified as an expert to testify to the pedigree of a certain horse.—Fleming v. McClafflin, 1 Ind. App. 537, 27 N. E. 875.

[b] (App. 1900)

In a proceeding to collect a special assessment for a street improvement, it was proper to permit the engineer who had charge of the work to testify as an expert in regard to the manner in which the work was done.—Fralich v. Barlow, 58 N. E. 271, 25 Ind. App. 383.

[c] (App. 1909)

A civil engineer of 30 years' experience, who had held the office of city engineer for a

number of years, and who was engineer when the city constructed a sewer system, and who was familiar with the pipes and sewers, was competent to give his opinion as an expert whether the sewers had sufficient capacity to drain the area they were called on to serve.—*City of Garrett v. Winterich*, 87 N. E. 161, rehearing denied 88 N. E. 308.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2343, 2344, 2347.

See, also, 28 Cyc. p. 46.

**§ 537. Bodily and mental condition.**

[a] (Sup. 1871)

Physicians who are engaged in practice, and have given the subject of medical jurisprudence some attention, may be examined as experts on the subject of insanity.—*Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2345; 49 CENT. DIG. Wills, §§ 116, 117.

See, also, note, 39 L. R. A. 306, 317.

**§ 539. Machinery and mechanical devices and appliances.**

[a] (Sup. 1908)

Where, in an action by an employé for personal injuries, plaintiff alleged that defendant negligently failed to provide oil pans and drains for its engine, a witness who testified that at the time of the accident he was defendant's chief engineer, and had been employed and connected with engines and machinery of the kind in question at numerous places continuously for 14 or 15 years, was competent to testify as to whether or not oil pans and drains were customarily used.—*Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2349-2352.

**§ 539½. Construction and operation of railroads.**

[a] (Sup. 1889)

One who has managed or assisted in the management of hand cars may express an opinion as to the rate at which a hand car was moving on a specified occasion.—*Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. Rep. 865.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2350-2352.

**§ 542. Physical facts.**

[a] (Sup. 1866)

On the trial of an action for the price of cross-ties furnished to a railroad company, the defense being that the ties were not of good quality, one witness, called by the plaintiff to prove the quality of the ties stated that he had been roadmaster of another railroad, and as such it had been his duty to inspect and receive

ties. Another witness, called for the same purpose, stated that he had made and sold cross-ties to defendant. *Held*, that the witnesses had sufficient knowledge of the subject to make them competent witnesses as to the quality of the ties.—*Jeffersonville R. Co. v. Lanham*, 27 Ind. 171.

[b] (Sup. 1880)

In a suit to recover for injuries resulting from a defect in a wooden-gutter crossing, which had become rotten and unsafe, a witness who has followed the business of civil engineering a great deal of the time for 25 years, and who is shown to have had experience in judging of the soundness of timbers in bridges and such structures, and to have handled woods since he was a boy, may be allowed to give an opinion whether one of the sleepers in such crossing (he having examined it) had rotted recently, or whether the decay was of some length of time.—*City of Indianapolis v. Scott*, 72 Ind. 196.

[c] (Sup. 1893)

Blacksmiths engaged for years in working and handling all the grades of iron are competent to testify as to the quality and condition of the iron in a coupling pin.—*Louisville, N. A. & C. Ry. Co. v. Berkey*, 35 N. E. 3, 136 Ind. 181.

A witness who had worked upon a section for three years and subsequently as a brakeman for eight months, and claimed to possess some knowledge of the different grades of iron from his experience in handling it, is competent to testify as to the quality and condition of the iron in a railroad coupling pin.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2355.

**§ 543. Value.**

[a] (Sup. 1871)

Other persons having knowledge of the subject may testify, as well as lawyers, as to the value of services rendered by an attorney in a case.—*McNiel v. Davidson*, 37 Ind. 336.

[b] (Sup. 1888)

In an action against a township to recover the value of services rendered as road superintendent, witnesses who were acquainted with the highway, its condition before it was improved, the lay of the land over which it passes, the character of the soil, the amount of water necessary to be drained away from the highway, and had had experience in improving and maintaining highways were competent to give their opinions as to what was necessary to put it in good ordinary repair.—*Clark Civil Tp. v. Brookshire*, 16 N. E. 132, 114 Ind. 437.

[c] (App. 1896)

In an action for damages for the destruction of hay, one witness testified that he had been dealing in hay for five or six years, and that he had lived for many years in the vicinity, and was acquainted with the character of

the hay grown there; another, that he had lived in the vicinity a number of years, and was acquainted with the character of the hay destroyed. *Held*, that the testimony of either as to the value of the hay was inadmissible.—*Burke v. Howell*, 14 Ind. App. 296, 42 N. E. 952.

[d] (App. 1899)

Where a witness had several years' experience in buying and shipping cattle from the point of shipment to the point of destination, and knew the condition of the cattle shipped, and their age, and had owned cattle of like character, and had observed their weight at place of shipment and at place of delivery, he was competent to give an opinion as to their probable shrinkage between the time of shipment and the time of delivery.—*Cleveland, C. & St. L. R. Co. v. Heath*, 53 N. E. 198, 22 Ind. App. 47.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2356½-2358.

§ 543½. Damages.

[a] (App. 1894)

In an action for damage to a meadow by fire, plaintiff, a farmer, was competent to testify as to what would be necessary to put the drainage in condition for draining said meadow.—*Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13, 38 N. E. 534.

[b] (App. 1897)

A person who has been in the life insurance business for eight years, has been supplied by his companies with tables giving the expectancy of life, and has used them in his business, may be examined as an expert witness on the issue of a life expectancy.—*Clark County Cement Co. v. Wright*, 45 N. E. 817, 16 Ind. App. 630.

[c] (App. 1900)

Where, in an action against a carrier to recover for personal injuries, a witness is shown to have been a life insurance agent for 20 years, he is competent to testify as to expectancy of life.—*Chicago, I. & L. R. Co. v. Neff*, 56 N. E. 927, 25 Ind. App. 107.

[d] (Sup. 1908)

Witnesses who had been residents of the city for years were engaged in the real estate business and were acquainted with real estate values generally throughout the city, in the vicinity of a street improvement for which assessments were sought to be levied on defendant railroad company, were competent to testify on the question of benefits to the company's property, though they were not shown to have had knowledge of the value of the property for railroad purposes.—*New York, C. & St. L. R. Co. v. City of Hammond*, 170 Ind. 493, 83 N. E. 244.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2359.

§ 544. Cause and effect.

[a] (App. 1899)

In an action for damages caused by fire on plaintiff's land, where there is evidence that it was muck land, witnesses who had not seen it, but who had seen and owned similar land, are competent to testify as experts as to the effect of fire on muck land.—*Pennsylvania Co. v. Hunsley*, 54 N. E. 1071, 23 Ind. App. 37.

[b] (App. 1906)

In an action for personal injuries, a physician competent to testify as a medical expert, and who attended and treated plaintiff immediately after the injuries and for some time after that, was competent to testify as to what in his opinion was the producing cause of sleeplessness and nervousness with which plaintiff was afflicted.—*Indianapolis & E. R. Co. v. Bennett*, 39 Ind. App. 141, 79 N. E. 389.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2356.

§ 545. Preliminary evidence as to competency.

[a] (Sup. 1854)

That a person is the county surveyor, regularly appointed, is prima facie evidence that he has a knowledge of the art of surveying.—*Ashe v. Lanham*, 5 Ind. 434.

[b] (Sup. 1877)

A witness, called to testify as an expert concerning an occupation requiring a particular kind of skill and experience, must, to be competent, show himself to be possessed of such skill and experience.—*Hinds v. Harbour*, 58 Ind. 121.

[c] (Sup. 1886)

It is not error to refuse to permit defendant to cross-examine as to his qualifications an expert witness called by plaintiff before the examination in chief by the latter.—*City of Ft. Wayne v. Coombs*, 7 N. E. 743, 107 Ind. 75, 57 Am. Rep. 82.

[d] (Sup. 1892)

It is error to allow a witness to answer a question as to how much a certain person's life estate in land would be worth at sheriff's sale, considering his age and physical condition, where it is not shown that the witness is acquainted with the average duration of human life, or that he has the skill constituting him an expert as to a man's physical condition, and its effect on his expectancy of life.—*Wilson v. Bennett*, 132 Ind. 210, 31 N. E. 184.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2360-2362.

§ 546. Determination of question of competency.

Determination of question as to competency of nonexpert witness, see ante, § 498½.

[a] (Sup. 1859)

Objections to particular testimony that it was "collateral," and "that they had no right to



impeach a medical witness by the opinion of one who was not an expert," though well taken, are no ground for the rejection of a witness altogether; and, if a witness be rejected generally upon such objections, the error is sufficient to reverse the judgment, and it need not be shown that the witness was introduced to prove something pertinent to the issue.—*Horne v. Williams*, 12 Ind. 324.

[b] (Sup. 1879)

The qualification or competency of witnesses to testify as experts is a question for the court.—*Forgey v. First Nat. Bank, of Cambridge*, 66 Ind. 123.

[c] (Sup. 1886)

No standard exists by which to determine the qualifications of an expert witness. If it appears that he is *prima facie* qualified to testify, the court may allow his testimony to go to the jury, allowing the adverse party to cross-examine as to his qualifications, and leaving to the jury the duty of determining the weight of the testimony.—*City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

[d] (App. 1908)

An expert whose fee is contingent upon the result of the suit is an interested witness, but while such interest disqualified a witness at common law, it now goes only to his credibility and the weight to be given to his testimony.—*Indiana Union Traction Co. v. Pheanis*, 43 Ind. App. 653, 85 N. E. 1040.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2363.

See, also, 17 Cyc. pp. 258-261.

#### (D) EXAMINATION OF EXPERTS.

As to handwriting, see post, § 506.

In criminal prosecutions, see CRIMINAL LAW, §§ 482-489.

Sufficiency and scope of objections to admission of expert testimony, see TRIAL, § 84.

#### § 547. Mode of examination in general.

[a] (Sup. 1859)

It is not proper to ask an expert whether he has heard the testimony of a previous expert, and whether he agrees with him. Each expert must be examined fully.—*Horne v. Williams*, 12 Ind. 324.

One called as an expert cannot offer in evidence the particulars of his own private practice, not connected with the case on trial, and such testimony should be excluded upon objection at the time.—Id.

[b] (Sup. 1875)

On the trial of an action to recover the value of services rendered by plaintiff as an attorney in defending another action, a question is not irrelevant which seeks the opinion of a witness as to the value of such services; such opinion being founded upon the character

of the case set out in the complaint filed in said other action, or upon a hypothetical case put to the witness corresponding with the real case.—*Covey v. Campbell*, 52 Ind. 157.

[c] (App. 1891)

Questions put to an expert are properly refused where they are not based on proved or admitted facts nor on facts assumed for the purpose of hypothetical inquiry.—*Chicago & I. Coal R. Co. v. De Baum*, 28 N. E. 447, 2 Ind. App. 281.

[d] (App. 1904)

In an action for injuries to a servant, an expert witness, testifying to the practicability of using a guard on the machinery, which, unguarded, caused the accident, was properly precluded from stating "what the judgment of competent workman is as to the practicability of using a guard" over such machinery.—*Espenlaub v. Ellis*, 72 N. E. 527, 34 Ind. App. 163.

[e] (App. 1909)

Where, in an action for damages to a greenhouse, etc., overflowed by a sewer negligently constructed by a city, plaintiff testified that he was acquainted with the value of flowers and plants in the city, his subsequent testimony of the value of certain plants and beds of flowers in his greenhouse before the same were flooded and the effect of the flood on them, and his answer to a question as to their value in the condition the flood left them, was admissible, in view of his preceding testimony, as against an objection that the question did not call for their value in the place where they were when injured.—*City of Garrett v. Winterich*, 87 N. E. 161, rehearing denied 88 N. E. 308.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2364; 50 CENT.

DIG. Witn. § 849.

See, also, 17 Cyc. p. 242.

#### § 548. Questions and answers based on personal knowledge of expert.

[a] (Sup. 1882)

A physician, called as an expert, cannot be allowed to testify as to his opinion whether a certain plaster, which he had not examined, was poisonous; his opinion being based upon experience, study, and facts personally known to him, all of which were not in evidence.—*Burns v. Barenfield*, 84 Ind. 43.

[b] (Sup. 1886)

In examining a medical expert, a question as follows: "State to the jury what fact you observed, what, if any, experiments you made, and what you learned to be the now condition, or the then condition of the eyes and ear, and how it was done"—is proper.—*Louisville, N. A. & C. R. Co. v. Falvey*, 3 N. E. 389, 4 N. E. 908, 104 Ind. 409.

[c] (Sup. 1888)

In an action for a personal injury, a physician stated in detail plaintiff's condition and the character and condition of his wounds at

the time he attended him. *Held*, that it was not error to permit the physician to state his opinion as to the probable results of plaintiff's injuries, though he had not attended plaintiff continuously up to the time of the trial.—*Louisville, N. A. & C. R. Co. v. Wright*, 16 N. E. 145, 17 N. E. 584, 115 Ind. 378, 7 Am. St. Rep. 432.

[d] (App. 1890)

In an action for personal injuries, a physician examined as an expert for defendant may be asked whether he had noticed plaintiff walking on the street, and for the past two days about the court room, as the questions were preliminary.—*City of Warsaw v. Fisher*, 55 N. E. 42, 24 Ind. App. 46.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2365.

§ 550. Questions and answers based on testimony of others.

[a] (Sup. 1871)

In an action to contest a will, it was not proper to ask a physician, testifying as an expert, "If, at any time before the making of the will, the testator was the subject of a delusion on the subject of poisons, and that delusion had relation to any of his sons-in-law, then, judging from the evidence of his acts and language on that day, and from all the evidence in the case, what was his condition at the time of making his will?" as it is not within the province of an expert to determine the credit of the witnesses, nor pass upon the truth of the facts in evidence.—*Rush v. Megee*, 36 Ind. 69.

In a contest of a will, on the ground of unsoundness of mind of the testator, the question was asked an expert, in rebutting evidence: "State whether the evidence introduced by defendants, in connection with the evidence introduced by plaintiffs, indicates to you that there was a lucid interval or not at the time the testator made his will." *Held*, that the question was improper as calling for the judgment of the witness upon the credibility of the witnesses or of the truth of the facts testified to.—*Id.*

[b] (Sup. 1871)

Where, in an action for damages caused by unskillful treatment of a broken limb, the evidence was conflicting as to the method of treatment adopted, it was improper to ask an expert, who had heard the evidence, his opinion, from the evidence, as to the propriety of the treatment.—*Bishop v. Spining*, 38 Ind. 143.

[c] (Sup. 1882)

A professional witness must base his opinion upon his own testimony, or a statement of the facts assumed to be proven, and not upon his recollection and construction of the evidence given in the case.—*Burns v. Barenfield*, 84 Ind. 43.

[d] (Sup. 1884)

It is error to ask an expert his opinion based on his understanding of the testimony of other witnesses, as the question should be what his opinion is on a hypothetical case which such evidence tends to prove.—*Elliott v. Russell*, 92 Ind. 526.

[e] (Sup. 1884)

A professional expert must base his opinion on a hypothetical case stated, not on his own recollection of the evidence.—*Craig v. Noblesville & S. C. Gravel Road Co.*, 98 Ind. 109.

[f] (Sup. 1884)

It is competent to ask a medical witness what would be the probable results following an injury such as had been described by other witnesses on the trial.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[g] (App. 1893)

Where an engineer has been called as an expert to testify as to the quantity of stone in certain walls, it is competent for the opposite party to introduce another engineer to testify as to such quantity, from calculations based on statements given in the testimony of the first engineer.—*Moelering v. Smith*, 7 Ind. App. 451, 34 N. E. 675.

[h] (App. 1896)

Where a witness gives his opinion as an expert, based on the testimony of others, the assumed facts should be stated hypothetically in the question; and it is erroneous to permit a witness to be asked to state his opinion, based on his recollection of the testimony of another witness.—*Bedford Belt R. Co. v. Palmer* (Ind. App.) 44 N. E. 686, 16 Ind. App. 17.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2366, 2367.

See, also, note, 39 L. R. A. 310.

§ 551. Hypothetical questions and answers.

Instructions as to weight and sufficiency of hypothetical evidence as invading province of jury, see TRIAL, § 194.

Motion to strike out answer to, effect of failure to make, see TRIAL, § 89.

On proceedings for discovery, see DISCOVERY, § 41.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2368-2375.

See, also, 17 Cyc. pp. 242-252; note, 39 L. R. A. 313; note, 53 Am. Rep. 307.

§ 552. — In general.

[a] (Sup. 1871)

In an action of maltreatment by a physician, the proper practice in obtaining the opinion of an expert as to the propriety of the treatment adopted by the physician is to state the case hypothetically to such expert, and to take his opinion upon the supposed state of facts, leaving the jury to determine whether the

hypothetical case as put is the one proved.—*Bishop v. Spining*, 38 Ind. 143.

[b] (*Sup.* 1876)

Where, on the trial of an action, the value of services rendered by one of the parties for the other in boarding and taking care of certain persons was in issue, *held*, it was not reversible error to admit, over objection, the answer of a witness to a question asking what such services would be worth under supposed circumstances stated; there being evidence tending to prove the existence of such circumstances.—*Chamness v. Chamness*, 53 Ind. 301.

[c] (*App.* 1891)

On the hearing of a claim against a decedent's estate for work and labor alleged to have been performed by the claimant for decedent, it is proper to permit a hypothetical question to be propounded by the claimant to a witness relating to the value of the services.—*Grave v. Pemberton*, 29 N. E. 177, 3 Ind. App. 71.

For the purpose of proving values, questions may be propounded in a hypothetical form.—*Id.*

[d] (*Sup.* 1906)

On the issue of mental capacity of testator, a medical expert witness was properly permitted to testify, upon a hypothetical statement of facts showing some form of mental unsoundness, under what class of unsoundness of mind testator should be placed.—*Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2368.

See, also, 17 Cyc. p. 242, 28 Cyc. p. 46.

### § 553. — Form and sufficiency of questions.

[a] (*Sup.* 1885)

Where a hypothetical case covering the leading facts testified to, and practically admitted, is stated to an expert, his opinion, based on such hypothetical case, is admissible in evidence.—*Lotz v. Scott*, 103 Ind. 155, 2 N. E. 560.

[b] (*Sup.* 1885)

In an action for damages for malpractice of a physician and surgeon, a hypothetical question, proper in other respects, put to an expert is not objectionable for including statements of what the attending surgeon is supposed to have said to the patient during treatment concerning the cause of certain depressions and enlargements about the dislocated joints.—*Boor v. Lowrey*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

[c] (*Sup.* 1886)

It is proper for the party examining an expert witness to assume the facts which he thinks the evidence tends to prove, and to require the witness to state his opinion upon the facts assumed in the question.—*Louisville, N.*

*A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Where a medical witness states the facts known to him to the jury, it is proper to incorporate these facts in the hypothetical question.—*Id.*

It is not proper to incorporate in a hypothetical question an opinion of another expert witness, but facts only must be stated in such a question.—*Id.*

Where some of the facts assumed in a hypothetical question are eliminated by a subsequent ruling on a motion to strike out, yet, if facts remain upon which an opinion may properly be based, it is not error to refuse to strike out the entire opinion, but it should go to the jury for what it is worth, although the elimination of some of the facts may weaken its value.—*Id.*

[d] (*Sup.* 1887)

The opinion of an expert witness must be based on proved or admitted facts, or upon such facts as are assumed to exist for the purpose of a hypothetical question. It is not a sufficient objection to such question that the facts stated therein had not been put in evidence, nor can it be objected to upon the ground that the facts assumed are not true.—*Deig v. Morehead*, 110 Ind. 451, 11 N. E. 458.

[e] (*Sup.* 1887)

In an action against a railroad company for killing a horse, it is not error to permit the following question to be answered: "Suppose 'Little Miss' [the animal killed] was in as good condition, sound in wind and limb, at the time she was killed, in October, 1884, if she was killed then, as she was when you knew her last, \* \* \* what was her fair market value?" especially where counsel apprise the court that, if they do not maintain the hypothesis upon which the question is put, the evidence may be stricken out.—*Cincinnati, H. & I. R. Co. v. Jones*, 111 Ind. 259, 12 N. E. 113.

[f] It is not necessary that a hypothetical question propounded to an expert witness shall embrace all the facts as to the particular subject under investigation.—(*Sup.* 1888) *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; (1893) *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

[g] (*Sup.* 1888)

Where, in the examination of a medical expert, a hypothetical question is asked of the witness, the party propounding the same may assume such facts, within the range of the evidence, as the basis for his question, as he thinks the evidence tends to establish.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[h] (*Sup.* 1896)

A party has the right to the opinion of his expert witness on the facts which he claims to be the facts of the case, and, if there be any

evidence in the case tending to establish such claimed facts, the trial judge should not reject the question because he may think the facts are not sufficiently established.—*Standard Oil Co. v. Bowker*, 40 N. E. 128, 141 Ind. 12.

[l] (App. 1907)

Where, in a personal injury action, plaintiff had introduced evidence from which the jury might infer that her physical condition as described in a hypothetical question propounded to an expert was produced alone by the injury she had received in the accident complained of, the hypothetical question was not erroneous.—*Indianapolis Traction & Terminal Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2369-2374.

**§ 555. Facts forming basis of opinion.**

[a] (Sup. 1882)

In an action for breach of a contract by a physician to give proper and skillful treatment, a question to an expert as to whether from his examinations he believed the treatment to have been skillful was improper; there being no evidence as to the facts disclosed by such examinations.—*Burns v. Barenfield*, 84 Ind. 43.

[b] (Sup. 1885)

A physician may testify as to statements or expressions of existing pain, or symptoms made by an injured person, even after suit is brought, if made with a view to medical treatment, and necessary to show the basis of his opinion as an expert witness.—*Cleveland, C., C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

[c] (Sup. 1886)

The opinion of a medical witness may rest on statement made by his patient.—*Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

[d] (Sup. 1889)

Expert testimony as to personal injuries is properly based in part on statements made to witness by the injured person.—*Louisville, N. A. & C. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434.

[e] (Sup. 1893)

It is proper for physicians to testify to knowledge obtained of plaintiff's condition by their professional examinations, and inquiries made of her, so as to treat her alleged injuries, and they can state their conclusions from the knowledge gained by such examinations.—*Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[f] (Sup. 1894)

A physician may testify as to plaintiff's condition, based on an examination of him, and his expressions of pain.—*Ohio & M. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687.

[g] (Sup. 1899)

A question to an expert witness, whether proposed drainage could be accomplished, without extraordinary labor and expense, without constructing a drain through a city, must be based upon facts previously appearing at the trial.—*Sauntman v. Maxwell*, 54 N. E. 397, 154 Ind. 114.

[h] (App. 1899)

A question calling for the opinion of an expert, which does not include a statement of facts admitted or proved, or assumed to be true, on which an opinion can be based, is inadmissible.—*City of Warsaw v. Fisher*, 55 N. E. 42, 24 Ind. App. 46.

A question addressed to a physician who has testified as to whether the plaintiff in an action had any paralysis is bad for failure to include any statement of facts admitted or proved or assumed to be true on which an opinion can be based.—Id.

[i] (Sup. 1907)

In railroad right of way condemnation proceedings, witnesses were properly permitted, as a basis of opinions expressed as to the value of the land before and after the taking, to describe the character of the soil, and to name the various crops to which it was adapted.—*New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. § 2376; 49 CENT. DIG. WILLS, § 118.

See, also, note, 39 L. R. A. 319.

**§ 558. Cross-examination and re-examination.**

[a] (Sup. 1864)

It is not error to sustain objections to the questions, "What is insanity? What is wound?" put to a medical expert on cross-examination, where no question in regard to insanity or a wound is in issue, and when such questions do not test the qualifications of the witness as an expert.—*Horne v. Williams*, 23 Ind. 37.

[b] (Sup. 1868)

On the cross-examination of an expert as to his estimate of the value of work, as the building of a mill, it is proper to ask him for what sum he would have undertaken to build the mill according to the contract requirements.—*Gilman v. Gard*, 29 Ind. 291.

[c] (Sup. 1871)

In an action to contest a will, an expert having testified affirmatively as to the mental capacity of the testator, it was proper to ask him, on cross-examination, this question: "Suppose a man starts suddenly from his tea table under an impression that some one is at his door, when there has been no sound and the door is closed, seizes his gun, making out, and afterwards asserts that he chased from his door a very near relative of the family, who lived close by, and that he finally disappeared

from him in a cornfield,—supposing him to be honest in his belief, and that no one was in fact at his door, what do you think of his mental condition?"—*Rush v. Megee*, 36 Ind. 69.

[d] (Sup. 1886)

It is competent for the cross-examining counsel to ask a medical witness what method he pursued in making an examination of an injured person, and also to ask questions for the purpose of testing the knowledge and skill of the witness.—*Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 380, 4 N. E. 908.

Cross-examining counsel may assume such facts as they believe to be proved, and require the opinion of the expert witness upon the facts assumed; and the examination in chief cannot be so conducted as to deprive cross-examining counsel of this right, nor can they be confined to any particular part of a subject entered upon on the examination in chief.—*Id.*

[e] (Sup. 1888)

In an action for personal injuries, the plaintiff, on cross-examination of one of the medical witnesses introduced by defendant, asked, if the plaintiff received a shock upon the feet in a certain manner 2½ years before, how far such a shock would account for her present physical condition. *Held*, that the question was proper.—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

[f] (Sup. 1889)

On cross-examination of an expert witness, defendant's counsel was properly allowed to ask an opinion based on an assumption of facts which counsel believed to have been proved.—*Conway v. State*, 118 Ind. 482, 21 N. E. 285.

[g] (Sup. 1889)

In an action for personal injuries, it is competent, particularly on cross-examination, and for the purpose of testing his skill, to ask a medical witness his opinion as to the probable results of the injury received by plaintiff.—*Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193.

[h] (Sup. 1890)

It is proper, in cross-examining an expert witness, to read the statements made by a certain writer on surgery, as the basis of a question tending to test the expert's knowledge of the subject.—*Hess v. Lowrey*, 23 N. E. 156, 122 Ind. 225, 7 L. R. A. 90, 17 Am. St. Rep. 355.

[i] (App. 1892)

In an action for an allowance equivalent to an annuity for life, the annual value being given, to establish the probable longevity it was proper to allow a witness, qualified as an expert in life insurance, to use the American

Mortality Table to refresh his memory, and testify that a person at the age of 81 had an expectation of 4.1 years.—*Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

[j] (Sup. 1896)

A medical expert cannot, on direct or redirect examination, be asked what is said in a certain book as to the difference between certain diseases, in order to determine which of the diseases was indicated by the appearance of plaintiff's wound.—*Louisville, N. A. & C. R. Co. v. Howell*, 45 N. E. 584, 147 Ind. 260.

[k] (Sup. 1898)

A physician testified that he had been practicing 18 years, and had treated deceased for quinsy. He described in detail the characteristics of that disease, what suppuration is, the prescription of chloral, the condition of deceased's throat before death, and the appearance and condition of his throat, as shown by the post mortem examination which he made at the request of the coroner, what the thorax is, the meaning of congestion, arterial and pulmonary blood, and the difference between them, the pulmonary circulation, the condition of the heart and all its cavities, and whether the heart was of normal size, the condition of the stomach and bowels, the usual smell of a dead body, the color and condition of the throat, and that it had the color and characteristics of a healthy throat. *Held*, that he testified as a medical expert, and hence could be cross-examined as such.—*Shields v. State*, 40 N. E. 351, 140 Ind. 395.

[l] (Sup. 1908)

A physician called as an expert may be cross-examined as to whether his compensation is contingent on recovery in the suit by the party calling him.—*Indiana Union Traction Co. v. Pheanis*, 43 Ind. App. 653, 85 N. E. 1040.

[m] (App. 1910)

Where defendant's mine boss testified for it as an expert on the subjects involved in the trial, evidence that he had been three times tried, convicted, and fined before justices of the peace for neglecting his duties as mining boss was competent on cross-examination to rebut the conclusion of expert competence and also as affecting his credibility as a witness.—*Princeton Coal Mining Co. v. Howell*, 92 N. E. 122.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2377, 2379; 50 CENT. DIG. Witn. § 932.

See, also, note, 39 L. R. A. 326.

§ 560. Contradiction.

[a] (Sup. 1885)

To impair the force of the testimony of one claimed to be an expert, it may not be shown that his neighbors and business asso-

ciates thought him incompetent.—*Adams v. Sullivan*, 100 Ind. 8.

Evidence of the general reputation of a witness for skill in a particular employment is inadmissible to impeach his testimony as an expert in regard to such employment.—*Id.*

[b] (Sup. 1892)

Where defendant produced expert evidence on the result of an examination of the heel of the boot worn by deceased at the time of the accident, the testimony of a shoemaker on the same subject was competent in rebuttal.—*Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564.

[c] (App. 1897)

In an action for personal injuries resulting in a miscarriage, plaintiff's physician testified in chief as to her injuries and general condition. A medical witness for defendant then testified as to certain physical conditions which would tend to produce the results alleged. *Held*, that plaintiff's physician could testify in rebuttal as to facts indicating that these conditions did not produce the miscarriage.—*Hammond, Whiting & E. C. Electric R. Co. v. Spyzchalski*, 46 N. E. 47, 17 Ind. App. 7.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2380.

See, also, note, 39 L. R. A. 326.

## (E) COMPARISON OF HANDWRITING.

In criminal prosecutions, see CRIMINAL LAW, § 491.

Scope of evidence in rebuttal, see TRIAL, § 62. Waiver of objections to testimony of expert by comparison of handwriting, see TRIAL, § 75. Writings submitted to jury for comparison, see ante, §§ 196–198.

### § 561. Grounds for allowing comparison.

[a] (Sup. 1880)

Though a witness cannot testify to the genuineness of a signature from a comparison of handwriting, yet if he has previous knowledge of the handwriting from having seen the person write, or from authentic papers derived in the usual course of business, he may, in corroboration of his testimony, compare the writing in question with other signatures known to be genuine.—*Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90.

[b] An expert witness may testify to the genuineness of a signature from a comparison of handwriting.—(Sup. 1873) *Burdick v. Hunt*, 43 Ind. 381; (1879) *Forgey v. First Nat. Bank of Cambridge City*, 66 Ind. 123.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2381.

See, also, 17 Cyc. pp. 163–173.

### § 563. Competency of expert.

[a] (Sup. 1879)

One who has managed a bank 16 years, and made the signatures to paper a study for 25 years, is competent to give his opinion as to the genuineness of a signature to a note, upon comparing it with specimens of the maker's signature admitted to be genuine.—*Forgey v. First Nat. Bank of Cambridge City*, 66 Ind. 123.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2347, 2383, 2384.

See, also, 17 Cyc. p. 171; note, 63 L. R. A. 937, 963.

### § 564. Standard of comparison.

[a] (Sup. 1870)

Where the genuineness of handwriting is in issue, a witness who is an expert may give his opinion from mere comparison of the handwriting in question with other writings admitted to be genuine.—*Chance v. Indianapolis & W. Gravel Road Co.*, 32 Ind. 472, criticising *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90.

[b] (Sup. 1873)

Papers not in evidence in the cause, nor admitted to be genuine, cannot be used in making a comparison of handwriting for the purpose of determining the genuineness of a signature.—*Burdick v. Hunt*, 43 Ind. 381.

[c] (Sup. 1874)

Papers having no connection with the cause, but genuine, may, with the signature alleged to be forged, be submitted to experts for the purpose of comparison by them, and that they may give to the jury an opinion based on such comparison.—*Huston v. Schindler*, 46 Ind. 38.

[d] (Sup. 1881)

Evidence cannot be introduced to prove a signature, for the purpose of comparing it with the signature in dispute.—*Hazzard v. Vickery*, 78 Ind. 64.

[e] (Sup. 1881)

On an issue as to the genuineness of a receipt, it was error for the court to permit expert handwriting witnesses to use certain notes and mortgages not connected with the case, nor admitted in evidence, nor admitted to be genuine, as a basis for comparison.—*Shorb v. Kinzie*, 80 Ind. 500.

[f] (Sup. 1885)

An affidavit purporting, but not proved nor admitted, to be signed by one who has denied that a certain other signature was his, cannot be used as a standard of comparison.—*Shorb v. Kinzie*, 100 Ind. 429.

[g] (Sup. 1889)

To show a forgery of a decedent's writing, the testimony of an expert that the writ-

ing in question was not the same as that of the signature to what purported to be the decedent's will was properly excluded, where the signature to the will was not admitted to be genuine, as a comparison could only be made with writing which was admitted to be that of decedent.—*Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271.

[h] (Sup. 1890)

On a question as to the genuineness of defendant's signature to the bond sued upon, certain letters and notes were produced by witnesses for plaintiff, who testified that they had received them from defendant, and believed them to be genuine. These papers were not papers in the case. *Held* proper, on cross-examination of defendant's witnesses, not being experts, to exclude their opinion as to the genuineness of the signatures thereto.—*White S. M. Co. v. Gordon*, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109.

[i] (Sup. 1890)

On the question of the genuineness of a signature, comparison of it, by witnesses, with other signatures of the same person to instruments introduced in evidence by the party disputing its genuineness, is admissible.—*Swales v. Grubbs*, 126 Ind. 106, 25 N. E. 877.

[j] (App. 1893)

There being no evidence that a letter offered as a means of comparison was genuine, it cannot be used for the purpose of comparison with a disputed signature.—*Merritt v. Straw*, 6 Ind. App. 360, 33 N. E. 657.

[k] (Sup. 1895)

A witness not an expert cannot be allowed, after having been shown other instruments purporting to have been signed by testator, the signatures to which he has pronounced genuine, to testify from his "present knowledge" as to the genuineness of the signature in question, the instruments previously shown not having been papers in the case.—*McDonald v. McDonald*, 41 N. E. 336, 142 Ind. 55.

A witness cannot, in testifying as to the validity of the signature of one of the witnesses to a will, be permitted to compare the disputed signature with one found in certain account books, not papers in the case.—*Id.*

[l] (App. 1895)

The genuineness of defendant's signature to a paper not in evidence cannot be established for the purpose of comparing that signature with the one attached to the obligation sued on, and thus establishing the genuineness of the latter.—*Bowen v. Jones*, 13 Ind. App. 193, 41 N. E. 400.

[m] (Sup. 1896)

On an issue as to the genuineness of plaintiff's signature to a release pleaded in bar, her signature to an affidavit for a change of venue and her verified reply of non est factum in the action may be used as a standard with which to compare the disputed signature.—*Tuck-*

*er v. Hyatt*, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2385-2389.

See, also, 17 Cyc. p. 177; note, 63 L. R. A. 427.

### § 566. Examination of expert.

[a] (Sup. 1873)

In determining the genuineness of handwriting by comparison, the better practice is to place papers admitted to be genuine in the hands of a qualified expert, together with the instrument in controversy, and to allow him to state to the jury whether the handwriting or signature on the two papers is the same.—*Burdick v. Hunt*, 43 Ind. 381.

[b] (Sup. 1895)

A witness to the genuineness of the signature to a will, after stating the facts showing him to be an expert, and giving to the jury facts which he had discovered and peculiarities observed in regard to the signatures in question by examinations which he has made, may be allowed to answer, in response to a direct question, "that they were not genuine."—*McDonald v. McDonald*, 41 N. E. 336, 142 Ind. 55.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2390.

### (F) EFFECT OF OPINION EVIDENCE.

Form, requisites, and sufficiency of instructions as to weight and effect of opinion evidence, see TRIAL, § 235.

In criminal prosecutions, see CRIMINAL LAW, §§ 492-494.

Instructions as to weight and sufficiency of opinion evidence as invading province of jury, see TRIAL, § 194.

Weight of nonexpert testimony as question of law or fact, see TRIAL, § 139.

### § 568. Opinions of witnesses in general.

Instructions as to weight and sufficiency of opinion evidence as invading province of jury, see TRIAL, § 194.

[a] (Sup. 1884)

Opinions or estimates of witnesses as to the amount of damages are not binding on the jury.—*Town of Princeton v. Gieske*, 93 Ind. 102.

[b] (Sup. 1890)

In proceedings de lunatico the opinions of nonexpert witnesses, founded on facts testified to by them, are to be weighed by the jury by the facts on which they are based.—*Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 662.

[c] (Sup. 1905)

The jury, in determining the question of damages caused by the establishment of a highway, is not bound to accept the opinions of witnesses in regard to the value of the land in dispute and the cost of changing and con-

structing fences, walls, etc.—*Heath v. Sheetz*, 74 N. E. 505, 164 Ind. 665.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2392-2394.

See, also, 17 Cyc. p. 262; note, 38 L. R. A. 745.

**§ 569. Testimony of experts.**

Instructions as to weight and sufficiency of expert testimony as invading province of jury, see TRIAL, § 194.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2395-2398.

See, also, 17 Cyc. pp. 267-269; notes, 39 L. R. A. 328, 42 L. R. A. 753.

**§ 570. — In general.**

[a] (Sup. 1863)

An instruction that, in questions involving science and skill, the opinions of scientific men, in professions or pursuits to which such questions may pertain, are authoritative, and in doubtful cases should control the jury, is wrong. Such opinions are to be received and weighed by the jury, and their credibility considered, in the same manner as other evidence.—*Humphries v. Johnson*, 20 Ind. 190.

[b] (Sup. 1877)

The credibility of experts testifying as witnesses is tested by the same rules as are applied to any other class of witnesses.—*Eggers v. Eggers*, 57 Ind. 461.

[c] (Sup. 1878)

In considering the testimony of experts as to matters of opinion, the jury should weigh it as they do the testimony of other witnesses.—*Cuneo v. Bessoni*, 63 Ind. 524.

[d] (Sup. 1896)

Under the Indiana statute of wills (Rev. St. 1894, § 2766; Rev. St. 1881, § 2596), which authorizes a contest on the simple "allegation of the unsoundness of mind of the testator," the burden rests on the contestant of a will to prove want of testamentary capacity. *Kenworthy v. Williams* (1854) 5 Ind. 375, overruled. *Durham v. Smith* (1889) 22 N. E. 333, 120 Ind. 463, disapproved.—*Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

It is error to instruct, in relation to the testimony of medical experts, that in proportion to the degree of such harmony between the facts embraced in the hypothetical questions and those embraced by the evidence, and the skill and capacity of these experts, judging by the law of mind, to deduce therefrom just conclusions, will be the value and force of such testimony.—*Id.*

[e] The opinion of medical experts is to be considered in connection with the other testimony, but the jury is not bound to act on such opinion to the exclusion of the other evidence.—(App. 1907) *Cleveland, C., C. & St. L.*

*R. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025; (Sup. 1908) *Id.*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2395.

See, also, 17 Cyc. p. 267.

**§ 571. — Nature of subject.**

[a] (Sup. 1878)

Other things being equal, the value of the testimony of each witness depends upon his knowledge of the subject concerning which he is called to testify, rather than the class of persons to which he belongs. So *held* as to testimony concerning the value of an attorney's services.—*Blizzard v. Applegate*, 61 Ind. 368.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2395-2398.

**XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.**

Admissibility as judicial admissions, see ante, § 211.

Admissibility in action for malicious prosecution of evidence in proceedings in criminal prosecution, see MALICIOUS PROSECUTION, § 58.

Admissions by petitioner in justice's court on oath, as evidence in appellate court, see JUSTICES OF THE PEACE, § 175.

At preliminary proceedings in bastardy prosecution, see BASTARDS, § 56.

Competency to impeach witness by showing inconsistent statements, see WITNESSES, § 303. Depositions taken for former trial or other proceeding, see DEPOSITIONS, §§ 97-99.

In criminal prosecutions, see CRIMINAL LAW, § 547.

**§ 575. Grounds for admission in general.**

[a] (App. 1896)

Where, in an action on a life policy, the defense was suicide of insured, the taking of testimony before the coroner ex parte and his finding was not admissible in support of the defense; the coroner and all the witnesses examined by him, except three, being present at the trial, and there being no showing that the evidence of the others could not have been obtained.—*Union Cent. Life Ins. Co. v. Hollowell*, 43 N. E. 277, 14 Ind. App. 611.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2407-2409.

See, also, 16 Cyc. pp. 1088-1091.

**§ 576. Death or disability of witness.**

[a] (Sup. 1880)

The testimony of a witness, since deceased, in a former suit, is admissible in a subsequent suit between the same parties or their privies in reference to the same subject-matter.—*Rooker v. Parsley*, 72 Ind. 497.



[b] (Sup. 1883)

There is no rule admitting the evidence of a witness at a former trial where the witness is not deceased and he is not a party to the suit, except for the purpose of impeachment.—*Woollen v. Whitacre*, 91 Ind. 502.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2401-2405.

See, also, 16 Cyc. pp. 1099-1101.

### § 577. Absence of witness.

[a] (App. 1910)

Where a witness is a nonresident of the state and absent at the time of trial, his testimony at a former trial of the case may be proved.—*Reichers v. Dammeier*, 90 N. E. 644.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2406.

See, also, 16 Cyc. pp. 1096-1099; note, 98 C. C. A. 3.

### § 577½. Nature of former proceeding.

[a] In a civil action the record of defendant's conviction on his plea of guilty in a criminal prosecution is admissible.—(Sup. 1883) *Rudolph v. Landwerlen*, 92 Ind. 34; (1884) *Hamm v. Romine*, 98 Ind. 77.

[b] (Sup. 1890)

Plaintiff sued to declare a judgment satisfied. The original record of a judgment having been burned, defendant had sued to reinstate it against plaintiff and the principal debtor, both of whom were served with process. Plaintiff appeared and answered, and the cause was referred to a master, who found that the judgment was unsatisfied. Plaintiff then withdrew his answer and suffered default, and the judgment was reinstated. Defendant offered the report of the evidence before the master in evidence. *Held*, that it was inadmissible, since the judgment in that case was rendered against plaintiff on the default, and not on the evidence.—*Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2410.

### § 579. Identity of issues.

[a] (Sup. 1876)

On the trial of an action brought by an administrator to recover damages for the death of his intestate, caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses, since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act; the cause of action being substantially the same.—*Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

[b] (Sup. 1883)

The judge's notes of the testimony given at the hearing of a complaint to set aside a

default are not admissible in evidence in a subsequent trial of the case.—*Citizens' State Bank of Newcastle v. Adams*, 91 Ind. 280.

[c] (App. 1839)

Where a plaintiff gives testimony in an action to recover insurance for loss by fire, and afterwards dies, and his administrator pursues the action in a second trial, and the only difference in the pleadings is that in the former trial the date of insurance was fixed in November, 1893, and the latter in January, 1894, said testimony in the former trial is admissible in the latter.—*Western Assur. Co. v. McAlpin*, 55 N. E. 119, 23 Ind. App. 220, 77 Am. St. Rep. 423.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2412.

See, also, 16 Cyc. pp. 1094, 1095.

### § 580. Identity of parties.

[a] (Sup. 1839)

To admit the testimony of witnesses on a former trial, the parties must be the same.—*Earl v. Hurd*, 5 Blackf. 248.

[b] (Sup. 1859)

A paper filed by the parties to one action cannot be received as evidence in another, in which the same party is plaintiff and part of the defendants are different, though the former action was brought in part for the same money sued for in the latter.—*Burroughs v. Hunt*, 13 Ind. 178.

[c] (Sup. 1876)

Where a party dies subsequent to the trial, and the subject-matter is relitigated between his administrator and the other party, testimony given on the first trial is admissible in the second.—*Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2413.

See, also, 16 Cyc. pp. 1091-1093.

### § 581. Preliminary evidence.

[a] To admit the testimony of a person since deceased, given on a former trial, the fact of death must be shown.—(Sup. 1830) *Hobson v. Doe ex dem. Harper*, 2 Blackf. 308; (1883) *Woollen v. Whitacre*, 91 Ind. 502.

[b] (Sup. 1843)

It is necessary to the admission of evidence of what a deceased witness swore upon a former trial that it be proved by the record of that trial that the suit was between the same parties, and for the same cause of action.—*Ephraims v. Murdock*, 7 Blackf. 10.

[c] (Sup. 1880)

Evidence by undertakers that they had prepared for burial and assisted in the interment of a man bearing the name of a witness who had testified at a former trial, and that the deceased lived at a certain described house

and was known in the vicinity by the name of the witness referred to, was sufficient prima facie proof that the witness was dead to render evidence as to his testimony at the former trial admissible.—*Rooker v. Parsley*, 72 Ind. 497.

[d] (Sup. 1887)

The testimony of a witness, as set out in a bill of exceptions, is not admissible on a second trial, unless it is shown that the recital of the testimony is correct.—*Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

[e] (Sup. 1901)

Where a witness who had testified on a former trial was temporarily absent from the state with a railway surveying party, so that his address was not ascertainable by inquiry among his relatives and friends, but was within the jurisdiction, to the knowledge of the attorney desiring his evidence, after it was known that a retrial was necessary, and it was not shown that it was not known when the witness was within the jurisdiction that he would be absent at the time of trial, nor that inquiry as to his address was made of his employer, nor whether a letter was sent to his last known address, nor why his deposition was not taken, the admission of the stenographic report of his testimony on the former trial was error.—*Wabash R. Co. v. Miller*, 61 N. E. 1005, 158 Ind. 174.

[f] (App. 1901)

Whether a party is permitted to prove what one of his witnesses testified to on a former trial until he has proved that the witness is dead, *quære*.—*Wabash R. Co. v. Miller*, 60 N. E. 1127, 27 Ind. App. 180.

[g] (App. 1909)

A sufficient foundation is laid for admission of the stenographic notes of testimony at a former trial by evidence that the witness was a defaulter, and had left the country, and that, notwithstanding diligent effort by a party and his attorneys, the whereabouts of the witness was, and for months prior had been, unknown to them.—*Iowa Life Ins. Co. v. Haughton*, 87 N. E. 702.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2414-2418.

See, also, 16 Cyc. p. 1089.

§ 582. Mode of proof.

Competency as witnesses of judges, jurors, and judicial officer as to proceedings before them, see WITNESSES, §§ 60-74.

[a] (Sup. 1843)

A witness must state the very language in which the testimony of a deceased witness was given, and not merely the substance thereof.—*Ephraims v. Murdock*, 7 Blackf. 10. CONTRA, see (1864) *Horne v. Williams*, 23 Ind. 37.

[b, c] (Sup. 1871)

Evidence of what an interpreter testified as received by him in a foreign language from a witness, on a former trial, cannot be given by one who heard the translation by the interpreter, unless the interpreter be dead, insane, out of the jurisdiction, or sick, and unable to testify, or, having been summoned, appears to have been kept away by the adverse party.—*Scheerer v. Harber*, 36 Ind. 536.

[d] (Sup. 1883)

A judge's notes of the former testimony of a deceased witness are not admissible to prove the testimony.—*Schafer v. Schafer*, 93 Ind. 586.

[e] (Sup. 1889)

Longhand notes, as transcribed by a stenographer, of the testimony of a witness at a former trial of the same case, are not admissible.—*Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89.

[f] (Sup. 1892)

The testimony of a witness, given at a former trial, cannot be shown by the bill of exceptions.—*Fisher v. Fisher*, 131 Ind. 462, 29 N. E. 31.

[g] (App. 1896)

The official shorthand reporter of the court may testify from her recollection, as refreshed by her notes made on a former trial, whether at that trial a witness made a certain statement.—*Houk v. Branson*, 45 N. E. 78, 17 Ind. App. 119.

[h] (Sup. 1908)

The shorthand notes of an official stenographer are not, in the absence of statute, conclusive evidence of the testimony in a preceding trial; and, where witness in a previous trial died before a second trial, it was error to exclude testimony of a competent witness to prove the testimony of such deceased witness given at the previous trial of the same cause and between the same parties.—*Studabaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. Rep. 397.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 2419-2423.

See, also, 16 Cyc. pp. 1106-1110.

XIV. WEIGHT AND SUFFICIENCY.

Conclusiveness and effect of admissions, see ante, § 265.

Conclusiveness and effect of declarations, see ante, § 313.

Conclusiveness and effect of documentary evidence, see ante, § 383.

Credibility, impeachment, contradiction and corroboration of witnesses, see WITNESSES, §§ 311-414.

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 Effect of tax deeds as evidence, see TAXATION, §§ 787-789.  
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 Instructions as to weight and sufficiency, see TRIAL, §§ 206, 208, 210, 211, 235-237.  
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Torts of child. **PARENT AND CHILD**, § 13.

**TRESPASS**, § 46.

**TROVER AND CONVERSION**, § 40.

**USURY**, § 117.

**WORK AND LABOR**, § 28.

**§ 584. Weight and conclusiveness in general.**

Number of witnesses for and against question, see post, § 598.

[a] (*Sup.* 1855)

To justify the rejection of evidence, it must either be contradicted, or improbable, or obnoxious, according to some established legal mode of testing truth.—*Peter v. Wright*, 6 Ind. 183.

[b] (*Sup.* 1880)

The law does not, as a rule, recognize the inferiority of testimony embodied in depositions

to testimony given orally at the trial. The relative value of these two classes of testimony depends upon the facts of, and the circumstances attending, each particular case, and not upon any inexorable general rule.—*Voss v. Prier*, 71 Ind. 128.

[c] (*Sup.* 1881)

An instruction that, "All other things being equal, evidence of witnesses, given in the presence of the court and jury, is entitled to greater weight than that of witnesses whose depositions have been taken and read in evidence," is erroneous.—*Works v. Stevens*, 76 Ind. 181.

[d] (*Sup.* 1883)

On a motion to set aside a default judgment, evidence consisting of the sworn complaint of the plaintiff, counter affidavits of defendant, and affidavits in reply partakes of the nature of depositions and parol testimony of resident witnesses, and not of the nature of documentary evidence, and therefore the rule as to the weight of the evidence applied to parol testimony must be applied to them.—*Nash v. Cars*, 92 Ind. 216.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2424, 2426, 2427.

See, also, 17 Cyc. pp. 753, 754, 798, 818.

### § 585. Statutory provisions.

[a] (*Sup.* 1883)

The Legislature cannot decree what shall be conclusive evidence.—*Scott v. Brackett*, 89 Ind. 413.

[b] (*Sup.* 1909)

The Legislature can make certain acts or facts *prima facie* evidence of other facts necessary to be established in a legal proceeding.—*Rose v. State*, 87 N. E. 103, 171 Ind. 662.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2428.

### § 586. Positive and negative evidence.

Giving of signals by locomotive, see RAILROADS, § 348.

[a] (*Sup.* 1855)

In an action of trespass on the case for distress for rent, where it is alleged no rent is due, plenary proof of the negative averment is not necessary; it being sufficient to adduce such evidence, as, in the absence of counter evidence, affords ground for presuming the averment to be true.—*Smith v. Downing*, 6 Ind. 374.

[b] (*Sup.* 1887)

Testimony negative in form and quality cannot be regarded as entitled to the same weight as positive testimony, when other circumstances are equal.—*Allen v. Bond*, 112 Ind. 523, 14 N. E. 492.

[c] (*App.* 1904)

Proof that shippers sometimes applied for a bill of lading cannot overcome positive proof of the nonacceptance of a bill in question.—*Cleveland, C. & St. L. R. Co. v. C. & A. Potts & Co.*, 71 N. E. 685, 33 Ind. App. 564.

[d] (*App.* 1906)

In an action against a railroad for negligently causing the death of plaintiff's decedent while attempting to drive over a crossing, the complaint alleged failure of defendant to sound the whistle at the crossing, as required by statute. One of plaintiff's witnesses testified that, as she approached another crossing of defendant's road, she heard the signal therefor, saw the train, waited for it to pass, and shortly thereafter heard three whistles. Another witness, living near the track, testified to seeing the train go by, that it whistled for a certain crossing, that she did not hear any whistle for the crossing in question, but thereafter heard three whistles. Another witness testified that the train did not whistle for the crossing, though it gave three short whistles after passing the same; that he was paying particular attention to the train, as he was watching to see if his brother-in-law, who was traveling at that time, would come home that night; and that he noticed if the train would whistle or if it was slackening in speed. *Held*, that such evidence was not of a purely negative character, and that the jury could properly give more weight thereto than to the testimony of witnesses testifying merely that they did not hear the signals, but were where they could have heard them had they been given.—*New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

[e] (*App.* 1909)

In an action against a railroad company for death at a highway crossing, that a witness did not hear the crossing whistle would only be evidence that it was not blown, where the circumstances were such that the witness would probably have heard it had it been blown.—*Grand Trunk Western R. Co. v. Reynolds*, 90 N. E. 94.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2432-2435.

See, also, 17 Cyc. pp. 800-806, 808; note, 52 C. C. A. 82.

### § 587. Circumstantial evidence.

As to communication of fire from railroad property, see RAILROADS, § 482.

In actions to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, §§ 295, 298. Of belief of person, see ante, § 151.

Of contributory negligence, see NEGLIGENCE, § 135.

Of fraud inducing sale, see SALES, § 52.

Of fraud in general, see FRAUD, § 58.

Of freedom of servant from contributory negligence, see MASTER AND SERVANT, § 281.

Of mistake in description of deed, see DEEDS, § 211.



Of negligence, see **NEGLIGENCE**, § 134.

Of undue influence invalidating will, see **WILLS**, § 106.

[a] (**Sup.** 1880)

Circumstantial evidence, to be sufficient, must agree with and support the hypothesis which it is admitted to prove.—*Indianapolis*, P. & C. R. Co. v. *Collingwood*, 71 Ind. 476.

[b] (**Sup.** 1890)

It is not necessary to establish a fact by direct evidence, for it may be proved by circumstances. If circumstances are proved authorizing an inference in favor of a plaintiff, it is proper for the jury to draw it, and their verdict cannot be disturbed.—*Louisville*, N. A. & C. R. Co. v. *Balch*, 122 Ind. 583, 23 N. E. 1142.

[c] (**Sup.** 1890)

Where proof of circumstances is such that a fact may be inferred therefrom, such fact is sufficiently proved.—*Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157.

[d] (**App.** 1908)

The essential facts to support a civil action may be established by circumstantial as well as by direct evidence, and in some cases the circumstances may be such as to overcome direct and positive testimony to the contrary.—*Evansville Metal Bed Co. v. Loge*, 42 Ind. App. 461, 85 N. E. 979.

**FOR CASES FROM OTHER STATES.**

SEE 20 CENT. DIG. Evid. § 2436.

See, also, 17 Cyc. p. 817; note, 2 L. R. A. (N. S.) 905; note, 97 Am. St. Rep. 771.

**§ 588. Credibility of witnesses in general.**

[a] (**Sup.** 1857)

There is no distinction between civil and criminal cases, in respect to the mode of arriving at a conclusion as to the credibility of witnesses.—*Lewis v. Lewis*, 9 Ind. 105.

[b] (**App.** 1909)

The testimony of a witness which conflicts with natural law is not legitimate evidence, and cannot be considered.—*Emrich Furniture Co. v. Byrnes*, 87 N. E. 1042.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2437.

See, also, 17 Cyc. p. 818; note, 81 Am. Dec. 208.

**§ 589. Testimony of party.**

[a] (**App.** 1907)

Where plaintiff was injured in a collision with a street car which approached a street crossing at night at a high rate of speed without any headlight, plaintiff's positive testimony that he looked for the car as he approached the crossing, and did not see it, was not so unreliable as to require its rejection, though a number of other witnesses for both parties testified that they were able to see the car some dis-

tance away.—*Indianapolis St. R. Co. v. Taylor*, 39 Ind. App. 592, 80 N. E. 436.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2438.

**§ 591. Conclusiveness of evidence on party introducing it.**

Impeachment of party's own witness, see **WITNESSES**, §§ 321-325, 380, 400-402.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. §§ 2440-2443.

See, also, 17 Cyc. p. 816.

**§ 592. Evidence introduced by adverse party.**

[a] (**Sup.** 1898)

The fact that the party in whose favor judgment was rendered omitted proof essential to his recovery afforded no reason for reversal, on appeal, where the adverse party, in his evidence, supplied such omission.—*Collier v. Collier*, 49 N. E. 1063, 150 Ind. 276; *Pierce v. Same*, Id.

**FOR CASES FROM OTHER STATES,**

SEE 20 CENT. DIG. Evid. § 2429.

See, also, 17 Cyc. p. 799.

**§ 593. Evidence improperly admitted.**

Effect of failure to object, see **TRIAL**, § 105.

[a] (**Sup.** 1857)

Evidence admitted under issues made by the parties, without objection,—not inconsistent with the case made by the bill,—may have the effect of legitimate proof, though not strictly applicable to any issue.—*Earnhart v. Robertson*, 10 Ind. 8.

[b] (**Sup.** 1885)

Evidence brought out incidentally, and not applicable to any issue formed by the pleadings, may not be considered in determining whether the finding was right upon the evidence.—*Marshall v. Mathers*, 103 Ind. 458, 3 N. E. 120.

[c] (**Sup.** 1885)

Where parol evidence is introduced without objection, it will, if otherwise sufficient, sustain a recovery, although, if objection had been made, it would not have been competent.—*Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70, 3 N. E. 633.

[d] (**Sup.** 1887)

It is sufficient if the substance of the issue be proved; and if it is proved by oral testimony, introduced without objection, although written evidence would have been the best evidence, the verdict will not be disturbed.—*McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120.

[e] (**Sup.** 1887)

Where an execution, read in evidence without objection on the ground of the omission of formal proof of the filing and recording of the transcript from the justice's docket in the cir-

cuit court, as required by law, contains a recital of such facts, it will to that extent supply the omission of such formal proof.—Yeager v. Wright, 112 Ind. 230, 13 N. E. 707.

[f] (App. 1894)

In an action for damages to plaintiff's lots by change of grade of a street by a railroad company, it appeared that plaintiff held a warranty deed for the lots, and was in actual and open possession of them for several years before such change. On the trial the lots were repeatedly referred to by the attorneys and witnesses as his, and positive oral evidence was given that they were his, without objection. *Held*, that plaintiff's title was sufficiently shown.—*Pennsylvania Co. v. Stanley*, 10 Ind. App. 421, 37 N. E. 238, 38 N. E. 421.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2430.

See, also, 17 Cyc. p. 800.

§ 595. Inferences from evidence.

[a] (Sup. 1858)

That a paper was considered by a board, and not indorsed as required by statute, gives rise to the presumption that the board refused to indorse their approval.—*Wiggins v. Holley*, 11 Ind. 2.

[b] (Sup. 1879)

In an action on a promissory note, a surety thereon set up as a defense an extension of time. On the note was a general indorsement of a credit. *Held*, that an inference from such indorsement that it was for interest in advance was not sufficient to overcome evidence that there was no extension granted, and no interest paid in advance.—*Butterfield v. Trittip*, 67 Ind. 338.

[c] (Sup. 1885)

Evidence which supplies grounds for inferring the facts essential to a recovery is sufficient, in civil cases, to warrant a verdict for plaintiff.—*Riehl v. Evansville Foundry Ass'n*, 104 Ind. 70, 3 N. E. 633.

[d] (Sup. 1896)

An inferential fact is an inference or conclusion from an evidentiary fact. It is an inference or conclusion from the evidence.—*Louisville, N. A. & C. R. Co. v. Miller*, 37 N. E. 343, 141 Ind. 533.

It sometimes happens that the evidentiary facts and the inferential facts are one and the same.—*Id.*

[e] (Sup. 1896)

Where a city ordinance is admitted in evidence without objection, and it is admitted that it has been passed, the jury are justified in concluding that the ordinance was in force, though there is no proof of publication as required by law.—*Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551.

[f] (Sup. 1901)

In determining the weight of testimony, courts are permitted to draw reasonable inferences from the facts found.—*Rauh v. Waterman*, 61 N. E. 743, 63 N. E. 42, 29 Ind. App. 344.

[g] (Sup. 1906)

When circumstantial evidence is relied on, the circumstances must be shown to exist, since no inference of fact or law is reliable if drawn from inferences which are uncertain.—*Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582.

Evidence of plaintiff's declaration that she claimed the corner house and the lot north does not justify an inference that she claimed only a portion of the large unplatted lot north, since inferences cannot be based on inferences.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2444, 2445.

See, also, 17 Cyc. p. 820; note, 74 C. C. A. 561.

§ 596. Degree of proof in general.

In disbarment proceedings, see ATTORNEY AND CLIENT, § 53.

[a] If the testimony is evenly balanced, the court should find against the party on whom the burden of the issue rests.—(1873) *Gulick v. Connely*, 42 Ind. 134; (1876) *Brannaman v. Wells*, 54 Ind. 127.

[b] (Sup. 1888)

In all civil actions, a preponderance of the evidence only is necessary to establish the affirmative of an issue, whatever the nature of that issue may be.—*Reynolds v. State ex rel. Cooper*, 17 N. E. 909, 115 Ind. 421.

[c] (App. 1896)

Where the estimate of an engineer as to the quantity of work performed, provided for by the contract, is attacked for fraud or mistake, the fraud or mistake need only be shown by a preponderance of the evidence.—*Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2446-2448.

See, also, 17 Cyc. pp. 753, 754.

§ 597. Sufficiency to support verdict or finding.

[a] (App. 1906)

A finding as to what one's custom was, being according to his testimony, is not without evidence to support it.—*Western Union Tel. Co. v. Sanders*, 39 Ind. App. 146, 79 N. E. 406.

[b] (Sup. 1907)

Where the evidence establishes the allegations of the complaint, determining the sufficiency of the complaint also determines the sufficiency of the evidence to support the verdict.—*Pittsburgh, C., C. & St. L. R. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

## [c] (Sup. 1907)

The answer to interrogatories, that a person named was in charge of defendant's engine causing plaintiff's injury, is not without evidence to support it, where plaintiff testified thereto.—Pittsburgh, C., C. & St. L. R. Co. v. Lighthouse, 168 Ind. 438, 78 N. E. 1033.

## [d] (Sup. 1907)

Where there is no material conflict in the evidence, and the material averments of the complaint are proved by the evidence of one witness, a verdict in accordance therewith is not contrary to law and is supported by the evidence.—Pittsburgh, C., C. & St. L. R. Co. v. Ross, 169 Ind. 3, 80 N. E. 845.

## [e] (App. 1908)

Every material fact necessary to support the verdict must be founded upon legal evidence.—Whiteley Malleable Castings Co. v. Wishon, 42 Ind. App. 288, 85 N. E. 832.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. § 2449.

See, also, 17 Cyc. p. 818.

## § 598. Preponderance of evidence.

Instructions, see TRIAL, § 237.

## [a] (Sup. 1858)

Mere number of witnesses does not constitute preponderance of evidence, and the jurors may believe one in opposition to several, if satisfied that the truth is with him.—McLees v. Felt, 11 Ind. 218.

## [b] (Sup. 1874)

Though more witnesses testify on one side than on the other, this does not make weight or preponderance of evidence.—Wray v. Tindall, 45 Ind. 517.

## [c] (Sup. 1877)

Courts ought not, as a rule, to weigh evidence by the number of witnesses testifying on each side. The evidence of one witness, even though a party, may have more weight in the decision than the testimony of a dozen adverse witnesses. If testimony of different witnesses cannot be harmonized, the court or jury trying the cause must determine which of the witnesses are the more worthy of belief.—Rudolph v. Lane, 57 Ind. 115.

## [d] (Sup. 1881)

The jury may, if they deem proper, credit the unsupported testimony of one witness over the testimony of another, though the latter is corroborated.—Canada v. Curry, 73 Ind. 246.

## [e] (Sup. 1881)

The preponderance of the evidence is not to be determined by the number of witnesses testifying on each side, and will not necessarily be in favor of the party who has the greater number, nor against the one having the burden of proof, where the number of witnesses on each side is equal; but will be dependent on their credibility. The evidence, therefore, of one witness, even though a party, may, and

often ought to have, more weight in proper decision of the cause than the testimony of a dozen adverse witnesses.—Johnson v. Holliday, 79 Ind. 151.

## [f] (App. 1892)

An instruction that if plaintiff has proven the allegations of the complaint by only one witness, and such allegations have been denied by one witness of equal credibility and means of knowledge, the allegations have not been proven, unless in the minds of the jury there have been corroborating circumstances proven sufficiently to outweigh the testimony of defendant, is error prejudicial to plaintiff.—Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313.

[g] The preponderance of the evidence does not necessarily depend on the number of witnesses, but means the greater weight of the evidence.—(Sup. 1904) Indianapolis St. R. Co. v. Johnson, 72 N. E. 571, 163 Ind. 518; (1905) Nickey v. Steuder, 73 N. E. 117, 164 Ind. 189.

## FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. Evid. §§ 2450-2452.

See, also, 17 Cyc. pp. 754-770.

## § 599. Elements of cause of action or claim.

## [a] (App. 1905)

Evidence tending to prove the essential facts in a case is sufficient to sustain the verdict.—Indianapolis, G. & F. R. Co. v. Hubbard, 74 N. E. 535, 36 Ind. App. 160.

## § 600. Matters of defense and rebuttal.

## [a] (Sup. 1873)

Where a general denial and set-off are pleaded, defendant is required to establish his set-off by a preponderance of the evidence.—Lewis v. Edwards, 44 Ind. 333.

Where a general denial and a set-off are pleaded, plaintiff is required to make out his cause of action by a preponderance of the evidence.—Id.

## [b] (Sup. 1887)

Where an insurance company defends an action on a policy on the ground that the fire originated through act or design of plaintiff, it need prove such defense only by a preponderance of evidence, and not beyond a reasonable doubt, as is required in criminal cases.—Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194.

## [c] (Sup. 1896)

A prima facie case made by plaintiff must always stand, unless its force is broken by defendant's evidence, but defendant is never required, under the general denial, to negative the truth of plaintiff's prima facie case by a preponderance of the evidence.—Young v. Miller, 44 N. E. 757, 145 Ind. 652.

## [d] (App. 1899)

An affirmative defense to a civil action must be shown by a preponderance of the evi-

dence.—*Shufflebarger v. Olleman*, 52 N. E. 774, 21 Ind. App. 531.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. Evid. §§ 2453-2455.

### § 601. Particular facts or issues.

[a] (Sup. 1880)

In an action by a mortgagee to recover damages from an attorney, sustained by the failure of the latter to record a mortgage, whereby the lien of the mortgage was lost, the amount for which the mortgaged property was sold on execution is not conclusive as to its value, as against the mortgagee, who was a stranger to such writ.—*Stott v. Harrison*, 73 Ind. 17.

[b] (Sup. 1880)

Where property is regularly exposed to sale on execution, there being no fraud or irregularities in such sale, the amount realized must be taken as conclusive evidence as between the parties interested of the actual value of such property.—*Moorman v. Hudson*, 25 N. E. 593, 125 Ind. 504.

[c] (App. 1908)

One having the burden of proving that at the time a man married he was not divorced from a former wife has the burden of proving a negative, and the burden is satisfied where he offers such evidence as in the absence of counter evidence affords ground for presuming that his contention is true.—*Compton v. Benham*, 85 N. E. 365.

FOR CASES FROM OTHER STATES,  
SEE 20 CENT. DIG. Evid. §§ 2456-2459.  
See, also, 17 Cyc. pp. 821, 822; note, 95 Am. Dec. 525.

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EXCEPTIONS, BILL OF.

## *Scope-Note.*

[INCLUDES statements in writing of exceptions taken to rulings or other action of the court at trials of civil causes, required for correction of errors at such trials; nature and scope of bills of exceptions in general; in what cases and as to what objections such bills are available; requisites, contents, making, and filing of such bills; and proceedings to compel settlement, signing, sealing, and filing thereof.

[EXCLUDES exceptions in criminal cases (see *Criminal Law*); exceptions to pleadings or other proceedings in equity (see *Equity*) or admiralty (see *Admiralty*); taking and noting exceptions at trials (see *Trial; Reference*); review of decisions relating to making bills of exceptions (see *Appcal and Error*); hearing of exceptions in first instance by appellate court (see *Appeal and Error*); necessity and use of exceptions on motions for new trial (see *New Trial*), or on appeals or writs of error (see *Appeal and Error*). For complete list of matters excluded, see cross-references, post.]

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Impeachment of witness by use of. **WITNESSES**, §§ 388, 393.

Incorporation of, into transcript or return of record. **APPEAL AND ERROR**, § 600.

Necessity for purpose of review—  
**APPEAL AND ERROR**, §§ 544-554.  
**CRIMINAL LAW**, § 1090.

That making and filing appear of record on appeal. **APPEAL AND ERROR**, § 511.

Part of record for purpose of review. **APPEAL AND ERROR**, §§ 535-537.

Presumptions as to making and contents. **APPEAL AND ERROR**, § 938.

Taking exceptions at trial—

**CRIMINAL LAW**, §§ 697, 698, 728, 841-845, 868.

**EQUITY**, §§ 250, 259, 410.

**TRIAL**, §§ 31, 99-103, 105, 131, 157, 270-284, 317, 345, 366, 400.

**In particular actions or proceedings.**

See—

Application for new trial. **NEW TRIAL**, § 131.  
**CRIMINAL LAW**, §§ 1089-1094.

Election contests. **ELECTIONS**, § 305.

Highway proceedings. **HIGHWAYS**, § 58.

## I. NATURE, FORM, AND CONTENTS IN GENERAL.

In criminal cases, see **CRIMINAL LAW**, § 1091.

### § 1. Nature and purpose of remedy in general.

[a] (**App.** 1904)

It is not the office of a bill of exceptions to supply that which is essential to the validity of a judgment.—*Johnson v. Staley*, 70 N. E. 541, 32 Ind. App. 628.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 1.

See, also, 3 Cyc. p. 23.

### § 2. Statutory provisions.

[a] (**Sup.** 1906)

Where a bill of exceptions recited that it contained all the evidence given and was signed by the trial judge and afterwards duly filed as a bill of exceptions, so that there was a substantial compliance with Acts 1897, providing for the preparation thereof, it was no objection that it had been prepared under the invalid act of 1899.—*May v. Dobbins*, 77 N. E. 353, 166 Ind. 331.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 2.

### § 4. Matters subject to exception.

[a] (**Sup.** 1898)

Under Rev. St. 1894, § 642 (Rev. St. 1881, § 630), authorizing a special bill of exceptions to

review "any question of law decided" during the progress of the cause, a special bill of exceptions will not lie to determine the sufficiency of the evidence to support the findings, as the question is one of mixed law and fact.—*Haney v. Farnsworth*, 49 N. E. 383, 149 Ind. 453.

[b] (**App.** 1896)

The taking of exception to and at the time of the overruling of a motion for new trial may be shown by the bill of exceptions.—*Burns' Rev. St. 1894*, §§ 638, 640, 641 (*Horner's Rev. St. 1897*, §§ 626, 628, 629), providing time may be given to reduce the exception to writing; that when the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception "may be taken" by the party causing it to be noted at the end of the decision that he excepts; and that, when the record does not otherwise show the decision or grounds of objection thereto, the party objecting "must, within such time as may be allowed present to the judge a proper bill of exceptions."—*Gaar, Scott & Co. v. Wilson*, 51 N. E. 502, 21 Ind. App. 91.

[c] (**Sup.** 1902)

Instructions given or refused cannot be presented on appeal by a bill of exceptions, under *Burns' Rev. St. 1901*, § 638a, which provides the time for taking and perfecting of exceptions, and that written instruments or documentary evidence need not be copied into the bill.—*Andrysiak v. Satkowski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286.

## [d] (Sup. 1906)

The motion based on alleged misconduct of counsel in argument, the action of the court thereon, and the exceptions thereto may be brought into the record on appeal by a bill of exceptions.—*Hasper v. Weitcamp*, 167 Ind. 371, 79 N. E. 191.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 5, 6.

## § 6. Scope and contents of bill in general.

## [a] (Sup. 1858)

Where the refusal to suppress a deposition is assigned for error, the bill of exceptions must specify whose deposition it was; for, if it was one not read in evidence, no harm was done by the refusal, though it might be erroneous.—*Templeton v. Hunter*, 10 Ind. 380.

## [b] (Sup. 1869)

Where the interference of the trial court with counsel's statement of the evidence is complained of on appeal, the bill of exceptions must show the statement that was being made when the court interposed.—*Aylesworth v. Brown*, 31 Ind. 270.

## [c] (Sup. 1871)

A bill of exceptions may be general, embracing everything, or it may embrace but one question.—*Miles v. Buchanan*, 36 Ind. 490.

## [d] (Sup. 1887)

A bill of exceptions is substantially defective, where it shows on its face that it does not include all the evidence adduced and the agreements of the parties entered into at the trial.—*Lyon v. Davis*, 12 N. E. 714, 111 Ind. 384.

## [e] (Sup. 1893)

Under Rev. St. 1881, § 630, providing that, on notice of intention to take the question reserved to the supreme court on the bill of exceptions only, the court shall thereupon cause the bill of exceptions to be so made that it will embrace so much of the record of the cause, only, and the statement of the court, as will enable the supreme court to apprehend the particular question involved, the petition need not be embodied in the bill of exceptions, where the questions reserved do not depend on the petition, or anything contained therein.—*Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277.

## [f] (App. 1897)

Exceptions to the submission of interrogatories in a draft for a special verdict are not properly reserved, when neither the draft of the verdict, nor the interrogatories designated, nor the pages on which they may be found, are set out in the bill of exceptions.—*Lauter v. Duckworth*, 48 N. E. 864, 19 Ind. App. 535.

## [g] (App. 1898)

Acts 1897, p. 244 (Horner's Rev. St. 1897, § 650a; 4 Burns' Rev. St. § 638a), provides that in order to make the evidence, and all of the

rulings thereon, and the competency of witnesses and the objections thereto, a part of the record on appeal, it is sufficient if the transcript contain the original bill of exceptions embracing all such evidence, etc. *Held*, that the mere presence in the bill of matters other than those which may be presented on appeal by an original bill does not render the bill insufficient as an original bill containing the evidence, where, aside from the incorporation therein of such other matters, there has been a full compliance with the statutory provisions.—*City of New Albany v. Lines*, 51 N. E. 346, 21 Ind. App. 380.

## [h] (Sup. 1904)

A long statement by the person who took down the evidence, interposed between the conclusion of a bill of exceptions and the certificate of the judge, while unnecessary and improper, does not vitiate the bill.—*Howe v. White*, 69 N. E. 684, 162 Ind. 74.

## [i] (App. 1904)

What shall be contained in a bill of exceptions is a matter exclusively for the determination of the trial judge.—*Avery v. Nordyke & Marmon Co.*, 70 N. E. 888, 34 Ind. App. 541.

## [j] (App. 1907)

Where a bill of exceptions, as provided in Acts 1903, p. 340, c. 193, § 5, contained a clear statement of the ruling called in question and a succinct recital of such parts of the evidence as were necessary to advise the court of the pertinency and materiality of the matters set out to be reviewed, it set forth all that was necessary in order to properly present the questions on appeal, and was sufficient.—*Atkinson v. Maris*, 40 Ind. App. 718, 81 N. E. 745.

## [k] (App. 1909)

A bill of exceptions, containing a clear statement of the ruling objected to, together with a succinct recital of the substance of the evidence and proceedings necessary to advise the court of the pertinency or materiality of the matters sought to be reviewed, as required by Acts 1903, p. 340, c. 193, § 5, is sufficient.—*Dillman v. Chicago, I. & L. R. Co.*, 88 N. E. 873.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 8, 12.

See, also, 3 Cyc. p. 26.

## § 7. Setting forth errors or irregularities.

[a] An appellate court will not undertake to decide upon the validity of objections where the bill only states that an objection was made and overruled, without giving the ground of objection.—(Sup. 1870) *Robinson v. Murphy*, 33 Ind. 482; (1874) *Blizzard v. Hays*, 46 Ind. 166, 15 Am. Rep. 291; (1881) *Clay v. Clark*, 76 Ind. 161; (1882) *Cox v. Rash*, 82 Ind. 519.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 9



### § 8. Setting forth objections, rulings, and exceptions.

[a] (Sup. 1852)

From a judgment in probate court defendant prosecuted a writ of error to a circuit court, where the judgment was reversed on the ground that evidence excluded should have been admitted. *Held*, that the circuit court did not err in reversing for that cause, in that the bill of exceptions did not state the objections made to the evidence, since the rule that objections to evidence should be shown by a bill of exceptions on which appellant relies refers to cases in which testimony has been admitted, and not to cases where it has been rejected.—*Gore v. Gore*, 3 Ind. 522.

[b] (Sup. 1868)

Where, on the overruling of a motion for a new trial, time is given "to prepare and file a bill of exceptions herein," objections taken during the trial to the admission of testimony may properly be incorporated in the bill containing the evidence.—*State ex rel. Vincennes Tp. v. Grammer*, 29 Ind. 530.

[c] (Sup. 1872)

Where a bill stated in conclusion that plaintiff at the time noted exceptions on the margin of a part of the charges and at the time excepted to each of the charges, severally, on which exceptions were noted on the margin at the time, and the clerk noted that no instructions were on file with exceptions marginally noted, the appellate court cannot determine whether plaintiff excepted severally to all the instructions, or only to those where exceptions were noted on the margin.—*Cobb v. Krutz*, 40 Ind. 323.

[d] (Sup. 1872)

A bill which does not show the ruling on a motion, and whether an exception was taken thereto, is defective, and the defect is not cured by statements of the clerk on the point.—*Greensburgh, M. & H. Turnpike Co. v. Sidener*, 40 Ind. 424.

[e] (Sup. 1899)

Instructions given by the court on its own motion recited on the margin that they were "given and excepted to," but nowhere was it recited in the bill of exceptions which party took the exceptions. *Held* to show no exceptions on the part of the appellant to such instructions justifying review on appeal.—*Indiana, I. & I. R. Co. v. Bundy*, 53 N. E. 175, 152 Ind. 590.

[f] (App. 1903)

*Burns' Rev. St. 1901, § 642*, provides that, where a party reserves for the decision of the Appellate Court any question of law shown by a bill of exceptions, he shall notify the court of his intention to take the question up on a bill of exceptions only, and the court shall cause the bill to be so made as to embrace only so much of the record and the statement of the court as to enable the Appellate Court to apprehend the question involved. Section 639

provides that no particular form of exception is required, but the objection must be stated with so much of the evidence as is necessary to explain it. *Held* that, where a question is reserved upon the admission or exclusion of evidence, the bill must show that objection was made, with the grounds thereof, and that an exception was taken at the time to the ruling.—*Fritzing v. State ex rel. Eckert*, 67 N. E. 1006, 31 Ind. App. 350.

[g] (Sup. 1905)

A bill of exceptions disclosing that at the close of the evidence defendant filed a motion for directed verdict, and that the court directed the jury to return a verdict in form "that the jury find for defendant," and that the jury complied with the direction, and was immediately discharged by the court, properly preserves the ruling of the court in directing a verdict.—*Davis v. Mercer Lumber Co.*, 73 N. E. 899, 164 Ind. 413.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 10.

See, also, 3 Cyc. pp. 29, 30.

### § 9. Setting forth proceedings not shown by record.

[a] (Sup. 1856)

In chancery such matters only in the progress of a cause as do not necessarily become part of the record (such as oral evidence of exhibits at the hearing, etc.) need be presented on appeal by bill of exceptions.—*Egbert v. Rush*, 7 Ind. 706.

[b] The object of a bill is to bring upon the record such matters as would not otherwise appear, and not to show facts that are properly matters of record.—(Sup. 1875) *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742; (1882) *Hadley v. Atkinson*, 84 Ind. 64; (1882) *Heaton v. White*, 85 Ind. 376; (1883) *Elliott v. Russell*, 92 Ind. 528; (1884) *Burk v. Audis*, 98 Ind. 59.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 11.

### § 11. Incorporating evidence.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 13-17.

See, also, 3 Cyc. pp. 26, 27; note, 14 C. C. A. 248.

### § 12. — Necessity.

[a] (Sup. 1879)

The facts may be admitted in the bill of exceptions as facts, but, when not so admitted, the evidence which tends to prove or disprove them must be set out.—*Proctor v. Cole*, 66 Ind. 578.

[b] (Sup. 1880)

A bill of exceptions on which error is assigned in denying a new trial as of right under Code §§ 601, 611, 612, in an action involving

conflicting claims to land, and which states that appellant proved to the satisfaction of the court that he had paid all the costs accruing in the action and moved the court to grant him a new trial as a matter of right, is sufficient without showing how and to whom the costs were paid, or setting out the evidence from which the court found that they were paid.—*Hunter v. Chrisman*, 70 Ind. 439.

[c] (Sup. 1902)

Where a bill of exceptions, attempting to present on the evidence, as a reserved question of law, the constitutionality of a statute, contains only part of the evidence, and there is nothing to show that no other evidence was given on the point and issue to which the proffered evidence related, or that the bill embraces so much of the record and the statement of the court as will enable the supreme court to apprehend the particular question involved, the bill is insufficient.—*Standish v. Bridgewater*, 65 N. E. 189, 159 Ind. 386.

[d] (App. 1907)

When an appeal is taken upon a reserved question of law, only so much of the evidence as is necessary to preserve the question is properly in the bill of exceptions.—*Zimmerman v. Beatson*, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165.

[e] (App. 1908)

Under *Burns' St.* 1908, §§ 664–666, it is only necessary to put in the bill of exceptions so much of the evidence as illustrates the rulings of the trial court.—*Abney v. Indiana Union Traction Co.*, 41 Ind. App. 53, 83 N. E. 387.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 13.

See, also, 3 Cyc. p. 26.

§ 13. — Setting forth evidence in general.

Insertion in skeleton bill, see post, § 23.

Mode of insertion in general, see post, § 22.

Mode of presenting physical objects, see post, § 20.

[a] (Sup. 1872)

Under 2 Gav. & H. Rev. St. p. 200, § 343, a written instrument, or any documentary evidence, need not be copied into a bill of exceptions, but may be referred to, if its appropriate place be designated by the words "here insert," but testimony given in the cause must be set out in the bill of exceptions.—*Goodwine v. Crane*, 41 Ind. 335.

[b] (Sup. 1874)

Where evidence is copied into the record, without any indication to distinguish it from ordinary entries of the clerk, it cannot be regarded as legally in a bill of exceptions.—*Etter v. Armstrong*, 46 Ind. 197.

[c] (Sup. 1875)

A statement in the bill that a witness named testified in substance the same as an-

other witness named, whose testimony is set out in full, does not sufficiently set out the testimony of the first-named witness.—*Yates v. George*, 51 Ind. 324.

[d] (Sup. 1881)

Oral testimony can only properly be presented in a bill by copying it in extenso before the judge signs it.—*Stratton v. Kennard*, 74 Ind. 302.

[e] (Sup. 1884)

The evidence is part of the record when it is incorporated in a bill, no matter who took it down at the trial.—*Bradway v. Waddell*, 95 Ind. 170.

[f] (Sup. 1889)

Oral evidence must be embodied in the bill before it is signed by the judge, in order to be considered in the record.—*Harrell v. Seal*, 121 Ind. 193, 22 N. E. 983.

[g] (Sup. 1891)

The evidence is not properly incorporated in the bill of exceptions so as to make it a part of the record, where, if a dispute were to arise as to whether what purports to be the long-hand manuscript of the evidence, found with the papers, is the manuscript referred to in the bill of exceptions, the question could not be settled by the record presented.—*Stevens v. Stevens*, 26 N. E. 1078, 127 Ind. 560.

[h] (Sup. 1891)

Where the bill shows that the evidence was fully set out in the bill before it was assigned by the judge, the evidence is properly in the record, and it is entirely unimportant how it was taken down before it was so incorporated in the bill.—*Benson v. Christian*, 129 Ind. 535, 29 N. E. 26.

[i] (Sup. 1892)

A statement in a bill of exceptions that certain testimony was offered does not make the testimony a part of the record, and it is not equivalent to the statement that such testimony was given.—*National Bank of Battle Creek v. Lock*, 31 N. E. 1115, 132 Ind. 424.

[j] (Sup. 1899)

A bill of exceptions not containing the evidence, but referring to it as "filed herewith," is insufficient to obtain a review of a finding on the ground that it is contrary to the evidence.—*State ex rel. Luse v. Luse*, 53 N. E. 459, 152 Ind. 701.

[k] (App. 1900)

Where much of the evidence in the bill of exceptions contains references to models, and no diagrams or explanations of the models are given which would render such references intelligible, the bill of exceptions shows affirmatively that it does not contain all the evidence, notwithstanding it recites that it does.—*South Bend Chilled Plow Co. v. Geidie*, 57 N. E. 562, 24 Ind. App. 673.

**[l] (Sup. 1901)**

Where the trial court signed a bill of exceptions and made a certificate that it contained all the evidence, the fact that the statute under which appellant sought to incorporate the evidence into the bill had been adjudged invalid constituted no objection to the sufficiency of the bill, as it was sufficient without the statute.—*Miller v. Coulter*, 59 N. E. 853, 156 Ind. 290.

**[m] (App. 1902)**

The fact that a bill of exceptions contains matters other than the evidence does not affect it as a bill containing the evidence.—*Town of Lewisville v. Batson*, 63 N. E. 861, 29 Ind. App. 21.

**[n] (Sup. 1909)**

A record on appeal which recites "no answer that the reporter caught" will not sustain a contention that the bill of exceptions does not contain all the evidence; but such practice is bad.—*Cleveland, C., C. & St. L. R. Co. v. Powers*, 88 N. E. 1073.

**[o] (App. 1909)**

A bill of exceptions containing a motion to set aside a default judgment and the evidence submitted should show that all the evidence is included in the bill.—*Milbourn v. Baugher*, 43 Ind. App. 35, 86 N. E. 874.

**FOR CASES FROM OTHER STATES.**

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 13, 16.

**§ 14. — Stenographer's report.**

Insertion in skeleton bill, see post, § 23.

Mode of insertion in general, see post, § 22.

**[a] (Sup. 1881)**

It is no objection to a bill that the stenographer who took the evidence incorporated therein was not sworn.—*Williams v. Pendleton & F. Turnpike Co.*, 76 Ind. 87.

**[b] (Sup. 1882)**

The longhand report of a shorthand reporter, duly signed and attested by him, and signed by the judge, with a statement that it contains all the evidence in the case, *held* to be sufficient for a bill of exceptions.—*Davis v. Liberty & C. Gravel Road Co.*, 84 Ind. 36.

**[c] (Sup. 1882)**

The fact that the evidence was written out by some one other than the shorthand reporter who acted on the trial is immaterial, if such evidence is contained in a bill of exceptions which purports to contain all the evidence.—*Hill v. Hagaman*, 84 Ind. 287.

**[d] (Sup. 1882)**

Under Rev. St. § 1410, authorizing the original longhand manuscript of a reporter, when duly certified, to be incorporated in a bill of exceptions, a mere transcript of the evidence taken before a master, without his cer-

tificate that it is the original longhand manuscript, and not incorporated in a bill of exceptions, is not sufficient.—*Lee v. State ex rel. Templeton*, 88 Ind. 256.

**[e] (Sup. 1885)**

A bill containing the evidence in the form of a shorthand report written out, with the clerk's certificate that the manuscript was filed in his office, "furnished by A. B., shorthand reporter of said court," is sufficient.—*Lord v. Bishop*, 101 Ind. 334.

**[f] (Sup. 1890)**

Where the original longhand manuscript of the evidence is certified to be "all the evidence given in the cause," and the stenographer certifies that it is such original longhand manuscript of the evidence made by him, "incorporated into a bill of exceptions at the request of the defendant," and the judge, in signing the bill of exceptions, recites that "defendants \* \* \* tender this their bill of exceptions, and pray that the same may be signed and sealed, and made a part of the record in the cause," such manuscript is properly incorporated in the bill of exceptions.—*Harvey v. State ex rel. Rogers*, 123 Ind. 260, 24 N. E. 230.

**[g] (Sup. 1890)**

The longhand manuscript of the evidence in a cause taken by the official reporter is not properly in the record, and does not bring up the evidence on appeal, unless it has been embodied in a bill of exceptions by the circuit judge, under Rev. St. 1881, § 1410, which provides that, where such manuscript has been filed with the clerk, he must, on request of the person filing it, certify the same to the appellate court, instead of a transcript thereof, "when the same shall have been incorporated in a bill of exceptions."—*Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 662.

**[h] (Sup. 1892)**

Where the judge who tries a case sanctions and accepts the stenographer's statement of the evidence for use in the bill of exceptions, it may be considered, although it did not appear that the stenographer was appointed or sworn.—*McCoy v. Abel*, 30 N. E. 528, 31 N. E. 453, 131 Ind. 417.

**[i] (Sup. 1894)**

The original longhand manuscript of the evidence, rather than a certified copy thereof, should be embraced in the bill of exceptions, and certified to the supreme court by the clerk of the court in which it was filed.—*Louisville, N. A. & C. R. Co. v. Berkey*, 136 Ind. 591, 36 N. E. 642.

**[j] (Sup. 1894)**

Where the manuscript of the official reporter is properly embodied in the bill of exceptions, the evidence contained therein is properly in the record.—*Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52.

## [k] (Sup. 1895)

Where the longhand manuscript of the evidence is made a part of a bill, and the judge certifies that the bill contains all the evidence, and makes that contained in it part thereof, the evidence is in the record by bill of exceptions in proper form.—*City of Huntington v. Griffith*, 142 Ind. 280, 41 N. E. 8.

## [l] (App. 1898)

The longhand manuscript of the evidence must be filed in the clerk's office before being incorporated in the bill of exceptions, and before the bill is presented to the judge for approval, where appellant desires the original evidence as transcribed by the official reporter to be made a part of the bill of exceptions, without being recopied by the clerk.—*Capital City Dairy Co. v. Plummer*, 49 N. E. 963, 20 Ind. App. 408.

## [m] (App. 1898)

Failure of the bill of exceptions to affirmatively show that the stenographer was elected or agreed on by the parties, or that he was sworn to report the case, is not ground for excluding the evidence authenticated by the statement signed by the judge that it was all the evidence given in the cause.—*Gaar, Scott & Co. v. Wilson*, 51 N. E. 502, 21 Ind. App. 91.

## [n] (Sup. 1899)

Under Acts 1897, p. 244, requiring a bill of exceptions to be settled and allowed by the trial judge, and filed and certified by the clerk to be the original bill, to make the evidence a part of the record the stenographer need not certify that the longhand report is a true and complete report of his shorthand notes.—*Hauger v. Benua*, 53 N. E. 942, 153 Ind. 642.

## [o] (App. 1899)

Where a transcript of evidence was incorporated in a bill of exceptions which was duly approved and signed by the judge, and filed in open court, the evidence becomes a part of the record.—*Whitman Agricultural Co. v. Hornbrook*, 55 N. E. 502, 24 Ind. App. 235.

## [p] (Sup. 1901)

Under Acts 1897, p. 244, in relation to a bill of exceptions, the bill of exceptions containing the evidence may be embraced in the transcript, no matter who prepared the bill for the judge's approval and signature; and, if a shorthand reporter is employed, his longhand manuscript need not be filed in the clerk's office before it is embodied in the bill of exceptions.—*Diezi v. G. H. Hammond*, 60 N. E. 353, 156 Ind. 583.

## [q] (App. 1901)

Where the court reporter filed the longhand transcript of the evidence, and at appellant's request it was embraced in the bill of exceptions, which was settled and signed by the trial judge and filed in the clerk's office, and vacation entry made thereon, the evidence was properly before the court on appeal, under Acts 1897, p. 244 (*Burns' Supp.* 1897, §

638a; *Horner's Rev. St.* 1897, § 650a), providing that, to make evidence a part of the record on appeal, it is sufficient if the transcript contains the original bill of exceptions embracing the evidence.—*Hamilton v. Hamilton's Estate*, 59 N. E. 344, 26 Ind. App. 114.

## [r] (App. 1901)

Where a volume of manuscript bearing indications of being a report of the evidence, containing the formal parts of a bill of exceptions, signed by the trial judge within the time limited, and filed with the clerk, is certified by the clerk to the appellate court as the original bill, the evidence is before the court for review.—*Breedlove v. Breedlove*, 61 N. E. 797, 27 Ind. App. 560.

## [s] (App. 1902)

Where an effort was made to bring the evidence into the record under the invalid act of 1899, but the transcript contained the essentials of a bill of exceptions, the bill being signed by the judge, subsequently filed, and incorporated in the transcript, and duly certified, it was sufficient.—*Howard v. Indianapolis St. R. Co.*, 64 N. E. 890, 29 Ind. App. 514.

## [t] (Sup. 1902)

Where there was no pretense whatever at the commencement of a document purporting to be a longhand manuscript of the evidence, or in the introductory part thereof, to indicate that it was a bill of exceptions making the evidence a part of the record, it ought not to have been treated or signed as such by the trial judge, and could not be regarded as such in the Supreme Court.—*Knickerbocker Ice Co. v. Lewis*, 67 N. E. 188, 160 Ind. 494.

## [u] (App. 1904)

It is not necessary that the evidence incorporated in a bill of exceptions should be transcribed by the official stenographer.—*Avery v. Nordyke & Marmon Co.*, 70 N. E. 888, 34 Ind. App. 541.

## [v] (Sup. 1909)

A longhand transcript of the evidence not in compliance with the requirements of the statute cannot be regarded as a bill of exceptions containing the evidence.—*Rector v. Druley*, 172 Ind. 332, 88 N. E. 602.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 14.

See, also, 3 Cyc. p. 27.

## § 15. — Documentary evidence.

Insertion in skeleton bill, see post, § 23.

Mode of insertion in general, see post, § 22.

## § 16. — Abridgment.

## [a] (Sup. 1882)

A bill of exceptions, made for the purpose of showing the evidence, cannot properly state what was proven by a witness, as his testimony should be given therein as delivered, as nearly as practicable.—*Hays v. City of Vincennes*, 82 Ind. 178.

**[b] (App. 1894)**

The evidence in a bill of exceptions should be condensed under the supervision of the judge trying the cause, and it is objectionable to give every question and answer as taken down by the stenographer.—*Grisell v. Noel Bros. Flour-Feed Co.*, 9 Ind. App. 251, 36 N. E. 452.

**[c] (Sup. 1896)**

Bills of exceptions are not mere abstracts of evidence, but are required to present the full evidence, and the clerk has no authority to state his version of evidence introduced, but must copy it as it was introduced.—*Seston v. Tether*, 44 N. E. 304, 145 Ind. 251.

**[d] (App. 1904)**

The Appellate Court cannot disregard a bill of exceptions because the statement of evidence therein contained is in narrative form.—*Avery v. Nordyke & Marmon Co.*, 70 N. E. 888, 34 Ind. App. 541.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 16, 17.

See, also, 3 Cyc. p. 27.

**§ 17. Incorporating evidence excluded.****[a] (Sup. 1893)**

No question is presented for review as to the exclusion of certain parts of an admitted affidavit where the language of such parts is not itself embodied in the bill of exceptions, but only referred to by page and line of the affidavit.—*Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, § 18.

**§ 18. Incorporating instructions given.**

Insertion in skeleton bill, see post, § 23.

Mode of insertion in general, see post, § 22.

**[a] (Sup. 1894)**

Where a special exception, signed by the judge, is written after each instruction given by the court of its own motion, filing a bill of exceptions containing these as well as all other instructions given and refused is sufficient to bring such instructions, with the exceptions indorsed thereon, into the record.—*City of Columbus v. Strassner*, 138 Ind. 301, 34 N. E. 5, 37 N. E. 719.

**[b] (App. 1900)**

The presence in a bill of exceptions of the court's instructions, when such bill should contain only the transcript of the evidence, does not render the bill insufficient as to the matter properly therein.—*Chicago, I. & L. Ry. Co. v. McCoy*, 55 N. E. 869, 24 Ind. App. 651.

**[c] (Sup. 1903)**

An original bill of exceptions, containing the longhand manuscript of the evidence, cannot include the instructions.—*Baut v. Donly*, 67 N. E. 503, 160 Ind. 670.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, § 19.

See, also, 3 Cyc. p. 28.

**§ 19. Incorporating instructions refused.****[a] (App. 1904)**

Where objections were only made to the instructions given, it was immaterial that the bill did not include all the instructions requested.—*Nichols v. Baltimore & O. S. W. R. Co.*, 70 N. E. 183, 71 N. E. 170, 33 Ind. App. 229.

**[b] (App. 1908)**

Where a bill of exceptions did not show that instructions refused were either signed by the party or his attorney as required by *Burns' Ann. St.* 1908, § 561, the bill reciting only "above instructions refused and exceptions by defendant," the instructions were not properly a part of the record.—*Mace v. Clark*, 42 Ind. App. 506, 85 N. E. 1049.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, § 20.

See, also, 3 Cyc. p. 28.

**§ 20. Form and arrangement of bill.**

[a] A bill stating that "the above were the rough minutes of the court, including the material points of the evidence," is insufficient.—(Sup. 1856) *Jarvis v. Strong*, 8 Ind. 284; (1857) *Manly v. Hubbard*, 9 Ind. 230.

**[b] (Sup. 1864)**

The form of the bill of exceptions is not a matter of practice in the Supreme Court. Its requisites were well known before the adoption of the Code, and the law in reference to it, as it then stood, except so far as the Code modified it, or was inconsistent with it, was adopted by legislative enactment. 2 Gav. & H. Rev. St. p. 336, § 802.—*Coffin v. McClure*, 23 Ind. 356.

**[c] (Sup. 1864)**

Where a bond is copied into that part of the record of a case containing the complaint, and the latter mentions no other writing than such bond, a bill which states that the plaintiff introduced in evidence the writing mentioned in the complaint sufficiently shows that the bond was put in evidence.—*Smith v. Lisher*, 23 Ind. 500.

[d] The bill must state that the testimony was given, and not merely that it was "offered," to make testimony a part of the record on appeal.—(Sup. 1872) *Goodwine v. Crane*, 41 Ind. 335; (1881) *American Ins. Co. v. Gallahan*, 75 Ind. 168; (1884) *Peck v. Louisville, N. A. & C. R. Co.*, 101 Ind. 366.

**[e] (Sup. 1882)**

A bill concluding with the words "to be agreed to by counsel," the signature of the judge then following, will be regarded as properly in the record.—*Stephenson v. Ballard*, 82 Ind. 87.

[f, g] A bill, duly signed by the judge, is sufficient, although it has no formal caption.—(Sup. 1885) *Dennis v. State*, 103 Ind. 142, 2 N. E. 349; (App. 1891) *Everman v. Hyman*, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

[h] (Sup. 1891)

The transcript recited: "The following bill of exceptions was filed, to wit, Exhibits A, B, C, D, E, F, and G; the same being the evidence introduced on the trial of said cause." These exhibits were disconnected volumes, purporting to be longhand copies of the shorthand notes taken at the trial, and were identified only by the stenographer's certificates and the file marks of the clerk. The transcript also recited that the evidence, as therein set out by the longhand report from the shorthand taken by the stenographer, was all the evidence given, and that "now come the contestees, and present and file this bill of exceptions, which is signed, sealed," etc. *Held*, that the bill of exceptions was not sufficient to preserve the evidence.—*Stevens v. Stevens*, 127 Ind. 560, 26 N. E. 1078.

[i] (App. 1891)

The interposition of a certificate of the official shorthand reporter between the conclusion of the bill of exceptions and the authentication and signature of the judge does not invalidate the bill.—*Everman v. Hyman*, 28 N. E. 1022, 26 Ind. App. 165, 84 Am. St. Rep. 284.

[j] (Sup. 1892)

A bill which only states that certain evidence was "offered" is not fatally defective, where the record shows that the evidence so "offered" was "introduced."—*Harris v. Tomlinson*, 130 Ind. 426, 30 N. E. 214.

[k] (Sup. 1895)

A transcript of the evidence which has no formal commencement as a bill of exceptions, and was not filed in the clerk's office, is insufficient to bring the evidence into the record, though it concluded as a bill of exceptions, and was signed by the trial judge as such.—*Jenkins v. Wilson*, 140 Ind. 544, 40 N. E. 39.

[l] (App. 1895)

A bill of exceptions must have a caption or introductory part showing that it is a bill of exceptions, and contains the evidence introduced at the trial.—*Huston v. Cosby*, 14 Ind. App. 602, 41 N. E. 953.

[m] (Sup. 1896)

A bill of exceptions, to merit the attention of the court, should be capable of discovery in the record without requiring the gathering together of such fragments from the transcript as might appear suitable to such bill, and the tearing asunder of motions for a new trial or other connected single documents or entries.—*Trom v. Yohn*, 145 Ind. 272, 43 N. E. 437.

[n] (App. 1896)

The longhand manuscript of the evidence does not of itself constitute a bill of excep-

tions until embodied in a formal bill and signed by the court.—*Kelso v. Kelso*, 16 Ind. App. 615, 44 N. E. 1013, 45 N. E. 1065.

[o] (App. 1898)

A bill of exceptions cannot be rejected as an original bill containing more than can be presented by such a bill, though it is plainly shown that the part containing the evidence is the original longhand manuscript, and the signature of the judge and certain dates are in manuscript, the remainder being typewritten, it not being stated anywhere that the bill of exceptions is the original bill, and the clerk at the end of the transcript certifying that the foregoing transcript contains full copies of all papers and entries in the cause, and that on a certain date the stenographer filed in the clerk's office his longhand manuscript of the evidence, which is the same manuscript incorporated in the bill of exceptions made a part of the transcript.—*Gaar, Scott & Co. v. Wilson*, 51 N. E. 502, 21 Ind. App. 91.

[p] (Sup. 1899)

Where a bill of exceptions is certified by the judge to contain all the evidence given "in said cause," but fails to show, by caption, contents, or indorsement, in what cause, at what court, or at what term the evidence inserted was given, it is insufficient.—*Luckenbill v. Krieg*, 55 N. E. 259, 153 Ind. 479.

[q] (App. 1902)

Where a bill of exceptions, embracing the evidence, contains 500 typewritten pages, without the marginal notes required by the old rules of the appellate court (No. 30; 27 N. E. vii), the evidence will not be considered on appeal.—*City of Lafayette v. Wabash R. Co.*, 63 N. E. 237, 28 Ind. App. 497.

[r] (App. 1903)

Burns' Rev. St. § 638a, provides that, to make the evidence a part of the record on appeal, it shall be sufficient if the transcript contains the bill of exceptions embracing all such evidence, provided it shall appear that such bill was presented to and signed by the proper trial judge and filed within the time allowed by law. Section 1395 provides for the creation, in certain counties, of a "superior court," and section 1396 that the seal of such court shall contain the words "Superior Court of — County." The record shows that M. presided at the trial, and that the bill of exceptions containing all the evidence was duly presented to and signed by him. The caption of the bill of exceptions was, "State of Indiana, Marion County—ss. In the Superior Court," and it was signed, "M., Judge of Marion Superior Court." It bore the file mark of the clerk, and was included in the transcript under the certificate of the clerk attested by the seal of the "Superior Court of Marion County." *Held*, that the name of the court appeared with sufficient accuracy; hence the evidence was properly in the record.—Indian-

apolis St. R. Co. v. Lawn, 66 N. E. 508, 30 Ind. App. 551.

[s] (App. 1903)

Where appellant has failed to comply with the rule of court in regard to marginal notes in his bill of exceptions, the evidence contained therein is not properly before the court.—Home Savings Ass'n v. Noblesville Monthly Meeting of Friends Church, 66 N. E. 465, 31 Ind. App. 115.

[t] (Sup. 1904)

A reservation of an exception to a ruling permitting the filing of an additional answer cannot be shown by a recital in the original bill of exceptions containing the evidence and incorporated in the transcript.—Edmunds Electrical Const. Co. v. Mariotte, 69 N. E. 396, 162 Ind. 329.

[u] (Sup. 1905)

Where appellant fails to comply with rule 3 (55 N. E. iv), requiring the name of each witness, and whether the examination is direct, cross, or redirect, to be stated on each page of the bill of exceptions, questions depending for determination upon the bill of exceptions will not be considered.—Roberts v. Wolfe, 74 N. E. 990, 165 Ind. 199.

[v] (App. 1909)

An inanimate object can only be brought into a bill of exceptions by a description of the object exhibited to the jury.—Morgantown Mfg. Co. v. Hicks, 43 Ind. App. 32, 86 N. E. 856.

FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 21-28.

See, also, 3 Cyc. pp. 24, 25.

§ 21. Insertion of documents.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 12-15, 19, 29, 30.

See, also, 3 Cyc. pp. 26, 28.

§ 22. — In general.

[a] (Sup. 1836)

Where a bill refers to certain papers, this does not make such papers a part of the bill, and the court will not consider them.—Huff v. Gilbert, 4 Blackf. 19.

[b] Evidence cannot be made a part of a bill by a reference to a certain page of the record.—(Sup. 1872) Stewart v. Rankin, 39 Ind. 161; (1873) Columbus & I. C. R. Co. v. Griffin, 45 Ind. 369; (1874) Blessing v. Blair, Id. 546; (1874) Hopkins v. Greensburg, K. & C. Turnpike Co., 46 Ind. 187.

[c] (Sup. 1872)

A paper purporting to be a bill consisted of a certified agreement, signed by the counsel of both parties and the trial judge, reciting that "the following is all the evidence that was offered in said cause by both parties, together with all the exhibits, plats, maps, etc.,

and is submitted to this court by the agreement of the parties as all the evidence." To this were attached various documents and what purported to be the evidence of the witnesses. *Held*, that the documents were not in the record, as the appropriate place of insertion was not designated in the agreement.—Goodwine v. Crane, 41 Ind. 335.

[d] Motions and affidavits cannot be made a part of the bill by a reference to the part of the transcript where they may be found.—(Sup. 1873) Kesler v. Myers, 41 Ind. 543; (1874) Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Germania Ins. Co. v. Same, Id. 331; (1883) Crumley v. Hickman, 92 Ind. 388; (1883) City of Lafayette v. Weaver, Id. 477.

[e] (Sup. 1874)

A bill of exceptions may show that a certain deed was given in evidence; yet, if it is not set out, its contents cannot be known or considered on appeal.—Huddleston v. Ingels, 47 Ind. 498.

[f] (Sup. 1879)

A bill purported to contain all the evidence, and referred to certain documentary evidence which did not actually appear therein. After the judge's signature, however, there appeared copies of certain documents, with notes in the margin stating the part of the record of the bill of exceptions wherein they should appear. *Held*, that the bill of exceptions formed no part of the record.—Sidener v. Davis, 69 Ind. 336.

[g] (Sup. 1880)

Where a bill stated that an official reporter, appointed by the court, had taken down the evidence, and his report made part of the record, and the following entry was made below the signature of the judge: "Which said original manuscript of evidence, so incorporated in the foregoing bill of exceptions, duly certified by said official reporter, reads in the words and figures following,"—and there was no signature of the judge below the report, which was in no manner certified to by the clerks of the court, *held*, that said report had not been properly made part of the bill of exceptions.—Woollen v. Wishmier, 70 Ind. 108.

[h] (Sup. 1880)

Instructions cannot be brought into the record which are neither copied in the body of the bill, nor appropriately designated, nor the proper place for their insertion indicated by the words "Here insert," by being merely attached to the bill of exceptions.—Irwin v. Smith, 72 Ind. 482.

[i] (Sup. 1881)

Where the general bill of exception does not embrace motions for a change of venue and for a dismissal of the appeal from a justice of the peace, but it refers to them by page and line in other parts of the record, without copying them and making them a

part of the bill, such motions and rulings are not thereby made a part of the record.—*Ulrich v. Hervey*, 76 Ind. 107.

[j] (Sup. 1881)

The annexation of papers by the clerk to the bill of exceptions after the signature of the judge does not make such papers a part of the bill.—*Baltimore, O. & C. R. Co. v. Barnum*, 79 Ind. 261.

Papers copied into a bill without the direction "Here insert" do not become a part of the record.—Id.

[k] (Sup. 1882)

A recital in a bill as to affidavits in support of a new trial, that the affidavits were filed and have been inserted on — page of the record, does not bring them before the court.—*Chambers v. Butcher*, 82 Ind. 508.

[l] (Sup. 1882)

That an exhibit set forth in the record is referred to in the bill does not necessarily make it a part of the bill.—*Sanders v. Farrell*, 83 Ind. 28.

[m] (Sup. 1883)

Where a pleading or written instrument is a part of the record by force of the statute, and has been once copied into the transcript, and is referred to in the bill, the clerk need not again set it out in full, but may refer to the page and line of the transcript where it may be found; but, when not thus a part of the record, such reference is insufficient.—*Board of Com'rs of White County v. Karp*, 90 Ind. 236.

[n] (Sup. 1885)

In order to make motions and affidavits a part of the record by bill, they must be referred to as properly appearing elsewhere in the record or set out at length therein.—*Shields v. McMahan*, 101 Ind. 591.

[o] (Sup. 1885)

When it is intended to incorporate into the bill papers or documents which were read or offered in the court below, they must be copied into the bill before it is signed by the presiding judge, or must be so described, by names of parties, amounts, or other identifying features, as to leave no room for mistakes in the transcribing officer.—*Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138.

[p] (Sup. 1889)

Where a paper is properly a part of the record as an exhibit, and is made a part of the pleading and once copied into the record, it is needless to recopy it into the bill of exceptions, and it is enough to refer to it in the bill of exceptions, and state the fact that it was admitted in evidence, and that a copy of it appears at a particular place in the record.—*Henry v. Thomas*, 118 Ind. 23, 20 N. E. 519.

[q] (Sup. 1890)

The stenographer's report of oral testimony can only be brought into the record by setting it out in the bill of exceptions before the bill is signed by the judge.—*Patterson v. Churchman*, 22 N. E. 662, 23 N. E. 1082, 122 Ind. 379.

[r] (Sup. 1890)

Under Rev. St. 1881, § 630, requiring, on notice of intention to take the question reserved to the supreme court on the bill only, that "the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the cause \* \* \* as will enable the supreme court to apprehend the particular question involved," an order made by the judge in vacation that certain papers—entries in the case and statement of the court—be made a part of the bill is sufficient to authorize their incorporation in the bill.—*Shugart v. Miles*, 125 Ind. 445, 25 N. E. 551.

[s] (Sup. 1891)

The evidence is not properly brought up on appeal where the record recites that appellants filed and presented a bill of exceptions, consisting of the stenographer's report of the evidence taken at the trial, which report is attached to the record, preceded by the certificate of the clerk; but the report must be embodied in the bill of exceptions before the judge signs it.—*Dick v. Mullins*, 128 Ind. 365, 27 N. E. 741.

[ss] (Sup. 1891)

Exceptions taken to a master commissioner's report must be copied into the bill of exceptions, and are not made a part thereof by use of the words "here insert" in such bill.—*Lewis v. Godman*, 27 N. E. 563, 129 Ind. 359.

[t] In Indiana the stenographer's report of the testimony given at a trial cannot be made a part of the bill of exceptions merely by a reference, but it must be incorporated into the bill of exceptions.—(Sup. 1891) *Morningstar v. Musser*, 129 Ind. 470, 28 N. E. 1119; (App. 1892) *Lauderback v. Rouch*, 31 N. E. 578.

[tt] (Sup. 1892)

A trial judge cannot delegate to the clerk the authority to take from a record in the auditor's office an order and insert it in the bill.—*Seymour Woolen Factory Co. v. Brodhecker*, 130 Ind. 389, 28 N. E. 185, 30 N. E. 528.

[u] (Sup. 1892)

The stenographer's report of the evidence cannot be made a part of the bill of exceptions in any other mode than by incorporation therein.—*McCoy v. Able*, 30 N. E. 528, 31 N. E. 453, 131 Ind. 417.

[uu] (App. 1892)

A bill of exceptions relating to a refusal to make the complaint more specific, which does not contain a copy of the motion, is insufficient, though it states that the motion was in writing, and filed in open court, and refers to a page of



the transcript where the motion is inserted.—*Ohio & M. R. Co. v. McDaniel*, 5 Ind. App. 108, 31 N. E. 836.

[v] (Sup. 1893)

If original depositions may be incorporated in a bill of exceptions without a direction to "here insert," they must at least be fastened to the bill.—*Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353.

[vv] (Sup. 1896)

A bill of exceptions containing statements of the introduction in evidence of certain tax receipts, which does not set out the receipts, but refers to the page in the transcript where they could be found, is insufficient, where it appears that at the page indicated a mere abstract of the various receipts is inserted, and not copies of the receipts.—*Seston v. Tether*, 145 Ind. 251, 44 N. E. 304.

[w] (Sup. 1898)

Where the longhand manuscript of the evidence in a trial, made by the official reporter, is attached to the bill of exceptions, but is not referred to by, or embodied in, or made a part of, such bill of exceptions, the evidence is not in the record.—*Garrett v. State ex rel. Hunt-singer*, 49 N. E. 33, 149 Ind. 264.

[ww] (App. 1898)

Error in overruling a motion cannot be considered where the motion is not copied into the bill of exceptions, though a reference is made in the bill, in the place where the copy should have been, to another part of the transcript, where it is inserted by the clerk.—*Baltimore & O. S. W. R. Co. v. Amos*, 49 N. E. 854, 20 Ind. App. 378.

[x] (App. 1900)

A bill of exceptions recited that a policy of insurance was "offered" in evidence and marked "Exhibit A," and then followed the policy sued on. The bill began by stating that the following evidence was "introduced," and closed with the recital, signed by the judge that "this was all the evidence given in the cause." Held to show that the policy was introduced in evidence.—*Knights Templar & Masons' Life Indemnity Co. v. Dubois*, 57 N. E. 943, 26 Ind. App. 38.

[xx] (Sup. 1901)

Where there was no authority for copying an affidavit in the transcript, a statement in the bill of exceptions, insert "affidavit found at record, page 35," was not sufficient to bring the affidavit into the record, since only papers which have been properly made a part of the transcript can be incorporated into the bill by a reference to the transcript.—*Miller v. Coulter*, 59 N. E. 853, 156 Ind. 290.

[y] (Sup. 1901)

Disputed ballots were not improperly before the court because the originals, instead of copies, were incorporated in the bill of excep-

tions containing the evidence.—*Tombaugh v. Grogg*, 59 N. E. 1060, 156 Ind. 355.

[yy] (App. 1901)

The longhand manuscript of the evidence must be incorporated into the bill of exceptions, and cannot be brought into the bill by reference.—*Shirk v. Lingeman*, 59 N. E. 941, 26 Ind. App. 630.

[z] (Sup. 1903)

Where an item of documentary evidence has been set out in the bill of exceptions, it is sufficient, if the document is again read in evidence, to describe the item by words of a general description, and refer to it as exhibited in the bill.—*Scott v. City of Laporte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 673.

[zz] (App. 1905)

An exhibit which is once properly made a part of the record may be made a part of the bill of exceptions by reference, but, when not so made part of the record, cannot be incorporated in the bill.—*Cincinnati, L. & A. Electric St. R. Co. v. Stahle*, 76 N. E. 551, 77 N. E. 363, 37 Ind. App. 539.

A plat which is not in any way authenticated as the plat introduced in evidence cannot be deemed incorporated in the bill of exceptions by reference.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 12-15, 19, 29.

#### § 23. — Skeleton bill.

[a] (Sup. 1858)

A bill drawn in skeleton form, the insertion of the evidence and instructions being afterwards made by the clerk, is insufficient, where there is no agreement of the parties authorizing the clerk to make such insertions entered on the record.—*Mills v. Simmonds*, 10 Ind. 464.

[b] (Sup. 1871)

The clerk should copy in their proper order the papers referred to where it is marked in the bill of exceptions "(here insert)."—*Miles v. Buchanan*, 36 Ind. 490.

[c] (Sup. 1872)

A judge may very properly sign a bill with a blank, where the purpose is to make a part of the record some written instrument or documentary evidence; but he should never sign a bill of exceptions purporting to embody the parol testimony until such testimony has been written out in full in such bill of exceptions, and he has convinced himself, either by the consent of opposing counsel or a personal examination, that it contains the truth, the whole truth, and nothing but the truth.—*Stewart v. Rankin*, 39 Ind. 161.

In making a bill, where it is proposed to make part of the record a written instrument or documentary evidence, it is not necessary to copy such written instrument or documen-

tary evidence into the bill of exceptions; but it shall be sufficient to refer to such instrument or evidence, if its appropriate place is designated by the words, "Here insert," and when the clerk makes out the transcript he should fill the blank with the written instrument or documentary evidence referred to. If the paper mentioned legitimately constituted a part of the record, and has already been set out in the transcript, the clerk need not again copy it into the bill, but may refer to the page and line of the transcript where it may be found.—Id.

[d] (Sup. 1872)

Where a bill shows that a motion to strike out part of a pleading was made, and contains the words "[Here insert]," the clerk is authorized to insert the motion in the bill of exceptions.—Greensburgh, M. & H. Turnpike Co. v. Sidener, 40 Ind. 424.

Where a motion to strike out part of a pleading is made, such motion is not made part of the record by the clerk's filling a blank in the bill of exceptions with a reference to the page of the transcript where it may be found, since, unless copied at length into the bill signed by the judge and certified by the clerk, it is not properly authenticated.—Id.

[e] If the original bill shows that it was signed in skeleton, with the directions, "Here insert evidence," the transcript of evidence will not be considered on appeal.—(Super. 1872) Bennett v. Baker, 1 Wils. 158; (Sup. 1801) Barnes v. Turner, 129 Ind. 110, 28 N. E. 322; (1891) Walter v. Uhl, 3 Ind. App. 219, 28 N. E. 733; (1895) City of New Albany v. Iron Substructure Co., 141 Ind. 500, 40 N. E. 44.

[f] Where it is attempted to incorporate a paper into a bill by means of the words "Here insert," the instrument must be so clearly identified that nothing remains for the clerk to do but to copy it into the bill at the place indicated.—(Sup. 1873) State ex rel. Evans v. President, etc., of Peru & I. R. Co., 44 Ind. 350; (1890) Boos v. Morgan, 146 Ind. 111, 43 N. E. 947.

[g] (Sup. 1873)

A bill may be made and signed by the judge, without setting out therein documents which have been given or offered in evidence, by referring to such evidence and designating its proper place by the words "Here insert."—State ex rel. Evans v. President, etc., of Peru & I. R. Co., 44 Ind. 350.

Where the clerk is left, by the words "Here insert," to copy in the bill documents given or offered in evidence, it must in some way appear that the instruments copied by him were read or offered in evidence.—Id.

[h] (Sup. 1875)

Where a bill when signed by the judge did not contain the evidence, but stated that "upon the trial of the cause the following evi-

dence was given, to wit: [Here insert],—which was all the evidence given upon the trial of said cause," the clerk, in making out a transcript of the record, had no right to insert in such bill what he supposed to be the evidence given in the cause.—Board of Com'rs of Henry County v. Slatter, 52 Ind. 171.

[i] (Sup. 1876)

After a bill has been signed, oral evidence cannot be inserted therein by the clerk in places where he is directed to insert it.—Everett v. Gooding, 53 Ind. 72.

[j] (Sup. 1878)

Where a bill designates certain affidavits resisting or supporting an application for relief against a judgment, and leaves blanks for their insertion, marked "H. I.," the affidavits form no part of the record, although the clerk has, without order of the court, copied them into the transcript.—Kimball v. Loomis, 62 Ind. 201.

[k] (Sup. 1881)

Under Code, § 343, providing that it shall not be necessary to copy a written instrument in a bill of exceptions, but it shall be sufficient to refer to such evidence if its appropriate place be designated by the words "here insert," a bill of exception stating "a writ of restitution was then read in evidence, and is in these words and figures, to wit," cannot be understood as a direction to the clerk, as such words imply that the judge intends to insert the instrument in the bill of exceptions, and not that the clerk shall do it.—Endsley v. State, 76 Ind. 467.

Under Code, § 343, providing that it shall not be necessary to copy a written instrument into a bill of exceptions, but it shall be sufficient to refer to such evidence in its appropriate place if its appropriate place be designated by the words "here insert," the clerk's authority to insert documents in the bill of exceptions depends on such provision, and, unless the court authorize him to copy into the record papers put in evidence at the trial by the words "here insert," he has no authority to do so.—Id.

[l] (Sup. 1882)

A bill which indicates a place for the instructions thus: "H. I."—and then follows: "For which instructions see page 67 and following of this record. Clerk,"—does not make the instructions a part of the record.—Blizzard v. Riley, 83 Ind. 300.

[m] (Sup. 1882)

In making a transcript of a bill, the clerk should not, at a "[Here insert]," refer to another part of the transcript for a copy of the document, unless the copy referred to is a proper part of the record.—Klingensmith v. Faulkner, 84 Ind. 331.

[n] (Sup. 1882)

On an appeal in an action founded on judgments, copies of the judgments must be el-

ther set out at length in the bill or appropriately referred to therein, with the place of insertion designated by the words "Here insert."  
—*Cosgrove v. Cosby*, 86 Ind. 511.

[o] (*Sup.* 1886)

The clerk of the court has no authority to incorporate the longhand manuscript of the evidence in the bill of exceptions, where no place is indicated therein where such manuscript may be inserted by the use of the words "here insert," as provided by Rev. St. 1881, § 626.—*Lowery v. Carver*, 4 N. E. 52, 104 Ind. 447.

[p] (*Sup.* 1886)

Rev. St. 1881, § 626, providing that in making up a bill of exceptions it shall not be necessary to copy a written instrument or any documentary evidence into the bill, but it shall be sufficient to refer to such evidence if its appropriate place be designated by the words "here insert," relates to such instruments and evidence as are thereafter to be transcribed by the clerk in making the transcript, and not to the reporter's longhand manuscript when that is to be certified under section 1410.—*Wagoner v. Wilson*, 8 N. E. 925, 108 Ind. 210.

[q] The stenographer's report of oral testimony, though pleaded in court, is not "a written instrument" or "documentary evidence," within the meaning of Rev. St. 1881, § 626, providing that it shall not be necessary to copy "a written instrument, or any documentary evidence," into a bill of exceptions, but it shall be sufficient to refer to such evidence by the words "Here insert."—(*Sup.* 1888) *Stone v. Brown*, 116 Ind. 78, 18 N. E. 392; (1888) *Flint v. Burnell*, 116 Ind. 481, 19 N. E. 140; (1890) *Patterson v. Churchman*, 122 Ind. 379, 22 N. E. 662, 23 N. E. 1082.

[r] (*App.* 1891)

The signing of a bill, which undertakes to incorporate therein oral instructions by the use of the words "Here insert," does not amount to an authentication of the bill by the court, under Rev. St. 1881, § 626, which only permits the incorporation of "documentary evidence" into a bill of exceptions in that manner.—*Sinclair v. Hanna*, 3 Ind. App. 164, 29 N. E. 434.

[s] (*Sup.* 1892)

Under the statute, written instruments may be brought into the bill of exceptions by reference provided they are shown to have been offered in evidence, are clearly identified by the judge, and the place for their insertion indicated by the words "here insert."—*Seymour Woolen Factory Co. v. Brodhecker*, 28 N. E. 185, 30 N. E. 528, 130 Ind. 389.

[t] (*Sup.* 1893)

Decree having been entered, and time allowed to file a bill of exceptions, within such time a bill was filed, including the evidence only by the words, "Here insert the copy of the stenographer's transcript of testimony given by plaintiff." Such copy was not filed till

after the time allowed. *Held*, that the judge could not dispense with his duty to examine the transcript of evidence before signing the bill, and that said evidence was not before the appellate court.—*Midland Ry. Co. v. Smith*, 135 Ind. 348, 35 N. E. 284.

[u] (*Sup.* 1893)

An affidavit that on a certain page of a bill of exceptions "a space was left for depositions, and such depositions were placed inside of said bill of exceptions at said point, but not otherwise fastened," means that the original depositions were placed inside the paper on which the bill was written, and hence shows that they were not copied into the bill, and were no part of it.—*Pennsylvania Co. v. Sears*, 136 Ind. 400, 34 N. E. 15, 36 N. E. 353.

[v] (*App.* 1893)

A bill of exceptions, purporting to contain all the evidence, recited that plaintiff gave in evidence "the note marked 'Exhibit A,' as follows." Then followed a blank space. Attached to the complaint was a copy of the note sued on, marked "Exhibit A." *Held*, that the note offered in evidence was not identified as the note sued on, so that the blank could be filled by reference to the copy attached to the complaint.—*Smith v. Walker*, 7 Ind. App. 614, 34 N. E. 843.

[w] (*App.* 1893)

Rev. St. 1881, § 626, provides that documentary evidence need not be copied into a bill of exceptions, but may be referred to, its place being marked by the words "here insert." A plat, as shown by the record, was introduced by agreement, and made an exhibit, and the bill recited that "thereupon said map was introduced in evidence, and is as follows," and then came the plat. *Held*, that the plat would not be excluded because not incorporated in the bill when signed by the judge, the clerk's certificate to the transcript affording the presumption that the plat was properly referred to, and its place pointed out, in the bill.—*Toledo, St. L. & K. C. R. Co. v. Cupp*, 8 Ind. App. 388, 35 N. E. 703.

[x] (*Sup.* 1896)

If an instrument does not properly constitute a part of the record without a bill of exceptions or order of court, it is the duty of the clerk in making a transcript to insert such instrument at its proper place in the bill of exceptions, otherwise it is no part of the record. The phrase "here insert" with a reference to the page of the transcript where it is printed is not sufficient.—*Seston v. Tether*, 44 N. E. 304, 145 Ind. 251.

[xx] (*Sup.* 1899)

At the place in the bill of exceptions marked "Here insert," where the clerk should have copied a motion to strike out a pleading, the clerk referred to the page of the transcript where the motion might be found. *Held*, that the motion was not thereby made a part of the

record.—*Corbey v. Rogers*, 52 N. E. 748, 152 Ind. 169.

[y] (App. 1899)

A motion and affidavits cannot be made part of the appeal record by mentioning them in the place in the bill of exceptions where they should have been inserted, in connection with the words, in parentheses, "Here insert," though they were copied elsewhere in the transcript by the clerk.—*F. C. Austin Mfg. Co. v. Clendenning*, 52 N. E. 708, 21 Ind. App. 459.

[yy] (Sup. 1901)

An amended complaint, and answers to interrogatories included in a bill of exceptions, which is copied into the transcript, are not properly a part of the record if not copied into the bill before it is signed, or appropriately referred to and the proper place for insertion designated by the words "here insert," as directly provided by *Burns' Rev. St. 1901, § 638* (Rev. St. 1881, § 626; *Horner's Rev. St. 1901, § 628*).—*Tilden v. Louisville & J. Ferry Co.*, 62 N. E. 31, 157 Ind. 532.

[z] (App. 1902)

The words "here insert," in a bill of exceptions do not make a motion to strike out part of a pleading a part of the bill, so as to allow of review of the ruling thereon, though the motion appears elsewhere in the transcript.—*Midland R. Co. v. Trissal*, 65 N. E. 543, 30 Ind. App. 77.

[zz] (Sup. 1903)

An entry in the cause recited: "Now comes the defendant herein by counsel, and files its bill of exceptions in the office of the clerk of the \* \* \* circuit court, in these words (insert)." Nothing whatever was set out in the transcript following the word "insert" which purported to be a bill of exceptions or manuscript of the evidence, but a longhand manuscript of the evidence had been formerly filed, and signed by the judge. There was nothing in it to indicate that it was intended as a bill of exceptions. *Held* that, even if the longhand manuscript could be considered as a bill of exceptions, it could not be regarded as such on the appeal, it not having been inserted in the manuscript after the word "insert," as it should have been.—*Knickerbocker Ice Co. v. Lewis*, 67 N. E. 188, 160 Ind. 494.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 30.  
See, also, 3 Cyc. p. 27.

§ 24. Number of bills.

[a] (Sup. 1848)

Although exceptions must be taken to the decision of the court at the time such decision is made, it is not necessary that a bill of exceptions should be then made out and signed. One bill of exceptions, made at the conclusion of a case, is sufficient to embrace all the exceptions

taken during the trial.—*Doe ex dem. Calvert v. Makepeace*, 8 Blackf. 575.

[b] (Sup. 1881)

Where a motion for a new trial was overruled and 30 days granted in which to file a bill of exceptions, it was immaterial that appellant presented the rulings objected to by two bills instead of one, both of which were filed within the time granted.—*Pitzer v. Indianapolis, P. & C. R. Co.*, 80 Ind. 569.

[c] (Sup. 1883)

Where two bills of exceptions are found in the record, and in one of them the objections are stated, but not in the other, the court will regard the one as a special bill and the other as a general bill, and treat the question as properly saved.—*Kuhns v. Gates*, 92 Ind. 66.

[d] (Sup. 1893)

After certain proceedings in a case, a special judge was appointed. The record showed a bill of exceptions signed by the regular judge, followed immediately by a bill signed by the special judge, each presented on the same day. The formal parts of the bills were the same, except that the latter had a caption mentioning the special judge as presiding during the proceedings therein. The contents of the bills were totally different. *Held*, that the appellate court would not regard the formal conclusion of the former bill, and the signature of the regular judge, as mere surplusage, and then incorporate the remainder of such bill into the latter bill, thus making all one bill of exceptions signed and allowed by the special judge. 34 N. E. 327, affirmed.—*Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

[e] (App. 1902)

The original manuscript of the evidence and the instructions cannot be brought up by one bill of exceptions.—*South Chicago City R. Co. v. Zerler*, 65 N. E. 599, 31 Ind. App. 488.

[f] (Sup. 1905)

Leave by the court to file "a bill of exceptions" authorizes appellant to file separate bills, one embracing the evidence and the other the ruling of the court in directing a verdict.—*Davis v. Mercer Lumber Co.*, 73 N. E. 899, 104 Ind. 413.

[g] (App. 1908)

Where defendant presented one bill of exceptions, and subsequently plaintiff presented another bill of exceptions, both of which the court signed and made part of the record, they will be treated as supplementary to each other, and all the facts stated are entitled to the same force as if they had all been incorporated in the first bill.—*United States Benev. Soc. v. Watson*, 41 Ind. App. 452, 84 N. E. 29.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 31.  
See, also, 3 Cyc. p. 25.

**§ 26. Construction of bill.**

[a] (Sup. 1859)

A bill stated: "Now come the parties," etc., "the defendants demur, and after argument of both parties the court sustains," etc., "to which opinion the plaintiff excepts." *Held*, that it sufficiently appeared that the exception was taken at the time the decision was made.—*Pace v. Oppenheim*, 12 Ind. 533.

[b] (Sup. 1882)

An exception in form, "Whereupon the defendant moved the court for a new trial, as heretofore set out in the record, and when the same was overruled the judgment heretofore set out in the record was rendered, and the defendant excepted," does not show an exception to the ruling of the court on the motion for a new trial.—*Creager v. Langford*, 87 Ind. 177.

[c] Where two bills of exceptions contain sufficient to present a question, the court will consider the same, though neither, standing alone, is sufficient.—(Sup. 1883) *Kuhns v. Gates*, 92 Ind. 66; (App. 1896) *Lewis v. Buskirk*, 14 Ind. App. 439, 42 N. E. 1118.

[d] (App. 1904)

A statement in a bill of exceptions that it contains all the instructions given was not falsified by a showing that a requested instruction of a particular number which the court modified was not in the record, since the modified instruction might have been given under another number.—*Nichols v. Baltimore & O. S. W. R. Co.*, 70 N. E. 183, 71 N. E. 170, 33 Ind. App. 220.

[e] (Sup. 1907)

The recital in a bill of exceptions of the day when it was presented to, or signed by, the judge must be taken as correct, while a general statement therein that the same was presented to the judge within the time allowed will be disregarded.—*Malott v. Central Trust Co.*, 168 Ind. 428, 79 N. E. 369.

[f] (App. 1897)

Where much of the evidence in the bill of exceptions contains reference to models, and no diagram or explanations of the models are given, the bill of exceptions shows affirmatively that it does not contain all of the evidence, notwithstanding that it recites that it does.—*Cincinnati Seating Co. v. Neiry*, 40 Ind. App. 144, 81 N. E. 216.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, § 33.  
See, also, 3 Cyc. p. 30.

**§ 27. Operation and effect of bill.**

[a] (Sup. 1873)

A bill of exceptions, when properly signed and in the record, imports absolute verity.—*Ryan v. Burkam*, 42 Ind. 507.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, § 34.

**II. SETTLEMENT, SIGNING, AND FILING.**

In criminal cases, see **CRIMINAL LAW**, § 1002. Laws relating to as impairing obligation of contracts, see **CONSTITUTIONAL LAW**, § 184.

Review of discretion of trial court, see **APPEAL AND ERROR**, § 985.

**§ 31. Necessity of allowance or settlement.**

[a] (Sup. 1881)

A bill of exceptions containing evidence must be definitely settled in the trial court, as the appellate court cannot undertake to determine from conflicting statements which is the correct version of the testimony.—*Stout v. Woods*, 79 Ind. 108.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, § 36.

**§ 32. Authority to allow or settle.**

[a] (Sup. 1858)

The clerk of court has no authority to sign a bill.—*Templeton v. Hunter*, 10 Ind. 380.

[b] (Sup. 1860)

Where the bill of exceptions is signed by one specially appointed as judge, the record shows his authority to act.—*Negley v. Wilson*, 14 Ind. 215.

[c] A bill can be signed by the successor of the judge before whom the cause was tried.—(Sup. 1869) *Smith v. Baugh*, 32 Ind. 163; (1873) *Ketcham v. Hill*, 42 Ind. 64; (1882) *State ex rel. Wick v. Slick*, 86 Ind. 501; (App. 1893) *Cincinnati, I., St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

[d] A bill of exceptions cannot be settled by the judge who tried the case after he has ceased to be a judge.—(Sup. 1869) *Smith v. Baugh*, 32 Ind. 163; (1873) *Ketcham v. Hill*, 42 Ind. 64; (App. 1893) *Cincinnati, I., St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

[e] (Sup. 1871)

Where a motion for a new trial was made before a pro tem. judge, who did not sit on the trial, and was denied by him, and the bill of exceptions was signed by the pro tem. judge in vacation, no reason appearing why it should not have been signed by the trial judge, the bill will be disregarded, as not properly signed.—*Travelers' Ins. Co. v. Leeds*, 38 Ind. 444.

[f] (Sup. 1873)

When an attorney or judge has been called or appointed to try a case in the place of the regular judge, such called or appointed judge has the same power over the case as the regular judge would have had, if he had not been disqualified; hence, as the regular judge might have given time and signed a bill of exceptions after the term, the called or appointed judge may and ought to do so in a proper case.—*Lerch v. Emmett*, 44 Ind. 331.

[g] (Sup. 1874)

A bill of exceptions cannot be signed by a person deputized by the judge. Signing it is a judicial act, which can only be performed by the judge who tried the cause, or by a judge who has succeeded him in office. Agreement of counsel that the bill is correct does not waive signature, nor cure the objection that the signature is not that of the judge in person.—*Tolledo, W. & W. R. Co. v. Rogers*, 48 Ind. 427.

[h] (Sup. 1878)

After a court is abolished, a bill of exceptions in a cause tried therein must be signed by the judge of the court in which the jurisdiction thereof has been conferred.—*McKeen v. Boord*, 60 Ind. 280.

[i] (Sup. 1878)

In an action to review a judgment rendered by a common pleas court, the record set out in the complaint on review embodied a bill of exceptions signed by the judge of the court after the taking effect of Act March 6, 1873 (1 Rev. St. 1876, p. 380), dividing the state into circuits and abolishing the court of common pleas. *Held*, that the judge had no authority to sign the bill, since the bill should have been signed by the judge of the circuit court, to which the business of the court of common pleas had been transferred by the statute.—*Reed v. Worland*, 64 Ind. 216.

[j] A judge has no power to sign a bill of exceptions after appointing a special judge.—(Sup. 1879) *Lee v. Hills*, 66 Ind. 474; (1893) *Bement v. May*, 135 Ind. 604, 34 N. E. 327, 35 N. E. 387.

[k] (Sup. 1880)

1 Rev. St. 1876, p. 771, § 6, providing that the longhand manuscript of a shorthand reporter may be used as a part of the transcript of the record when the same shall have been incorporated in a bill of exceptions, the shorthand reporter cannot certify that his report contains all the evidence in the case. That must be done by the judge.—*Woolen v. Wishmier*, 70 Ind. 108.

[l] (Sup. 1882)

A bill of exceptions signed by a special judge cannot be considered, where the record fails to show that he presided at the trial.—*Finch v. Travellers' Ins. Co.*, 87 Ind. 302.

[m] (Sup. 1882)

Where a case is referred to a master commissioner "for finding," the bill of exceptions must be signed by him.—*Lee v. State ex rel. Templeton*, 88 Ind. 256.

[n] (Sup. 1884)

The circuit judge has no authority to sign a bill of exceptions containing testimony taken before the commissioner, where it was not brought before the court in any proper manner, and was not before it at all until long after the court had made its finding on the facts as

reported by the commissioner without the evidence.—*Borchus v. Huntington Building Loan & Savings Ass'n*, 97 Ind. 180.

[o] (Sup. 1884)

Defendant appeared in a circuit court and moved to quash the summons and return, and, the motion having been overruled, on defendant's application the venue was changed to another circuit court. *Held*, that a bill of exceptions filed in the second circuit would not save an exception to the overruling of the motion to quash the summons and return, though the same judge presided in both courts.—*Cincinnati, H. & D. R. Co. v. Leviston*, 97 Ind. 488.

[p] The certificate of a reporter, to the effect that the bill of exceptions contained all the oral evidence, cannot take the place of such a certificate of the trial judge.—(Sup. 1887) *Lyon v. Davis*, 111 Ind. 384, 12 N. E. 714; (App. 1892) *Ehrisman v. Scott*, 5 Ind. App. 596, 32 N. E. 867; (Sup. 1895) *Rosenbower v. Schuetz*, 141 Ind. 44, 40 N. E. 256.

[q] (Sup. 1888)

Where the term of office of a judge before whom a cause was tried expires after the completion of the trial, but before the signing of the bill of exceptions, and the counsel for one of the parties is elected the successor of such judge, he is incompetent to sign such bill.—*Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590.

[r] (Sup. 1890)

The certificate of the official stenographer is not a part of the bill of exceptions, and neither adds to nor detracts from its effect.—*Guirl v. Gillett*, 24 N. E. 1036, 124 Ind. 501.

[s] (Sup. 1890)

The appointment of special judges being authorized by Const. art. 7, § 10, a special judge appointed by the regularly elected judge, in accordance with 2 Rev. St. 1876, p. 11, § 4, can sign a bill of exceptions after the close of the term he was appointed to hold, the act providing that "such appointee shall \* \* \* if he be not a judge of any court of record conduct the business of such court, subject to the same rules and regulations that govern circuit courts in other cases, and shall have the same authority during the continuance of the appointment as the judge elect."—*Shugart v. Miles*, 125 Ind. 443, 25 N. E. 551.

[t] (Sup. 1892)

The settlement and granting of a bill of exceptions is a judicial duty.—*McCoy v. Abel*, 30 N. E. 528, 31 N. E. 433, 131 Ind. 417.

[u] (Sup. 1899)

The settling of a bill of exceptions so as to cause it to express or speak the truth is a judicial act, and it is the duty of the trial judge to ascertain if the bill is complete and correct

before he signs it.—*Citizens' St. R. Co. v. Heath*, 55 N. E. 744, 154 Ind. 363.

[v] (Sup. 1899)

Where the proceedings complained of were had before a special judge, a bill of exceptions not signed by such judge, but by the regular judge of the circuit, is fatally defective.—*Stewart v. Adam Meldrum & Anderson Co.*, 55 N. E. 760.

[w] (App. 1901)

Under Acts 1899, pp. 198-200, changing the boundaries of certain judicial districts, and providing, in sections 10 and 11, that the judge before whom a trial is pending at the time of the change shall conduct the action to judgment, and approve and sign bill of exceptions therein, where an action was tried before the change in a county, which became a part of a district presided over by another judge, a bill of exceptions therein signed by the latter judge, the judge who tried the case being still in office, is of no avail.—*Carr v. Noah*, 62 N. E. 283, 28 Ind. App. 105.

[x] (Sup. 1904)

Where one who had been an attorney of an appellant in the trial of the cause afterwards became judge, a bill of exceptions settled and signed by him without the knowledge or consent of the appellee is not a part of the record.—*Winters v. Coons*, 69 N. E. 458, 162 Ind. 26.

[y] (App. 1908)

The settling of a bill of exceptions rests with the trial judge, who will not be actuated by any duties except to correct it and fairly state the facts involved.—*Abney v. Indiana Union Traction Co.*, 41 Ind. App. 53, 83 N. E. 387.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 37-41, 74, 94; 29 CENT. DIG. Judges, §§ 98, 103, 122, 144, 149, 157, 162.  
See, also, 3 Cyc. pp. 31-33.

### § 33. Duty to prepare bill.

[a] (Sup. 1864)

A bill of exceptions is presumed to have been prepared by appellant or his attorney, and, if it was necessary that a writing given in evidence should have been copied into the bill, it was the duty of appellant to do it, and he cannot be heard to complain of the failure so to do.—*Smith v. Lisher*, 23 Ind. 500.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 42.

### § 35. Time for presentation, allowance, and filing.

As part of record for purpose of review, see APPEAL AND ERROR, § 537.

Computation of time, see TIME, § 9.

Laws relating to, as encroachment by Legislature on judiciary, see CONSTITUTIONAL LAW, § 55.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 44-73.

See, also, 3 Cyc. pp. 37-43.

### § 36. — In general.

[a] (Sup. 1892)

The motion for a new trial was overruled February 19, 1886. On February 27, 1886, a bill of exceptions was presented to the judge, and indorsed by him. The same bill was afterwards presented to the judge, February 16, 1887, with more than 500 additional pages of matter never before seen by him. No time was asked or given within which to present a bill of exceptions. *Held*, that the delay in presenting the bill rendered the same insufficient.—*Wysor v. Johnson*, 130 Ind. 270, 30 N. E. 144.

[b] (App. 1894)

Though, on appeal from special term to the general term of the superior court, the cause is submitted on a transcript before a bill of exceptions is filed, the general term may consider the bill, if filed within the time given by the special term.—*Grisell v. Noel Bros. Flour-Feed Co.*, 9 Ind. App. 251, 36 N. E. 452.

[c] (Sup. 1898)

A paper purporting to be a bill of exceptions, signed by the judge after it was filed, is no part of the record.—*Chicago & S. E. R. Co. v. Cason*, 50 N. E. 569, 151 Ind. 329.

[d] (App. 1905)

Under Burns' Ann. St. 1901, § 641, providing for the preparation and filing of bills of exceptions, but fixing no time within which bills shall be presented to the trial judge, such time is to be fixed by the judge.—*State ex rel. Grau v. Adair*, 73 N. E. 611, 34 Ind. App. 622.

[e] (App. 1909)

Under Burns' Ann. St. 1908, § 656 (Burns' Ann. St. 1901, § 638), requiring exception to a decision to be made at the time of decision, but giving time for reduction of the exception to writing, etc., leave for filing a bill of exceptions given at a day after a decision is made is unauthorized, and a bill filed thereunder cannot be considered.—*Theobald v. Clapp*, 43 Ind. App. 191, 87 N. E. 100.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 44-46, 48, 51-53, 56.

See, also, 3 Cyc. p. 37.

### § 37. — At or after trial.

[a] (Sup. 1858)

A bill of exceptions, filed two days after judgment, in the present tense, no objection having been taken before, so far as appears, is too late.—*Johnson v. Bell*, 10 Ind. 363.

[b] (Sup. 1858)

A bill should be prepared and completed before the close of the trial.—*Lawton v. Swihart*, 10 Ind. 562.

[c] An exception must be reduced to writing at the time it is taken, or the court must grant a specified time for reducing it.—(Sup. 1880) *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; (1881) *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 47, 48.

See, also, 3 Cyc. p. 38.

**§ 38. — During or after term.**

Time allowed after term, see post, § 39.

[a] Where no time beyond the term was given within which to file a bill of exceptions, a bill not filed until during vacation is insufficient.—(Sup. 1859) *Thompson v. Hathaway*, 12 Ind. 479; (1880) *Engleman v. Arnold*, 118 Ind. 81, 20 N. E. 505.

[b] Bills of exception must be filed during the term of the court at which the trial was had, unless the time be extended by consent or order.—(Sup. 1860) *Lake Erie, W. & St. L. R. Co. v. Loveland*, 14 Ind. 291; (1864) *Garroll v. Young*, 22 Ind. 270; (1864) *Farnsworth v. Coquillard's Adm'r*, Id. 453; (1868) *Vandoren v. Kimes*, 29 Ind. 582; (1874) *Ward v. Angevine*, 46 Ind. 415; (1876) *Marshall v. Beeber*, 53 Ind. 83; (1882) *Indianapolis, D. & S. R. Co. v. Pugh*, 85 Ind. 279; (1883) *Arbuckle v. Biederman*, 94 Ind. 168; (App. 1895) *Dodge v. Morrow*, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; (Sup. 1901) *Judd v. Gray*, 59 N. E. 849, 156 Ind. 278; (App. 1897) *Indiana Mut. Building & Loan Ass'n v. Paxton*, 47 N. E. 1082, 18 Ind. App. 304.

**[c] (Sup. 1873)**

A cause was tried, a verdict rendered, and a motion for a new trial filed, and the cause was then continued to the next term, and thereafter the motion was overruled, and a judgment rendered; but no bill of exceptions was filed, and no time given to file the same, until a subsequent term, to which the cause was continued for further action. *Held*, that it was then too late to file a bill relating to the action of the court at the terms when the trial was had and the motion for a new trial was overruled (2 Gav. & H. p. 209, § 343, providing that the party objecting to the decision must except at the time the decision is made), but that time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court.—*Rinehart v. Bowen*, 44 Ind. 353.

**[d] (Sup. 1878)**

Under Rev. St. 1876, § 343, providing that the party excepting to a ruling must do so when it is made, but that time may be given to reduce the exception to writing, but not beyond the term, save by special leave of court, where the court took a case under consideration till the next term, it was proper practice, on announcement of the court's decision, to move for

a new trial, and on denial thereof to except and prepare a bill of exceptions containing the evidence given at the trial at the preceding term.—*Kendel v. Judah*, 63 Ind. 291.

**[e] (Sup. 1881)**

A bill of exceptions should be settled and signed during the term of court at which the trial is had, unless the time is extended by special order or by consent.—*Backus v. Gallentine*, 76 Ind. 367; *Firestone v. Firestone*, 78 Ind. 534.

**[f] (Sup. 1881)**

A bill of exceptions must not only be signed by the judge, but it must be filed during the term at which the ruling complained of was made, unless time is given beyond the term.—*Hart v. Walker*, 77 Ind. 331.

**[g] (Sup. 1882)**

An exception must be taken at the time of the decision, and reduced to writing during the term, unless an order is made at such term giving further time to file the bill.—*Eshelman v. Snyder*, 82 Ind. 498.

**[h] (Sup. 1882)**

Unless further time is given, exceptions must be reduced to writing at the term at which they are taken.—*Kinsey v. Satterthwaite*, 88 Ind. 342.

**[i] (Sup. 1892)**

If, notwithstanding no time is asked or given for filing a bill of exceptions, a proper bill is actually signed and filed during the term of court at which the ruling is made, this is sufficient.—*Wysor v. Johnson*, 30 N. E. 144, 130 Ind. 270.

**[j] (App. 1892)**

Exceptions can bring in question only the proceedings in a case had at the term of court at which the exceptions are presented, and cannot reach the proceedings of a former term.—*Smith v. Lotton*, 5 Ind. App. 177, 31 N. E. 816.

**[k] (Sup. 1893)**

Rev. St. 1881, § 626, providing that if a motion for a new trial be filed in a cause in which a decision excepted to at the time is assigned as reason, such motion shall carry the decision and exception forward to the time of ruling on such motion, and time may then be given within which to reduce the exceptions to writing, carries forward any ruling properly assignable as ground for a new trial, even from a previous term.—*Bement v. May*, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387.

[l] When there is a motion for a new trial, the time for the settlement of a bill of exceptions is extended to the term in which the motion is determined.—(Sup. 1894) *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; (1896) *Banner Cigar Co. v. Kamm & Schillinger Brewing Co.*, 145 Ind. 266, 44 N. E. 455.



[m] (*Sup.* 1896)

The provision of Burns' Rev. St. § 638 (Rev. St. 1881, § 626; Horner's St. 1897, § 626), that where a motion for a new trial is filed, in which a decision excepted to is assigned as a ground for the motion, the court may grant time thereafter to reduce such exceptions to writing, extends only to rulings made during the trial, and not to those made in making up the issues at a former term, or on a motion to modify the judgment; hence exceptions to such rulings must, be reduced to writing during the term at which they are taken, unless further time is then specially granted.—*Hoffman v. Henderson*, 44 N. E. 620, 145 Ind. 613.

[n] (*Sup.* 1909)

Under the express terms of Burns' Ann. St. 1908, § 656 (Burns' Ann. St. 1901, § 638; Rev. St. 1881, § 626), exception to a ruling must be taken when the ruling is made, but time may be given to prepare and file a bill of exceptions showing such rulings and exceptions, but not beyond the term, unless by special leave.—*Rose v. State*, 171 Ind. 662, 87 N. E. 103.

[o] (*App.* 1909)

At common law, it was necessary to file a bill of exceptions at the term at which alleged erroneous rulings were made.—*Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N. E. 80.

Burns' Ann. St. 1908, § 656, authorizes the court to give time to reduce exceptions to writing. Section 660 provides that within it the party objecting may present a bill, which, if true, the judge shall sign and cause to be filed, and that the judge's delay shall not deprive the party objecting to benefit thereof, and that the date of presentation shall be stated in the bill, and the entry shall show the time granted, if beyond the term for presenting the same. Section 661 makes provisions for extension of time in which to file bills, when necessary, provided application for extension must be made prior to expiration of the time first given. *Held*, that time beyond the term for filing a bill of exceptions, bringing into the record the rulings of the court for review which are reasons for a new trial, may be had only by special leave of court, given on the day the ruling on the motion for a new trial is made.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 49-53.

See, also, 3 Cyc. p. 39.

#### § 39. — Time prescribed or allowed.

Compliance within time prescribed, see post, § 41.

[a] (*Sup.* 1848)

Where a party intends to take a bill of exceptions, the court will allow a reasonable time to settle and reduce the exceptions to

form.—*Doe ex dem. Calvert v. Makepeace*, 8 Blackf. 575.

[b] (*Sup.* 1862)

The time fixed by the court for the filing of a bill of exceptions should be definite and reasonable.—*Lansing v. Coats*, 18 Ind. 166.

It is doubtful whether time for the filing of a bill of exceptions given "until the next term of the court" is sufficiently definite.—*Id.*

[c] (*Sup.* 1879)

The judge who tries a cause in the record of which appears no entry of leave to file a bill of exceptions after the expiration of the term cannot supply such entry in effect by stating in the bill of exceptions made after the term that such leave was given in the term.—*Schoonover v. Reed*, 65 Ind. 313.

[d] (*Sup.* 1880)

Under Code, § 343, requiring the party objecting to a decision to except at the time the decision is made, and authorizing the grant of time to reduce the exception to writing, but not beyond the term unless by special leave of court, an order extending the time to reduce an exception to writing beyond the term must be made during the term or the exception will be deemed waived or lost, although the motion for new trial is not passed on until a subsequent term.—*Sohn v. Marion & L. Gravel Road Co.*, 73 Ind. 77.

[e] (*Sup.* 1881)

An exception noted during a trial is covered by leave taken at the term the decision excepted to is rendered, the words "at the time" contained in a bill of exceptions referring to the time when an exception to ruling was taken as applied to a trial, being deemed to mean before the trial had reached the final step, to wit, rendition of final judgment denying a new trial.—*Pitzer v. Indianapolis, P. & C. R. Co.*, 80 Ind. 569.

Where leave to file a bill of exceptions was not obtained until a subsequent term, only such matters as appeared of record can be included therein, since no parol leave can be presumed, nor shown unless some note or minute of record supplies grounds for amendment.—*Id.*

Where leave to file a bill of exceptions is granted at the time a motion for a new trial is overruled, the bill may embrace all rulings made during the trial.—*Id.*

[f] Prior to Rev. St. 1881, § 626, where a motion for a new trial assigned as causes rulings upon the trial as to evidence, instructions, or the like, and the motion was not overruled until a succeeding term, questions on such rulings could not be saved by bill of exceptions filed on leave obtained at the latter term.—(*Sup.* 1882) *Bishop v. State ex rel. Lord*, 83 Ind. 67; (1882) *Cunningham v. Baker*, 84 Ind. 597; (1883) *Mullaney v. Indiana Nat. Bank of Indianapolis*, 91 Ind. 77.

[g] (Sup. 1882)

A motion was made for a new trial, which was taken under advisement until the next term, and 60 days were allowed to file a bill of exceptions, but none was filed at that time. At the next term the motion was overruled, and 60 days again given to file a bill, with special leave "to save all exceptions taken at the trial." *Held*, that the special leave thus given was a nullity.—*Kelsey v. Hay*, 84 Ind. 189.

[h] A bill of exceptions in relation to instructions or to the admission or exclusion of evidence must be filed at the term of trial, or within time then given within which to file the same. Such a bill, filed at a subsequent term to which the motion for a new trial was continued, by consent of the parties or within time then granted, cannot be considered.—(Sup. 1882) *Heaton v. White*, 85 Ind. 376; (1882) *Donaldson v. Dunn*, 87 Ind. 343; (1882) *McIlvain v. Emery*, 88 Ind. 298; (1885) *Hereth v. Hereth*, 100 Ind. 35.

[i] (Sup. 1882)

Where time is given at the trial term, on overruling a motion for a new trial, for a bill of exceptions, and one is filed in time, it embraces all rulings in admitting or excluding evidence made during the trial.—*Ryman v. Crawford*, 86 Ind. 262.

[j] (Sup. 1882)

At the term at which the trial was had a motion for a new trial was made and overruled, and afterwards on the same day a motion in arrest of judgment was overruled, and time then given extending beyond the term the time in which to file a bill of exceptions. *Held*, that a bill filed within the time so allowed was filed in time.—*Carithers v. Stuart*, 87 Ind. 424.

[k] (Sup. 1883)

A bill of exceptions, filed within the time granted therefor by the court on overruling a motion for a new trial at the term succeeding that at which the trial was had, brought up the evidence, but not exceptions to rulings made on the trial, under the law in force prior to Rev. St. 1881, § 626.—*Mullany v. First Nat. Bank of Indianapolis*, 89 Ind. 424.

[l] (Sup. 1883)

Bills of exceptions filed within the time allowed for the filing of bills upon the overruling of a motion for a new trial, but not filed during the term at which the ruling was made, cannot embrace motions made during the framing of issues.—*Boyce v. Graham*, 91 Ind. 420.

[m] (Sup. 1884)

A bill of exceptions may be settled and signed after the judgment term, if within a time fixed by order of court for the purpose.—*Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378.

[n] (Sup. 1884)

A bill of exceptions filed in vacation, but within the time allowed, brings up for review rulings made during the trial.—*Knox v. Traftalet*, 94 Ind. 346.

[o] (Sup. 1884)

A bill of exceptions filed after the term on time given on overruling a motion for a new trial cannot embrace matters occurring before the trial, as rulings on pleadings and like matters.—*Smith v. Flack*, 95 Ind. 116.

[p] (Sup. 1887)

A motion for a new trial having been overruled, and the ruling excepted to, it was immediately followed by a motion for a venire de novo. This motion was also overruled and excepted to, whereupon leave was given to settle and file a bill of exceptions. *Held*, that the leave to file the bill referred to all the rulings made on the day on which it was asked and secured.—*Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695; *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385.

[q] (Sup. 1887)

Where the order-book entry of one day's proceedings in a cause shows the overruling of a motion for a new trial, an exception taken at the time, and leave of court for a specified period of time in which to file the bill of exceptions, it will make no difference that the entry also shows that other steps in the cause intervened between the exception and the granting of time by the court; and a bill of exceptions duly filed within the time given is properly in the record.—*Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695.

[r] (App. 1891)

A bill of exceptions filed after the close of the term upon leave given because of the overruling of a motion for a new trial will not embrace motions made during the framing of the issues.—*Thomas v. Griffin*, 27 N. E. 754, 1 Ind. App. 457.

[s] (Sup. 1892)

An order made December 30, 1885, giving 60 days' time for filing bills of exception, does not apply to a ruling made February 19th thereafter.—*Wysor v. Johnson*, 30 N. E. 144, 130 Ind. 270.

[t] (Sup. 1893)

Leave to file a bill of exceptions, granted on overruling a motion for new trial, does not authorize the bringing into the record of exceptions to conclusions of law filed at a preceding term.—*Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694.

[u] (App. 1894)

A motion to strike out part of an answer to a question in a deposition to be used on the trial was overruled. The trial was had, and at the next term a motion for a new trial was overruled, and leave was granted to file a bill of exceptions. *Held*, that said motion to strike out said answer cannot be carried into

a general bill of exceptions filed pursuant to such leave granted at the subsequent term.—*Diether v. Ferguson Lumber Co.*, 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

[v] (App. 1894)

The order granting time to file a bill of exceptions after the term must be made during the term and must appear in the order book, and a recital of the fact in the bill is not sufficient.—*De Pauw University v. Smith*, 38 N. E. 1093, 11 Ind. App. 313.

[w] (App. 1900)

*Horner's Rev. St. 1897, § 626 (Burns' Rev. St. 1894, § 638)*, giving time beyond the term for the presentation of a bill of exceptions, means the term at which the decision was made and exception taken; and where a motion for new trial was overruled and exceptions taken at trial term, but no time given for a bill of exceptions, and at a subsequent term judgment was rendered time could not then be given to file bill of exceptions beyond that term.—*Wile v. Rochester Imp. Co.*, 56 N. E. 923, 24 Ind. App. 422.

[x] (App. 1902)

Where the court ordered the official reporter to file his longhand transcript of the evidence within 60 days, but it did not appear that any order had been granted extending the time for filing a bill of exceptions beyond the term, a bill of exceptions filed and certified at the next succeeding term could not be considered on appeal.—*American Tin-Plate Co. v. Williams*, 65 N. E. 304, 30 Ind. App. 46.

[y] (Sup. 1903)

*Burns' Rev. St. 1901, § 638*, provides that the party objecting to the decision must except at the time the decision is made, but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court, provided that, if a motion for a new trial shall be filed in a cause in which such decision so excepted to is assigned as a reason for a new trial, such motion shall carry the decision and exception forward to the time of ruling on such motion, and time may be given by the court within which to reduce such exception to writing. *Held*, that leave to file a bill of exceptions, not given until several days after a motion for a new trial has been overruled, is without authority.—*Citizens' St. R. Co. v. Marvil*, 67 N. E. 921, 161 Ind. 506.

[yy] (Sup. 1905)

Under *Burns' Ann. St. 1901, § 638*, providing that time may be given to reduce an exception to writing, but not beyond the term, unless by special leave of the court, where, after judgment, defendants were given 90 days in which to file "their general bill of exceptions herein," they were not entitled thereunder to present a special bill of exceptions, in vacation, to the action of the court in directing the jury to return a verdict in favor of plaintiffs.—*Wagner v. Weyhe*, 73 N. E. 89, 164 Ind. 177.

[z] (Sup. 1909)

Under *Burns' Ann. St. 1908, § 656 (Burns' Ann. St. 1901, § 638; Rev. St. 1881, § 626)*, authorizing the giving of time to reduce an exception to writing and providing that a motion for new trial shall carry a ruling and exception thereto forward to time of ruling on the motion, and that time may be then given within which to reduce the exception to writing, leave given several days after a new trial is denied to file a bill is void.—*Rose v. State*, 87 N. E. 103, 171 Ind. 662.

[zz] (App. 1909)

A trial court has no authority, except by statute, to grant time beyond the term in which to present a bill of exceptions.—*Nichols v. Central Trust Co.*, 43 Ind. App. 64, 86 N. E. 878.

Power to grant time beyond the term in which to present a bill of exceptions must be exercised at the time of the rulings excepted to or at the time of the ruling upon the motion for a new trial.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 51, 52, 54-56, 60.

See, also, 3 Cyc. pp. 38-40.

§ 40. — Extension of time.

Review of discretion, see APPEAL AND ERROR, § 985.

[a] (Sup. 1862)

It is not competent for a judge out of term to grant leave to perfect a bill of exceptions, or to extend the time for perfecting it "at his own instance."—*Everhart v. Hollingsworth*, 19 Ind. 138.

[b] (Sup. 1865)

Quære, whether leave can be given, even after notice to the opposite party, to file a bill of exceptions after the time fixed for filing it has expired.—*Noble v. Thompson*, 24 Ind. 346.

[c] (Sup. 1865)

Time for filing a bill of exceptions cannot be extended after it has once expired.—*Noble v. Thompson*, 24 Ind. 346; *Sherman v. Crothers*, 25 Ind. 417.

[d] When a judge has exercised the power conferred by Code, § 343, and extended by special leave the time for preparing a bill of exceptions beyond the term, and has rendered judgment and adjourned his court, his power to make any new order in the case has ceased, unless some sufficient ground is shown to amend the record.—(Sup. 1867) *McElfratrick v. Coffroth*, 29 Ind. 37; (1868) *Vanness v. Bradley*, *Id.* 388.

[e] (Sup. 1877)

The record of a cause appealed to the supreme court showed that, in term time, a certain period had been granted within which to file a bill of exceptions, and that, after the expiration of such period and term, a bill of exceptions had been filed, showing that a longer

time, not then expired, had been granted for such filing. *Held* that, after the expiration of the term, the judge had no power to grant any, or a longer, time for filing a bill of exceptions, and that it had not been filed in time.—*Whitworth v. Sour*, 57 Ind. 107

[f] (Sup. 1878)

An extension of the time of filing a bill of exceptions cannot be granted without the joint consent of both parties.—*Robinson v. Johnson*, 61 Ind. 535.

Though an appellee is constructively in court to attend to the entry of the final judgment, and to answer to a motion to tax costs, he is not in for, and consenting to, the extension of time as to the bill of exceptions, within the rule that the consent of both parties is necessary in order to extend the time for filing the bill of exceptions.—*Id.*

[g] (Sup. 1878)

The time given within which to file a bill cannot be extended, particularly where no necessity for it is shown, and the court has had ample opportunity, within the time originally given, to sign the same.—*Davidson v. State ex rel. Vanmeter*, 62 Ind. 276.

[h] (Sup. 1879)

A judge who tries a case, in the record of which no entry of leave to file a bill of exceptions after the expiration of the term appears, cannot supply in effect such entry, by stating in the bill of exceptions made after the term that such leave was given in the term.—*Schoonover v. Reed*, 65 Ind. 313; *Nye v. Lewis*, *Id.* 326; *York v. Webster*, 66 Ind. 50; *Schoonover v. Reed*, *Id.* 598.

[i] (Sup. 1879)

Where a bill was prepared and filed within a time granted beyond the term to prepare and file the same, but was not signed by the judge, because he had absented himself, so that it could not be presented for signature, the bill, though subsequently signed by him in open court, in the presence of the parties and without objection, cannot be made a part of the record by an original proceeding; the statute granting no power to extend at a subsequent term the time granted at a previous term within which to prepare and file a bill.—*Kirby v. Bowland*, 69 Ind. 290.

[j] (Sup. 1880)

Under Code, § 772, providing that "an attorney has authority, until discharged or superseded by another, to bind his client in an action or special proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise," a verbal agreement made by an attorney with the opposite counsel that a bill of exceptions might be filed after the 60 days, and that, when filed, it should be dated as of some day within the 60 days allowed by the court in which to file the same, is not binding on his client.—*Goben v. Goldsberry*, 72 Ind. 44.

[k] (Sup. 1880)

When a new trial is claimed on the ground that the verdict or finding is not sustained by the evidence or is contrary to law, the court, at the time of overruling the motion, may give time to prepare bills of exception showing the evidence; but, under Code, § 343, if the time is to be extended beyond the term at which the exception was taken, it must be by an order made during that term.—*Sohn v. Marion & L. Gravel Road Co.*, 73 Ind. 77.

[l] (Sup. 1881)

Under 2 Rev. St. 1876, p. 176, § 343, it is too late, after the term at which exceptions were taken, for the court to extend the time for filing a bill of exceptions.—*Rhyan v. Dunnigan*, 76 Ind. 178.

[m] (Sup. 1882)

Where the court has granted time for the filing of a bill of exceptions, it cannot, over objections, afterwards extend such time.—*Trentman v. Swartzell*, 85 Ind. 443.

[n] (Sup. 1882)

Under the Code of 1852, where time was properly granted to file a bill of exceptions, the court had no power to enlarge such time at a subsequent term.—*Boyer v. Libey*, 88 Ind. 235.

[o] (Sup. 1884)

Time given beyond the term to file a bill of exceptions cannot be extended at a subsequent term over the objection of the adverse party; but the silence of such party when a motion for extension is made will be *held* a waiver of his right to object.—*Sweetser v. McCrea*, 97 Ind. 404.

[p] (Sup. 1905)

The trial court cannot, after the expiration of the term at which a motion for new trial was overruled, extend the time previously fixed within which to file a bill of exceptions.—*Fireman's Fund Ins. Co. v. Finkelstein*, 73 N. E. 814, 164 Ind. 376.

[q] (App. 1905)

A motion for a new trial was overruled December 31, 1902, and plaintiffs, having excepted, were given 60 days in which to file "bills of exceptions." Final judgment was not rendered until March 20, 1903, at a succeeding term, to which finding and judgment plaintiffs excepted, and were allowed 120 days to file "all bills of exceptions," but no bills were filed until July 14, 1903, in vacation. *Held*, that under *Burns' Ann. St.* 1901, § 638, providing that time may be given to reduce exceptions taken at the time of writing, but not beyond the term unless by special leave of court, etc., the leave granted after entry of judgment did not extend the time for filing bills of exceptions to the overruling of the motion for a new trial, and that the bills filed were too late to authorize a review of assignments of error requiring consideration of the evidence.—*St. Paul's Congregation v. Houtz*, 74 N. E. 262, 35 Ind. App. 416.

[r] (App. 1908)

Act April 15, 1905 (Acts 1905, p. 45, c. 40), provides that when time has been given to file a bill of exceptions containing the evidence, the judge in vacation may, on a proper showing under oath, grant a reasonable extension of time, etc. *Held*, that the application is not an adversary proceeding, and no notice to the adverse party, nor sworn petition setting forth the facts, is required, nor is it necessary that the bill of exceptions be submitted for inspection of the adverse party.—*Bivens v. Henderson*, 42 Ind. App. 502, 86 N. E. 426.

[s] (App. 1909)

A trial court cannot be given jurisdiction of a bill of exceptions presented out of time by agreement of the parties.—*Nichols v. Central Trust Co.*, 43 Ind. App. 64, 86 N. E. 878.

Under Act April 15, 1905 (Acts 1905, p. 45, c. 40), authorizing extension of time for filing a bill of exceptions on application before expiration of the time first given, when the time beyond a term for filing has expired, it cannot be extended.—*Id.*

[t] (App. 1909)

Under Burns' Ann. St. 1908, § 661, authorizing extension of time for filing a bill on application before expiration of time first given, when the time beyond a term for filing expires, it cannot be extended, and signing a bill thereafter presented gives it no validity.—*Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N. E. 80.

[u] (Sup. 1910)

Burns' Ann. St. 1908, § 661, provided that, whenever time has been given in which to file any bill of exceptions, the court, if in session, or the judge thereof in vacation, may on proper showing under oath, either in term time or vacation, extend the time, and provided that, if the extension is granted by the judge in vacation, such action may be indicated by a recital in the bill of exceptions itself, but, if granted in term time, it may be indicated by an order of court, duly entered on the order book, of which all parties shall take notice. *Held*, that an extension of time can only be shown by the bill of exceptions where it is made in vacation, and that in all other cases the extension must be shown by an order book entry, and that an order book entry of an extension of time made in vacation is unavailable.—*Vandalia Coal Co. v. Yemm*, 92 N. E. 49.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 44, 45, 57-64; 29 CENT. DIG. Judges, § 149.

See, also, 3 Cyc. pp. 41-43.

#### § 41. — Compliance with requirements. Computation of time, see TIME, §§ 9, 10.

[a] (Sup. 1863)

A bill of exceptions was signed by the judge within the time limited for its filing, but

the attorney was called to other important professional business, and thereby forgot to file the bill within the time. *Held*, that the court could not afterwards allow the bill to be filed.—*Brouse v. Price*, 20 Ind. 216.

[b] (Sup. 1868)

A bill of exceptions perfected in all other respects, is not invalidated by the mere omission to file it with the clerk during the prescribed time.—*Albaugh v. James*, 29 Ind. 398.

[c] (Sup. 1871)

On June 8th a cause was disposed of, and 60 days were given to file a bill. On November 27th following, the bill was signed by the judge, and to it a certificate was attached by him stating that it was presented and left on his desk in his necessary absence from home, and that he did not return until after the time for signing it had expired. *Held*, that it did not appear that it was presented within the time limited, and could not be regarded as part of the record.—*Porter v. Wilson*, 35 Ind. 348.

[d] (Sup. 1871)

Where judgment was rendered on the 31st of December and 90 days were given within which to file a bill of exceptions, and the paper containing the exceptions was indorsed by the judge, "Prepared and presented to me for my signature, this 29th day of March, by the plaintiff's attorneys, and not signed till shown to the opposite attorneys," and the exceptions were finally signed on the 29th of June, over the objection of the defendant, and filed in the clerk's office on the 27th of August, the paper was no part of the record.—*Gaff v. Hutchinson*, 38 Ind. 341.

[e] (Sup. 1872)

Where time was granted to file a bill of exceptions, a statement by the judge that the bill was "tendered, prepared, and signed by the court" within the time limited, does not show that the bill was filed within such time.—*Stivers v. McConnell*, 39 Ind. 240.

[f] (Sup. 1873)

A paper purporting to be a bill of exceptions will not be considered, unless shown to have been filed within the time limited.—*Huston v. Roosa*, 42 Ind. 386.

[g] (Sup. 1873)

Where a bill of exceptions says on its face that it is filed in time, and is signed by the judge, this can only mean that the judge signed it in time. Only the clerk can say when a bill of exceptions or other paper or pleading was filed.—*Bargis v. Farrar*, 45 Ind. 41.

[h] (Sup. 1874)

Where an exception was taken to a ruling of the court, and time was given "till next term" to file a bill of exceptions, a bill filed on the sixth day of the next term was too late. "Till next term" did not include any part of the next term.—*De Haven v. De Haven*, 46 Ind. 206.

[hh] (Sup. 1878)

A statement in a bill that the several exceptions mentioned therein had been reserved "at the proper time" is equivalent to stating that such exceptions had been taken at the time the decisions excepted to were made.—*Crandall v. First Nat. Bank of Auburn*, 61 Ind. 349.

[i] (Sup. 1878)

Where, on June 10th, 60 days were given to file a bill of exceptions, a bill filed on August 12th was too late.—*Miller v. Muir*, 63 Ind. 496.

[ii] (Sup. 1881)

A bill of exceptions filed April 20, 1877, was not filed on or before the twentieth judicial day of the term which began March 19, 1877.—*Lewis v. Wintrobe*, 76 Ind. 13.

[j] (Sup. 1883)

Under Rev. St. 1881, §§ 625, 629, where a bill of exceptions is presented to the judge within the time granted for filing it, his delay in signing and filing it will not deprive the party objecting of the benefit thereof.—*Peed v. Brenneman*, 89 Ind. 252.

[jj] Where a bill of exceptions is tendered to the court within the time allowed for preparing the bill, it should be admitted as part of the record, though not filed until after the expiration of the time allowed.—(Sup. 1883) *Creamer v. Sirp*, 91 Ind. 366; (1886) *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; (1886) *Ohio & M. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373; (1886) *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 113, 9 N. E. 144; (1892) *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; (1893) *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 395.

[k] (Sup. 1884)

Where 60 days were given to file a bill of exceptions, and a transcript made out and duly certified within that period contained a bill, but it did not appear thereon by words that the bill had ever been filed, the bill should be regarded as properly filed in time.—*Armstrong v. Harshman*, 93 Ind. 216.

[kk] (Sup. 1884)

Rev. St. 1881, § 629, declares that, when a bill of exceptions is presented to the judge within the time limited for such presentation, and it is signed and filed thereafter, delay of the judge in signing and filing the same shall not deprive the party objecting of the benefit thereof. *Held*, that where the record showed 60 days' time was given within which to prepare and file a bill of exceptions, and on the sixtieth day the bill was presented to the judge, who took time to examine it, and the bill was signed and filed with the clerk after the expiration of the 60 days, the bill was properly signed and allowed.—*Hamm v. Romaine*, 98 Ind. 77.

[l] (Sup. 1885)

Under Rev. St. 1881, § 629, providing that delay of the judge in signing and filing a bill of exceptions shall not deprive a party of his rights, does not change the rule which requires bills of exceptions, not only to be signed by the judge, but also to be filed, within the time limited.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

[ll] Where an appellant tenders his bill of exceptions to the judge within the time limited for its preparation, it is a sufficient compliance with the order, although the judge does not sign it within the specified time.—(Sup. 1886) *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12; (1886) *Ohio & M. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373; (1886) *Terre Haute & L. R. Co. v. Bissell*, 108 Ind. 113, 9 N. E. 144; (1890) *Vincennes Water-Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; (1896) *Brower v. Ream*, 15 Ind. App. 51, 42 N. E. 824.

[m] Under Rev. St. 1881, § 629, which requires that "the date of the presentation shall be stated in the bill of exceptions," a bill of exceptions filed after the time allowed therefor is not made part of the record by an indorsement made on it by the judge showing the bill was presented to him during the time allowed for filing.—(Sup. 1887) *Orton v. Tilden*, 110 Ind. 131, 10 N. E. 936; (1888) *Buchart v. Burger*, 115 Ind. 123, 17 N. E. 125; (1889) *McCormick Harvesting Mach. Co. v. Maas*, 121 Ind. 132, 22 N. E. 983; (1889) *McCoy v. State ex rel. Trucks*, 121 Ind. 160, 22 N. E. 986; (1890) *Bain v. Goss*, 123 Ind. 511, 24 N. E. 361; (1891) *Buckner v. Spaulding*, 127 Ind. 229, 26 N. E. 792; (1891) *Hormann v. Hartmetz*, 128 Ind. 353, 27 N. E. 731; (1892) *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; (1892) *Stanley v. Holliday*, 130 Ind. 464, 30 N. E. 634; (App. 1892) *Morgan v. East*, 4 Ind. App. 507, 30 N. E. 946; (1892) *Plotz v. Friend*, 5 Ind. App. 146, 31 N. E. 587; (1893) *Franklin Water. Light & Power Co. v. Rouse*, 7 Ind. App. 669, 35 N. E. 29; (1894) *Miller v. Blue*, 11 Ind. App. 288, 38 N. E. 1097; (Sup. 1895) *Cornell v. Hallett*, 140 Ind. 634, 40 N. E. 132; (1895) *Ayres v. Armstrong*, 142 Ind. 263, 41 N. E. 522; (1895) *Davis v. National Forge & Iron Co.*, 143 Ind. 142, 42 N. E. 473.

[mm] (Sup. 1889)

Under Rev. St. 1881, § 629, providing the manner of signing and filing bills of exceptions, and requiring the date of presentation for signing to be stated in the bill, a bill presented, signed, and filed within the time allowed is not fatally defective for failure to allege the time of presentation for signing.—*Hale v. Matthews*, 118 Ind. 527, 21 N. E. 43.

[n] Where the date of the presentation of a general bill of exceptions to the trial judge does not appear in the bill itself, and the date of signing is after the expiration of the time allowed, it cannot be regarded as part of the record, and questions requiring an examination

of all the evidence cannot be considered.—(Sup. 1889) *Rigler v. Rigler*, 120 Ind. 431, 22 N. E. 776; (1890) *Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686; (1890) *Bierly v. Harrison*, 123 Ind. 516, 24 N. E. 361.

[nn] (Sup. 1889)

Where a bill of exceptions is filed with the clerk after the expiration of the time given for its preparation and filing, and the date of its presentation to the judge is not stated in it, as required by Rev. St. 1881, § 629, it cannot be considered.—*McCormick Harvesting Mach. Co. v. Maas*, 121 Ind. 132, 22 N. E. 983.

[o] (Sup. 1890)

In an action on a note and an account to which was joined a proceeding in attachment, final judgment was rendered in the main action and in the ancillary proceeding also on May 10, 1887. The appellant on the same day filed separate actions for a new trial—one in the main action and the other in the proceeding in attachment. On the 9th day of June following the motions were overruled, and the proper exceptions reserved, and 60 days time granted in which to file a bill of exceptions. *Held*, that a bill of exceptions embodying the longhand report of the evidence furnished by the official reporter filed within the time given was properly in the record.—*Clutter v. Riddle*, 25 N. E. 6, 124 Ind. 500.

[oo] (Sup. 1890)

A bill of exceptions is not properly in the record when the date of the presentation of the bill, as stated in the body thereof, indicates that the bill was not presented until after the time limited had expired, even though, following the proper authentication and signature of the judge, there is a personal memorandum, signed by him, showing that the bill had been presented within the proper time.—*City of Plymouth v. Fields*, 125 Ind. 323, 25 N. E. 346; *White v. Gregory*, 126 Ind. 95, 25 N. E. 806.

[p] (Sup. 1891)

Where a bill of exceptions is not filed within the time allowed by the court, and it does not appear in the body of the bill when it was presented to the judge, the bill will not be considered as part of the record.—*Buckner v. Spaulding*, 127 Ind. 229, 26 N. E. 792.

[pp] (Sup. 1891)

Under the statute requiring that the time of presenting a bill of exceptions shall be stated in the bill itself, it is not sufficient to indorse the time on the bill.—*Hormann v. Hartmetz*, 27 N. E. 731, 128 Ind. 353.

[q] (Sup. 1891)

Where leave was given to file a bill of exceptions on a certain day, it was seasonably filed on the day previous to that named.—*Fisher v. Bush*, 32 N. E. 924, 133 Ind. 315.

[qq] (Sup. 1892)

If time is given for filing a bill of exceptions, and within that time a proper bill is prepared and presented to the judge, and that fact

is shown by the recitals of the bill, delay of the judge in signing it will not prejudice the party presenting it. It may be signed and filed after the expiration of the time.—*Wysor v. Johnson*, 30 N. E. 144, 130 Ind. 270.

[r] (Sup. 1892)

Where it appeared from the transcript that at the close of the trial defendant filed his bill of exceptions, which related to the rulings of the court on the evidence, and did not purport to contain the evidence, and that 10 days afterwards, after the motion for new trial was overruled, an entry appears granting defendant 60 days in which to file his bill of exceptions, and the next entry is of date 5 months afterwards, and recites that the reporter's long-hand manuscript of the evidence was filed on that date, and incorporated in the bill of exceptions as a part of the transcript, and what appears to be a bill of exceptions is annexed to the transcript bearing a file-mark, but without the clerk's authentication, it must be *held* that the evidence is not in the record, and questions as to the admissibility of evidence and correctness of instructions cannot be considered.—*Shewalter v. Bergman*, 132 Ind. 556, 27 N. E. 159.

[rr] (App. 1892)

Where the time given for the filing of a bill of exceptions was within 60 days from December 12, 1889, and the bill was presented to the judge and by him signed on February 5, 1890, it was in time.—*Garn v. Working*, 31 N. E. 821, 5 Ind. App. 14.

[s] (App. 1893)

Where a motion for a new trial was overruled on August 15, 1891, and appellant was granted 60 days in which to file a bill of exceptions, and afterwards, on May 26, 1892, a bill of exceptions was filed showing that it was presented to and signed by the judge on October 13, 1891, and on the same day a bill of exceptions containing the longhand copy of the shorthand manuscript of the evidence was filed, and it appears that the same was presented and signed by the judge on October 13, 1891, such bill was properly in the record.—*Smith v. Walker*, 34 N. E. 843, 7 Ind. App. 614.

[ss] (Sup. 1894)

Under 1 Burns' Revision 1894, § 641, requiring presentation of a proper bill of exceptions within the time allowed, the date of presentation to be stated in the bill, and the entry to show the time granted if beyond the term, the appellate court can only look to the face of the bill for the date of presentation; and the day of the month being there left blank, so that it may or may not have been within the time, the date of signature must be taken as that of presentation.—*Wood v. Ohio Falls Car Co.*, 136 Ind. 598, 36 N. E. 282.

[t] (Sup. 1896)

The date of the judge's signature to a bill of exceptions is to be considered as the

date of its presentation to him where such date is not stated in the bill.—*Cornell v. Hallett*, 140 Ind. 634, 40 N. E. 132.

[tt] (App. 1896)

Where a bill of exceptions was not filed within the time allowed, it must be made to appear in the bill itself that it was presented to the judge for his signature within that time.—*Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028.

[u] (Sup. 1898)

Where only a part of a general bill of exceptions was presented within the time prescribed for preparation, no part of the bill could be considered.—*McFadden v. Owens*, 49 N. E. 1058, 150 Ind. 213.

[uu] (Sup. 1899)

On May 6th, 60 days were granted in which to file a bill of exceptions. The trial judge certified that "a bill" was presented to him on June 13th, which being incorrect, "now [August 28th], upon my own motion, I have amended," etc., and signed the bill. The clerk's certificate showed that manuscripts embraced in the bill as signed were not filed until July 28th. *Held*, that the bill as filed was not presented in time.—*Citizens' State Bank of Noblesville v. Julian*, 55 N. E. 1007, 153 Ind. 655.

[v] (Sup. 1900)

*Burns' Rev. St. 1894, § 638 (Rev. St. 1881, § 626; Horner's Rev. St. 1897, § 626)*, provides that where a motion for a new trial is filed in a cause, and the decision excepted to is assigned in the motion as a reason for a new trial, such motion shall carry such decision and exceptions forward to the time of the ruling on such motion, and time may then be given by the court within which to reduce such exception to writing. *Held*, that where the record showed that the case was tried at the September term, and the decision announced in the November term, at which time the defendant made a motion for a new trial, and on the same day filed his bill of exceptions, and the motion for a new trial was not overruled until the February term, when final judgment was rendered, an objection that the record did not affirmatively show that any time was granted by the court in which to file the bill of exceptions was not well taken, since, under the statute, the defendant was entitled, as a matter of right, to file his bill of exceptions at any time previous to the ruling on his motion for a new trial, without permission from the trial court.—*Minnick v. State ex rel. Steele*, 56 N. E. 851, 154 Ind. 379.

[vv] (Sup. 1900)

A bill of exceptions filed on the 19th day of October, to the overruling of motions for a new trial, which rulings were made on the 20th day of July, being the 122d judicial day of the March term, was filed too late, within *Burns' Rev. St. 1894, § 638 (Horner's Rev. St. § 626)*, providing that exceptions must be made

and filed in the same term as the decision is filed, unless time is extended by leave of court.—*Taylor v. Canaday*, 57 N. E. 524, 59 N. E. 20, 155 Ind. 671.

[w] (App. 1900)

Under *Rev. St. 1881, § 629*, requiring a bill of exceptions to be presented within the time allowed, and providing that the judge shall promptly sign the same, and cause it to be filed in the cause, and that the delay of the judge shall not deprive the party of the benefit thereof, the time of presentation must be stated in the bill, and a memorandum, indorsed by the judge on it, showing that the same was presented to him before the expiration of the time allowed for filing the same, will not cure a delay in filing the bill.—*Reid v. Town of Sullivan*, 56 N. E. 451, 24 Ind. App. 229.

[ww] (Sup. 1901)

Where nothing in the bill of exception shows to the contrary, the date of signing must be taken as the date of presentation.—*Surber v. Mayfield*, 60 N. E. 7, 156 Ind. 375.

[x] (Sup. 1903)

Where plaintiff, who was given 60 days to file a bill of exceptions on June 23, 1900, filed the reporter's transcript of the evidence in the clerk's office on August 20th, but the transcript was not certified by the judge until September 25th, and was refiled in the clerk's office October 20th, the evidence was not thereby made a part of the record, and could not be reviewed.—*Timmonds v. Twomey*, 66 N. E. 446, 160 Ind. 123.

[xx] (Sup. 1905)

*Burns' Ann. St. 1901, § 638*, provides "that if a motion for a new trial be filed in which a decision excepted to is assigned as a reason for a new trial, such motion will carry such decision and exception forward to the time of ruling on such motion." *Held*, that where, on overruling a motion for a new trial, 90 days were given in which to present a bill of exceptions, a bill presented within that time to the peremptory instruction for plaintiff presented that question for review, though appellant also presented another bill of exceptions embodying the evidence, with rulings and exceptions relating thereto.—*Wagner v. Weyhe*, 73 N. E. 89, 164 Ind. 177.

[y] (App. 1905)

A motion for a new trial was overruled and judgment rendered March 30, 1904, and 80 days allowed to file bills of exceptions. On June 18, 1904, the official shorthand reporter's longhand transcript of the evidence was filed, but the bill of exceptions was not filed until June 25th, and the clerk's certificate to the transcript for appeal was dated June 18, 1904. *Held*, that the record affirmatively showed that the bill of exceptions containing the evidence was not filed within the time allowed, and therefore could not be considered.—*Halstead v. Sigler*, 74 N. E. 257, 35 Ind. App. 419.



[yy] (App. 1907)

Under the express provisions of the statute, it is only necessary that the bill of exceptions should be presented to the judge for his examination and signature within the 90 days specified, and not that it should be filed in the office of the clerk of court within that time.—*Atkinson v. Maris*, 40 Ind. App. 718, 81 N. E. 745.

[z] (Sup. 1908)

Where a bill of exceptions contained a statement of the trial judge that it was presented to him within the time for filing the same, and it was taken under advisement and was subsequently approved, signed, and filed by the judge, after the time for filing had expired, appellant could not, under *Burns' Ann. St. 1908*, § 660, be deprived of the benefit thereof.—*Indianapolis & W. R. Co. v. Hill*, 172 Ind. 402, 86 N. E. 414.

[zz] (App. 1909)

Where a bill was presented within the time fixed by court, it will be considered a part of the record, though the court failed to sign and file the bill within the time, which failure was through no fault of appellant.—*Brown v. American Steel & Wire Co.*, 43 Ind. App. 500, 88 N. E. 80.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 65-71.

## § 42. — Waiver of objections to delay.

[a] (Sup. 1856)

A bill of exceptions, signed and filed by leave of the court at a term subsequent to that at which the case was tried, without objection by the adverse counsel, who signed an agreement as to what should be embraced in it, will not be rejected by this court, especially after submission on the record as made up, without any motion to strike out the bill.—*Brookville & G. Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768.

[b] (Sup. 1862)

Where bills are filed after the time allowed for filing the same, but no motion is made to the supreme court to strike out the same, and no cross-errors are assigned touching them, and the briefs are silent on the subject, objections will be considered waived.—*New Albany & S. R. Co. v. Huff*, 19 Ind. 315.

[c] (Sup. 1868)

A memorandum, attached to a bill and signed by the adverse party, acknowledging that the bill is correct and agreeing that it may be signed by the judge as of the date of filing, is not a waiver of the question of time. It will be presumed to have been so signed; but, where the date is after the time limited by the court, the bill is not properly in the record.—*Earl v. Dresser*, 30 Ind. 11, 95 Am. Dec. 660.

[d] (App. 1909)

That no objection was made to a second extension when it was made was not a waiver by appellee of its right to thereafter object to the court's action in the premises.—*Brown v. American Steel & Wire Co.*, 43 Ind. App. 500, 88 N. E. 80.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 72.

See, also, 3 Cyc. p. 43.

## § 43. — Presentation and allowance after expiration of time.

[a] A bill not filed in time will be stricken from the record.—(Sup. 1859) *Simonton v. Huntington & L. M. Plankroad Co.*, 12 Ind. 380; (1859) *Tracy v. Kaufman*, 13 Ind. 356; (1862) *Mahon v. Mahon's Adm'r*, 19 Ind. 324; (1863) *Terre Haute Gas Co. v. Teel*, 20 Ind. 131; (1864) *Harrison v. Price*, 22 Ind. 165; (1864) *Swinney v. Nave*, Id. 178; (1881) *Supreme Lodge Knights of Honor of the World v. Johnson*, 78 Ind. 110; (1882) *Smith v. Ryan*, 83 Ind. 152; (1882) *Stribling v. Tripp*, 86 Ind. 166; (1883) *Ackerly v. Board of Com'rs of Knox County*, 89 Ind. 581.

[b] (Sup. 1862)

A bill of exceptions, filed by leave of the court below over two years after the lapse of the time limited for its filing and without consent of the opposite party, will not be noticed by the supreme court.—*Cox v. Blair*, 19 Ind. 390.

[c] (Sup. 1864)

A bill of exceptions cannot be filed by the judge after the time given by the court in term; at least without the consent of all the parties.—*Swinney v. Nave*, 22 Ind. 178.

[d] (Sup. 1864)

Where the time for filing a bill of exceptions has once been extended, it must be filed within the time given, unless delay is with the consent of the adverse party.—*Farnsworth v. Coquillard's Adm'r*, 22 Ind. 453.

[e] (Sup. 1866)

A bill of exceptions must be signed by the judge within the time limited. If signed afterwards, it cannot be regarded as any part of the record. The statute which authorizes time to be given to reduce exceptions to writing does not mean that the paper must be merely prepared for signature within the time limited. Such a construction would defeat the object sought, which is to require it to be presented to the judge while the facts remain fresh, that mistakes resulting from want of memory may be avoided.—*Ex parte Gwartney*, 27 Ind. 189.

[f] (Sup. 1870)

In the absence of an agreement of the parties, a judge has no authority to sign a bill of exceptions tendered after the expiration of the time limited.—*Thompson v. Eagleton*, 33 Ind. 300.

## [g] (Sup. 1871)

Where time is given beyond the term in which to file a bill of exceptions, it must ordinarily, if not in all cases, be filed within the time limited.—*Gaff v. Hutchinson*, 38 Ind. 341.

## [h] (Sup. 1887)

The supreme court of Indiana cannot determine on affidavits and counter-affidavits the merits of an excuse for not filing a bill of exceptions within the time allowed, and the bill will be disregarded.—*Wishmier v. State ex rel. Wilcox*, 110 Ind. 523, 11 N. E. 291.

## [i] (Sup. 1889)

A bill must be signed within the time fixed by law, or the order of court, or agreement of the parties; and, if not done within the proper time, the bill may be stricken from the record.—*Rigler v. Rigler*, 120 Ind. 431, 22 N. E. 776.

[j] A bill of exceptions not presented, allowed, and filed within the time allowed cannot be considered.—(Sup. 1895) *Cornell v. Hallett*, 40 N. E. 132, 140 Ind. 634; (1897) *Dudley v. Pigg*, 43 N. E. 642, 149 Ind. 363; (1898) *McFadden v. Owens*, 49 N. E. 1058, 150 Ind. 213; (1902) *Hershberger v. Kerr*, 65 N. E. 4, 159 Ind. 367; (1903) *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742; (App. 1902) *Lavene v. Jarnecke*, 62 N. E. 510, 28 Ind. App. 221; (1902) *City of Elwood v. Laughlin*, 65 N. E. 18, 29 Ind. App. 667.

## [k] (Sup. 1904)

Under *Burns' Rev. St. 1901*, § 641, providing that the party objecting to a decision must, within the time allowed, present to the judge a bill of exceptions, and that the date of presentation shall be stated in the bill, and that the entry shall show the time granted, if beyond the term, for presenting the same, a bill of exceptions not signed within the time allowed does not form a part of the record on appeal, though the judge whose signature was required was without the state during the time allowed.—*Lengelsen v. McGregor*, 67 N. E. 524, 70 N. E. 248, 162 Ind. 258.

Where a bill of exceptions was not signed until after the term, nor within the time fixed by the court, it could not be considered on appeal, though appellant's failure to procure the signing thereof within the time resulted from the trial judge's absence from the state.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 72½.

See, also, 3 Cyc. p. 37.

## § 44. — Allowance and filing nunc pro tunc.

## [a] (Sup. 1861)

Upon overruling the motion for a new trial, 20 days were allowed for perfecting the bill of exceptions, which, however, was not filed within that time. *Held* that, without notice to or appearance by the opposing party, the court could not make an order at a subsequent term

permitting the bill to be filed at a time beyond the limit prescribed, or nunc pro tunc.—*New Albany & S. R. Co. v. Wilson*, 16 Ind. 402.

## [b] (Sup. 1879)

Where a bill was prepared and filed within a time granted beyond the term to prepare and file the same, but was not signed by the judge, because he had absented himself so that it could not be presented for signature, the bill, though subsequently signed by him in open court, in the presence of the parties and without objection, cannot be made a part of the record by a nunc pro tunc entry, as the court cannot do an act at a subsequent term, not done, but necessary to have been done, at a previous term.—*Kirby v. Bowland*, 69 Ind. 290.

## [c] (Sup. 1889)

In respect to presenting or signing bills of exceptions after the time limited therefor has expired, the only proper course to pursue is to make an application to the presiding judge, and to have the date inserted in the bill nunc pro tunc.—*Rigler v. Rigler*, 22 N. E. 776, 120 Ind. 431.

## [d] (App. 1896)

The trial judge was absent for several days before and after the time expired for filing the bill of exceptions and when appellant's counsel called to secure his signature to the bill. The clerk of the court indorsed on the bill that it was presented for the signature of the judge, and the counsel took it, but failed to present it for the judge's signature until nine months had elapsed, during which time the judge was almost continuously at his home. Appellant's excuse was that, owing to his poverty, he was required by the stenographer to leave it with him until his fees were paid. *Held*, that the refusal of the judge to sign the bill as of the date it was indorsed by the clerk as presented for signature by the judge was proper.—*State ex rel. Holland v. White*, 16 Ind. App. 200, 44 N. E. 589.

## [e] (Sup. 1904)

A refusal of a judge to sign a bill of exceptions as of a prior date which was within the time allowed for the filing of such bill is not error, though the judge was out of the state during the time so allowed.—*Lengelsen v. McGregor*, 67 N. E. 524, 70 N. E. 248, 162 Ind. 258.

Where, during the time fixed by the trial judge for the preparation and service of a bill of exceptions, he left the state, thereby preventing appellant from procuring a settlement of his bill within the time limited, and appellant was diligent in the preparation of his bill, he was entitled to have the same signed nunc pro tunc.—*Id.*

After the trial of a case the court granted 60 days within which to prepare bills of exceptions, and on the fifty-ninth day appellant had prepared for signing two bills, one occupying 2 written pages of the record, and another em-

bracing 60 typewritten pages. The judge being absent from the state at such time, appellant was unable to procure his signature to the bills within the time fixed, though there were 36 days after the end of the trial in which to prepare the bills before the judge left home. *Held*, that a finding that appellant had not exercised due diligence in presenting his bill, and was, therefore, not entitled to an order signing the same nunc pro tunc after the judge's return after the expiration of the time limited, was proper.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 73.

#### § 45. Preparation and requisites of proposed bill.

[a] (Sup. 1871)

It is a commendable practice to require the bill of exceptions to be prepared in time to enable the judge and opposite counsel to examine it conveniently.—*Gaff v. Hutchinson*, 38 Ind. 341.

[b] (Sup. 1878)

Where a bill of exceptions is prepared under and in accordance with Act March 7, 1873 (1 Rev. St. 1876, p. 769), concerning shorthand reporters, it is not invalid because it does not conform to Act March 10, 1875 (1 Rev. St. 1876, p. 770), on the same subject.—*Graham v. Martin*, 64 Ind. 567.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 74.

See, also, 3 Cyc. p. 33.

#### § 46. Submission or service of proposed bill.

[a] (App. 1905)

A rule requiring bills of exceptions to be submitted to the opposing counsel at least five days before presentation to the judge, and that they be presented to the court for settlement at least five days before expiration of the time allowed for filing; that all objections thereto will be deemed waived unless made before the bills are signed; and that, unless the adverse party admits the correctness of the bill, or as correct except the objection specified, the party filing the bill shall append thereto a specified affidavit of the attorney who prepared it—was neither repugnant to the laws of the state nor unreasonable, but was authorized by *Burns' Ann. St. 1901, § 1375*.—*State ex rel. Grau v. Adair*, 73 N. E. 611, 34 Ind. App. 622.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 75.

See, also, 3 Cyc. pp. 46, 47.

#### § 49. Stipulations as to allowance or settlement.

Extension of time for allowance or settlement by stipulation, see ante, § 40.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, § 77½.

See, also, 3 Cyc. p. 33.

#### § 51. Allowance or settlement by judge or other officer.

[a] (Sup. 1845)

The judges of the circuit court are not bound to seal a bill of exceptions which requires the clerk to insert therein copies of certain papers after the bill shall have been sealed.—*Board of Trustees for Vincennes University v. Embree*, 7 Blackf. 461.

[b] (Sup. 1872)

A bill of exceptions should not be signed by the judge, until the evidence, as taken down, has been written out in full, and the judge has examined it, so as to satisfy himself of its accuracy, and it has been embodied in the bill. The notes of the reporter, appointed by the court, are not included in the words "written instrument and documentary evidence," used in the statute.—*Cluck v. State*, 40 Ind. 263.

[c] (Sup. 1878)

It is the duty of the presiding judge, in signing a bill, to see that the same embodies a full and fair statement of all the circumstances connected with any action taken by him on the trial, complained of as error; and his own actions, being peculiarly within his own knowledge, need not be presented or made known to him by affidavit.—*Jones v. Johnson*, 61 Ind. 257.

[d] (Sup. 1881)

Where a commissioner to whom a cause was referred reports the "facts" found by him in accordance with the order of the court, the court cannot hear testimony as to what "evidence" was presented to the commissioner, for the purpose of making a bill of exceptions, which purports to set out the evidence.—*Watson v. State ex rel. School Town of Worthington*, 80 Ind. 212.

[e] (App. 1906)

Under *Burns' Ann. St. 1901, § 641*, requiring the judge to correct bills of exceptions offered for his signature, where the judge refused to sign a bill of exceptions to instructions because the record did not disclose that the defendant excepted to them, his denial of the correctness of the statement in the bill was a sufficient correction.—*Indianapolis Traction & Terminal Co. v. Grey*, 77 N. E. 1131, 38 Ind. App. 141.

[f] (App. 1907)

*Burns' Ann. St. 1901, § 641*, providing for the presentation to the judge of a bill of exceptions, which, if true, he shall promptly sign and file, and, if not true, shall correct, sign, and file the same, contemplates that bills of exceptions may be presented to the trial judge that are not correct, and when so presented he must correct them.—*State ex rel. Columbus St. R. &*

Light Co. v. Deupree, 40 Ind. App. 492, 81 N. E. 678.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 74, 78.

### § 53. Compelling allowance or settlement.

Original jurisdiction of Supreme Court to issue mandamus to compel signing, see COURTS, § 207.

[a] (Sup. 1875)

An absolute refusal on the part of the judge to perform his duty should be shown as a condition precedent to granting a mandamus to compel the signing of a bill of exceptions. A mere qualified and temporary refusal or delay on the part of the judge does not amount to such a refusal.—Jelley v. Roberts, 50 Ind. 1.

The application for a writ of mandate to compel a judge to sign a bill of exceptions must be accompanied by the bill of exceptions presented to the judge which he refused to sign; and such bill of exceptions should be attached to the writ.—Id.

Where the return of a judge to an alternative writ that he is willing to sign a true bill of exceptions, but alleges that, the bill as presented is not a true bill, the peremptory writ will be refused.—Id.

The mere act of signing and sealing a bill of exceptions is ministerial, and the supreme court may compel the judge of the trial court to sign and seal a bill when it is shown that he has improperly refused to do so.—Id.

The return by a court to a mandamus nisi to show cause why it should not be compelled to sign a bill of exceptions, that the bill did not state the facts truly, is conclusive.—Id.

[b] (Sup. 1882)

Mandamus will not issue to compel a judge to sign a bill of exceptions which it is his duty to sign, but which his predecessor refused to sign, until he first has been asked to sign the bill and has refused.—State ex rel. Wick v. Slick, 86 Ind. 501.

[c] (Sup. 1885)

One seeking a writ of mandamus to compel a judge to sign a bill of exceptions after the time limited must show proper diligence. If there has been an unexplained delay of 50 days, the writ will not be granted.—State ex rel. Johnson v. Dyer, 99 Ind. 423.

[d] (Sup. 1900)

Whether there were such laches and delay as justified a refusal to settle a bill of exceptions is a judicial question, to be determined on the facts shown to the trial court, and its decision will not be controlled by mandamus, if there were no abuse of judicial discretion.—State ex rel. Repp v. Cox, 58 N. E. 849, 155 Ind. 593.

Mandamus will not lie to compel settlement of a bill of exceptions when it is apparent the bill would be useless if signed.—Id.

[e] (App. 1900)

Though a trial judge can be compelled to settle and sign a bill of exceptions, he cannot be directed as to what he shall put into a bill where there is a controversy as to what it should contain.—Bogue v. Murphy, 57 N. E. 726, 25 Ind. App. 102.

Since delay of the trial judge in signing and filing a bill of exceptions cannot prejudice the rights of the parties, he cannot be compelled to sign a bill tendered in time, or, if not true, to correct and sign it, where there is a true bill prepared and signed by him in the record presenting the very question sought to be presented in the bill tendered, though the bill prepared by him was not signed and filed in time.—Id.

[f] (App. 1907)

The statutory duty of the trial judge to settle and sign a bill of exceptions may be enforced by mandamus, where he arbitrarily refuses to act, though he cannot be required to perform the duty in a particular manner by signing a particular bill.—State ex rel. Columbus St. R. & Light Co. v. Deupree, 40 Ind. App. 492, 81 N. E. 678.

A party in good faith, and within the time fixed by the judge, presented to the judge a bill of exceptions. The judge refused to settle it, on the ground that there was no shorthand reporter during the trial, and neither of the parties requested the judge to take down the evidence in the cause. Held, that mandamus would lie to compel him to act on the bill, and, if the same was correct, to sign it.—Id.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 80–88.

See, also, 3 Cyc. pp. 47–50.

### § 56. Certificate, signature, and seal of judge.

Effect of stenographer's certificate, see ante, § 32.

Signature to bill of exceptions on Sunday, see SUNDAY, § 30.

Time for signing, see ante, §§ 33–44.

[a] (Sup. 1822)

A bill of exceptions must be sealed by a majority of the court.—Springer v. Peterson, 1 Blackf. 188.

[b] (Sup. 1849)

A bill of exceptions must be signed by a majority of the judges present at the trial, or it will be no part of the record.—Gharkey v. Halstead, 1 Ind. 389, Smith, 208.

[c] The bill must be signed by the trial judge.—(Sup. 1853) Eastes v. Daubenspeck, 4 Ind. 617; (1861) Fromm v. Lawrence, 16 Ind. 384; (1866) Ex parte Gwartney, 27 Ind. 189; (1874)

Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; (1874) Germania Ins. Co. v. Same, Id. 331; (1878) Reeder v. English, 62 Ind. 78; (1881) Kelser v. Lines, 79 Ind. 445; (1882) Blizzard v. Riley, 83 Ind. 300; (1882) Donaldson v. Dunn, 87 Ind. 343; (1905) Adams v. Pittsburgh, C., C. & St. L. R. Co., 74 N. E. 991, 105 Ind. 648.

[d] (Sup. 1853)

A bill of exceptions, which is neither signed nor sealed by the judge, cannot be considered.—Eastes v. Daubenspeck, 4 Ind. 617.

[e] (Sup. 1858)

Where the bill of exceptions does not appear to have been signed by the judge and filed by the clerk, the statements therein as to the rulings of the trial court are not properly before the Supreme Court on appeal.—Patterson v. State, 10 Ind. 551.

[f] (Sup. 1861)

Exceptions must be signed as well as noted by the judge.—Fromin v. Lawrence, 16 Ind. 384.

[g] (Sup. 1861)

Where a judge indorses on a bill, "Refused," and adds his signature, there is no allowance of the bill.—Board of Com'rs of Warren County v. Saunders, 16 Ind. 405.

[h] (Sup. 1881)

A certificate to a bill which merely states that the evidence contained therein is a complete exhibit of all evidence is insufficient, as the certification is confined to the evidence, and does not authenticate other portions of the bill.—Clay v. Clark, 76 Ind. 161.

[i] (Sup. 1882)

It is no objection to a bill of exceptions that it contained an unnecessary repetition by the judge of the clerk's official statements in his certificate.—State ex rel. Huffman v. Parish, 83 Ind. 223.

[j] (Sup. 1887)

Under Rev. St. 1881, § 535, authorizing the writing on the margin of the instructions offered the words, "Given and excepted to," or "Refused and excepted to," such memorandum to be signed by the judge, a memorandum signed by counsel is insufficient.—McKinsey v. McKee, 109 Ind. 209, 9 N. E. 771.

[k] (Sup. 1889)

A paper purporting to be a stenographer's report of the evidence, but which is not signed or attested by the judge, is entirely without force as a bill of exceptions.—Louisville, N. A. & C. Ry. Co. v. Kane, 22 N. E. 80, 120 Ind. 140.

A statement in a separate paper, signed by the judge, that several special bills and a general bill were presented to him and signed by him, is not a sufficient certificate.—Id.

[l] (App. 1892)

Where the only signature to a bill is on the certificate of presentation, the bill is not suf-

ficiently signed.—Harvey v. State, 5 Ind. App. 422, 31 N. E. 835.

[m] (Sup. 1896)

Where, at the time an alleged bill of exceptions was filed, it was not signed by the judge, the evidence was not in the record, and an order denying the motion for a new trial could not be considered.—Robinson v. Dickey, 42 N. E. 679, 143 Ind. 205, 52 Am. St. Rep. 417.

[n] (App. 1896)

Preceding the bill of exceptions was an order-book entry that defendant had filed a bill of exceptions "containing the evidence, as follows," and the evidence purporting to have been taken at the trial was then set out. At the end of the bill was a recital, signed by the judge, that on the day it was filed it was presented for allowance and signing; and a recital, also signed by the judge, that the bill containing the evidence was subsequently signed and sealed. The clerk certified "the foregoing to be a full, true, and complete transcript of \* \* \* the order-book entries \* \* \* as the same appears of record." Held, that the bill was sufficiently authenticated.—Dodge v. Morrow, 14 Ind. App. 534, 43 N. E. 153.

[o] (App. 1896)

A bill of exceptions must be signed before it is filed.—Gifford v. Hess, 15 Ind. App. 450, 43 N. E. 906.

[p] (Sup. 1901)

A bill of exceptions signed by the trial judge was not improperly authenticated by reason of the judge's failure to certify that it contained all the objections, rulings, and exceptions reserved during the trial, since the law does not require the judge to certify to anything in performing the judicial act of settling a bill of exceptions, but an affirmation of all things required by law is implied in the solemn act of affixing his official signature.—Tombaugh v. Grogg, 59 N. E. 1060, 156 Ind. 355.

[q] (Sup. 1902)

A bill of exceptions not signed before filing cannot be considered.—Hershberger v. Kerr, 65 N. E. 4, 159 Ind. 367.

[r] (App. 1903)

A bill of exceptions, after the certificate of the official shorthand reporter, recited: "Presented to me for signature December 20, 1901." Following this was the signature of the judge, but there was no other signature, and no certificate or statement purporting to show that the bill was examined and approved or allowed by the judge. Held, that there was no sufficient authentication of the bill.—Lane v. Bowes, 67 N. E. 1002, 32 Ind. App. 330.

[s] (Sup. 1904)

A certificate, following a memorandum signed by the judge (which stated that on April 19, 1902, the bill of exceptions was presented to him), showing that the person who signed

the bill of exceptions was the judge before whom the cause was tried, that the bill contained all the evidence given in the cause, that it was presented to the judge March, 1902, and signed by him, and dated April 19, 1902, is sufficient, it being presumed that the memorandum and certificate were signed the same day, and constitute a single certificate.—*Howe v. White*, 69 N. E. 684, 162 Ind. 74.

The trial judge is not required to certify to the filing of a bill of exceptions, and any statement on that subject in his certificate is surplusage.—*Id.*

A statement, in the certificate of the trial judge to the bill of exceptions, that after being signed by him it was filed with the clerk of said trial court, sufficiently indicated that the judge, after signing the bill, "caused it to be filed in the cause," as required by *Burns' Rev. St. 1901*, § 641.—*Id.*

[t] (App. 1904)

Where the appeal record is duly attested by the certificate of the clerk with the seal affixed, the fact that no seal was attached to the special bill of exceptions in which the instructions were set out did not preclude a review of the instructions.—*Nichols v. Baltimore & O. S. W. R. Co.*, 70 N. E. 183, 71 N. E. 170, 33 Ind. App. 229.

[u] (App. 1904)

Where instructions are incorporated in the bill of exceptions, it is not necessary for the trial judge to sign marginal exceptions thereon.—*Avery v. Nordyke & Marmon Co.*, 70 N. E. 888, 34 Ind. App. 541.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of,  
§§ 94-96.

See, also, 3 Cyc. pp. 43-45.

§ 57. Filing.

Time for filing, see ante, §§ 35-44.

[a] (Sup. 1875)

A bill of exceptions to the ruling of a court in one county, where a cause was taken by a change of venue, cannot legally be filed in the same cause in the county from which the venue had been changed, after the cause has been remanded to that county, though the same judge hold both courts.—*McMahan v. Spinning*, 51 Ind. 187.

[b] (Sup. 1882)

A recital in a bill of exceptions that it was filed is not sufficient, but that fact must be made to appear in another manner.—*Law v. Kauffman*, 84 Ind. 341.

[c] (Sup. 1890)

A document purporting to be the long-hand manuscript of the evidence, with a certificate of the official stenographer attached, was certified with the record, but had the formal cap-

tion of a bill of exceptions and concluded with the usual statement: "This is all the evidence given in the case." There was no formal conclusion to the bill, but below the certificate signed by the stenographer was a memorandum signed by the judge: "Presented and signed March 14, 1888." There was nothing in the record to show that the bill was ever filed with the clerk. The clerk certified the record to the Supreme Court on March 12, 1888. Held insufficient to show that a proper bill of exceptions containing the evidence was filed, so that questions arising on the evidence were not reviewable.—*Guirl v. Gillett*, 24 N. E. 1036, 124 Ind. 501.

[d] (Sup. 1892)

File marks of the clerk of the circuit court on a bill of exceptions purporting to contain the evidence in the case are not sufficient to show that the bill was filed as a part of the cause, as required by *Rev. St. 1881*, § 629.—*Shewalter v. Bergman*, 27 N. E. 159, 132 Ind. 556.

[e] (Sup. 1895)

A paper purporting to be a bill of exceptions, and as such signed by the judge, will not be accepted by the supreme court as a bill of exceptions, if it has not been filed.—*Pittsburg, C. & St. L. R. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528; *De Hart v. Board of Com'rs of Johnson County*, 143 Ind. 363, 41 N. E. 825.

[f] (Sup. 1896)

Under *Rev. St. 1881*, § 629 (*Rev. St. 1894*, § 641), making it necessary to file the bill of exceptions with the clerk of the trial court after it has been approved and signed by the judge, a bill of exceptions is not properly before the supreme court on appeal where there is no entry independent of such bill to indicate that it was filed with such clerk.—*Miller v. Evansville & I. R. Co.*, 41 N. E. 801, 42 N. E. 806, 143 Ind. 570.

[g] A bill of exceptions filed before it was signed by the judge, and not refiled, cannot be considered.—(Sup. 1896) *Makepeace v. Bronnenberg*, 45 N. E. 336, 146 Ind. 243; (1898) *Starr v. State ex rel. Ketcham*, 49 N. E. 591, 149 Ind. 592; (1901) *Acme Cycle Co. v. Clarke*, 61 N. E. 561, 157 Ind. 271; (1901) *Allen v. Hamilton*, 61 N. E. 665, 157 Ind. 621; (App. 1897) *Importers' & Traders' Nat. Bank v. Knight*, 47 N. E. 837, 18 Ind. App. 257; (1897) *Woods v. Matlock*, 48 N. E. 384, 19 Ind. App. 364.

[h] (Sup. 1896)

Where a court entry showing the filing of a bill of exceptions in open court erroneously refers to the bill as appellant's "longhand transcript of the evidence," but the paper is also and properly styled "appellant's bill of exceptions," the unnecessary words in the court entry may be rejected as surplusage.—*Wabash Paper Co. v. Webb*, 45 N. E. 474, 146 Ind. 303.

The filing of a bill of exceptions in open court is equivalent to a filing in the clerk's office.—Id.

[i] After a bill of exceptions has been signed by the judge, it must be filed.—(Sup. 1897) Louisville, N. A. & C. R. Co. v. Schmidt, 46 N. E. 344, 147 Ind. 638; (1901) Beall v. Union Traction Co., 60 N. E. 1085, 157 Ind. 209; (1903) Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 66 N. E. 742; (1903) Veneziani v. Morrissey, 68 N. E. 682, 161 Ind. 391; (App. 1898) Nurdyke v. McCreery, 52 N. E. 89, 21 Ind. App. 708; (1901) Tretheway v. Peek, 62 N. E. 59, 28 Ind. App. 81; (1901) Trittippo v. Trittippo, 62 N. E. 85, 28 Ind. App. 80; Ayres v. Blevins, 62 N. E. 305, 28 Ind. App. 101.

[j] The order-book entry or the certificate of the clerk, showing that a bill of exceptions was filed after it was signed, is necessary to prove such filing.—(App. 1899) McCormick Harvesting Mach. Co. v. Smith, 52 N. E. 1000, 21 Ind. App. 617; (Sup. 1904) Howe v. White, 69 N. E. 684, 162 Ind. 74.

[k] (App. 1899)

A bill of exceptions, though signed by the trial judge, cannot be considered on appeal, unless it affirmatively appear that it was filed after it was so signed.—McCormick Harvesting Mach. Co. v. Smith, 52 N. E. 1000, 21 Ind. App. 617.

[l] The bill must be filed in the trial court.—(Sup. 1901) City of Indianapolis v. Tansel, 62 N. E. 35, 157 Ind. 463; (1903) Baut v. Donly, 67 N. E. 503, 160 Ind. 670; (App. 1902) Union Cent. Life Ins. Co. v. Evans, 63 N. E. 389, 28 Ind. App. 518.

[m] (Sup. 1904)

A clerk's certificate stating that the certificate attached to the transcript of the evidence was the certificate of the trial judge, and that the transcript and the bill of exceptions were afterwards filed in the clerk's office, sufficiently shows that the bill of exceptions was first signed by the trial judge and afterwards filed in the cause.—Howe v. White, 69 N. E. 684, 162 Ind. 74.

[n] (Sup. 1905)

Where the alleged bill of exceptions, containing a transcript of the evidence, was signed by the trial judge July 6, 1903, but above his signature was a certificate of the clerk that the document was filed in his office June 30, 1903, and the final certificate of the clerk stated that the transcript contained the original bill of exceptions, filed in his office June 30, 1903, "approved by the court, and ordered made a part of the record herein," there was nothing to show that the purported bill of exceptions was filed in the office of the clerk after it was signed by the trial judge, as required by Burns' Ann. St. 1901, §§ 638a, 641, so that the evidence was

not in the record.—Elrod v. Purlee, 73 N. E. 589, 74 N. E. 1085, 165 Ind. 239.

[o] (Sup. 1909)

A longhand transcript of the evidence is not available as a bill of exceptions where not filed, as required by Burns' Ann. St. 1908, § 657, after being signed by the trial judge.—Rector v. Druley, 172 Ind. 332, 88 N. E. 602.

[p] (Sup. 1910)

A bill of exceptions may be properly filed with the clerk or in open court.—Gfroerer v. Gfroerer, 90 N. E. 757.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. EXCEPTIONS, Bill of, §§ 97-99.

See, also, 3 Cyc. pp. 45, 46.

### § 58. Service.

Of proposed bill, see ante, § 46.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. EXCEPTIONS, Bill of, §§ 100-105.

See, also, 3 Cyc. pp. 46, 47.

### § 59. Amendment or correction.

Decisions reviewable, see APPEAL AND ERROR, § 117.

[a] (Sup. 1861)

No other judge than the one who tried the cause can, without the consent of parties, correct a bill of exceptions.—Halstead v. Brown, 17 Ind. 202.

[b] (Sup. 1867)

A bill of exceptions cannot be amended by the court below on parol testimony alone, so as to embrace such testimony.—Hamilton v. Burch, 28 Ind. 233.

[c] (Sup. 1874)

After a bill has been signed and filed, the court may, on notice and motion, order its correction by inserting omitted evidence.—Jeffersonville, M. & I. R. Co. v. Bowen, 49 Ind. 154.

[d] (Sup. 1875)

Where conflicting questions arise concerning the facts to be inserted in a bill of exceptions, and where an inferior court has already signed one bill, it will not be compelled to amend it.—Jolley v. Roberts, 50 Ind. 1.

Where a judge has settled, signed, and sealed a bill of exceptions, and alleges in his return to an alternative writ that such bill contains the truth, an appellate court will not, by peremptory writ of mandate, compel him to amend the same, either by striking out something which has been inserted, or by inserting something which has been omitted, for the reason that the determination as to what facts should be stated in a bill of exceptions invokes the exercise of a legal discretion, and is therefore a judicial act, and it is well settled that an officer cannot be compelled by mandate to do an act where he has a discretion to do or

not to do the act, and as to the manner in which the act is to be done.—Id.

[e] (Sup. 1880)

It is error for the court to allow an amendment of a bill of exceptions, by incorporating therein a clause, "And this was all the evidence given in the cause," after the close of the term at which such bill was signed and filed.—Seig v. Long, 72 Ind. 18.

[f] (Sup. 1881)

Where appellant prepares and files a bill of exceptions in vacation, under an order giving time for that purpose, the adverse party may afterwards move for the correction of omissions or inaccuracies in the bill.—Hannah v. Dorrell, 73 Ind. 465.

[g] (Sup. 1883)

A judge may amend a bill of exceptions after it has been signed, but before it has been filed.—Longworth v. Higham, 89 Ind. 352.

[h] (Sup. 1883)

A bill of exceptions, in a proper case, may be amended after the term; there being a sufficient memorandum of equal date to amend by.—Morgan v. Hays, 91 Ind. 132.

To make a proper case for the amendment of a bill of exceptions after it has been signed and made a part of the record and after the close of the term at which it was signed, there must be some memorandum or memorial paper record of the transaction to amend by of a date prior to or at least of equal date with the bill of exceptions.—Id.

[i] (Sup. 1884)

A bill of exceptions, signed by the judge as a true bill, cannot be attacked for alleged imperfections on its face by a writ of mandate requiring the judge to sign a true bill of exceptions.—Harbin v. Ketron, 94 Ind. 146.

[j] (Sup. 1892)

Where an application to correct a bill of exceptions is made, a notice served on the opposite party is sufficient to bring him into court, and, if a summons is issued and served, it will be treated as a mere notice.—Harris v. Tomlinson, 130 Ind. 426, 30 N. E. 214.

To test the sufficiency of an application for the correction of a bill of exceptions, the opposite party, after full appearance, may file a motion to dismiss such application.—Id.

A motion to dismiss an application for a correction and amendment to a bill of exceptions is not a formal pleading, and is sufficient if it specifies with reasonable certainty the relief sought, and the grounds on which it is founded.—Id.

A bill of exceptions recited the offer of an execution and return in evidence, and the objections to the introduction thereof, stating specifically the ground of the objections, the

overruling, and the exceptions noted. The execution and return were not set out in the transcript, but were marked as "not on file." Held, that an application to amend the bill by expunging all reference to the execution and return in evidence should have been refused, where the evidence in support of the application failed to show the facts recited did not occur.—Id.

Rev. St. 1881, § 396, providing that "the court may supply an omission in any proceedings on motion filed within two years," does not apply to proceedings to amend a bill of exceptions, as the court has inherent power at any time to so correct mistakes as to make its record speak the truth.—Id.

Where a party allowed two years to elapse after notice of the defect in a bill of exceptions before applying for amendment thereof, he was not entitled to the order of amendment.—Id.

[k] (Sup. 1897)

A bill of exceptions cannot be amended by stipulation of counsel after it has been filed, though the stipulation is approved by the trial judge.—Blair v. Curry, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908.

[l] (Sup. 1899)

The trial court should not allow, on oral proof alone, a nunc pro tunc correction of the bill of exceptions, which states that it contains all the evidence, after the original record has been filed in the appellate court, to show that certain evidence not included in the bill was given at the trial.—Driver v. Driver, 54 N. E. 389, 153 Ind. 88.

[m] (Sup. 1900)

Where a bill of exceptions is presented within the time allowed for its filing, the court, after the expiration of such time, may amend it by inserting a copy of a map, which it finds after a hearing of a motion for the correction of the bill to be a true copy of a map, which was introduced in evidence and afterwards lost, since it was its duty to make the bill speak the truth before signing it.—Tipton Light, Heat & Power Co. v. Newcomer, 58 N. E. 842, 156 Ind. 348.

[n] (App. 1905)

Where a bill of exceptions was filed but no entry made of such filing, an entry nunc pro tunc may be made if some note or memorandum in writing was made at the time; the judge's certificate to such bill, with the clerk's mark, supplemented with parol evidence, being sufficient to authorize such entry.—Davis v. Neighbors, 34 Ind. App. 441, 73 N. E. 151.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exceptions, Bill of, §§ 106-111.

See, also, 3 Cyc. pp. 50-52.



**EXCESS.**

In quantity of land sold, see **VENDOR AND PURCHASER**, § 164.

**EXCESSIVE DAMAGES.**

See—

**DAMAGES**, §§ 127-140.

Ground for new trial. **NEW TRIAL**, § 76.

**EXCESSIVE EXECUTION.**

See **EXECUTION**, § 83.

**EXCESSIVE FINES.**

See **CRIMINAL LAW**, § 1214.

**EXCESSIVE INTEREST.**

See **USURY**.

**EXCHANGE.**

See—

Provision for as affecting negotiability of bill or note. **BILLS AND NOTES**, § 159.

As constituting usury. **USURY**, §§ 23, 26.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EXCHANGE OF PROPERTY.

## Scope-Note.

(INCLUDES mutual transfers of ownership of property by way of interchange without fixed price or valuation; contracts for such transfers, executory or executed; rights and liabilities of parties to such transfers or contracts; and remedies relating thereto:

[EXCLUDES conveyances of land by way of exchange (see *Deeds*). For complete list of matters excluded, see cross-references, post.]

## Analysis.

1. Nature and elements in general.
2. Exchange of real property.
3. — Requisites and validity.
5. — Modification or rescission.
6. — Performance of contract.
7. — Rights and liabilities of parties.
8. — Remedies.
9. Exchange of personal property.
12. — Warranties.
13. — Remedies.
14. — Conditional exchange.

## Cross-References.

### See—

Application of statute of frauds. **FRAUDS, STATUTE OF, § 74.**  
Bill of particulars in action for balance due. **PLEADING, § 317.**  
Cancellation of written contracts or conveyances. **CANCELLATION OF INSTRUMENTS.**  
Compensation of broker for procuring. **BROKERS, §§ 39-77.**  
Exchange of lots on removal of county seat. **COUNTIES, §§ 32, 36.**  
Of paper as consideration for bill or note, **BILLS AND NOTES, § 95.**  
Exempt property. **EXEMPTIONS, § 81.**

Inadequacy of consideration of contracts in general. **CONTRACTS, § 53.**  
Parol or extrinsic evidence to contradict or vary written contract. **EVIDENCE, § 400.**  
Pleading matters of fact or conclusions relating to. **PLEADING, § 8.**  
Rejection of offer. **CONTRACTS, § 21.**  
Revocation of will by. **WILLS, § 194.**  
Title of husband to personal property acquired by exchange of real property of wife. **HUSBAND AND WIFE, § 10.**  
Validity of contracts made on Sunday. **SUNDAY, § 16.**

### § 1. Nature and elements in general.

[a] (**App. 1896**)

A contract whereby defendant's testator agreed to pay plaintiff a certain sum in money, and to convey to plaintiff lands to be selected by him, in consideration of certain lands to be conveyed by plaintiff to testator, does not constitute an absolute sale of plaintiff's land, with the privilege on testator's part to pay therefor in either money or land, but is merely a contract of exchange at fixed valuations, the difference to be paid in money.—*Lingeman v. Shirk*, 15 Ind. App. 432, 43 N. E. 33.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 1, 2.

See, also, 17 Cyc. p. 831.

### § 2. Exchange of real property.

Application of statute of frauds, see **FRAUDS, STATUTE OF, § 69.**

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 3-18.

See, also, 17 Cyc. pp. 829-847.

### § 3. — Requisites and validity.

[a] (**Sup. 1877**)

A. conveyed to B. certain real estate, promising to pay all delinquent taxes due thereon. In consideration of such conveyance and promise, B. conveyed certain real estate to A. by warranty deed, also promising to pay the delinquent taxes thereon. *Held*, that each conveyance, and the promise accompanying it, were

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consideration for the other conveyance and promise.—*Headrick v. Wisheart*, 57 Ind. 129.

[b] (Sup. 1877)

In an action to rescind an exchange of lands, where the complaint shows a gross fraud on the part of defendant by making false statements on which plaintiff in good faith relied in making the trade, it is sufficient.—*Leeds v. Boyer*, 59 Ind. 289.

[c] (Sup. 1879)

The validity and binding effect of a contract for the exchange of lands is not affected by the minority of the wife of one of the parties, and the mutual postponement by reason thereof of the necessary deeds.—*Armstrong v. Fearnaw*, 67 Ind. 429.

[d] (Sup. 1879)

A misrepresentation or concealment of the fact that a contract for an exchange of lands, in which the wife of one of the contracting parties does not join, cannot be enforced, and that the contract is within the statute of frauds relates to a matter of law, and does not constitute fraud in law.—*Burt v. Bowles*, 69 Ind. 1.

On an agreement to exchange lands, representations by one of the parties that he will pay off an incumbrance on the land offered by him is not a representation of an existing fact, the falsity of which will enable the other contracting party to avoid the agreement as having been induced by fraud.—*Id.*

[e] (Sup. 1881)

In an agreement to transfer certain real estate for bank stock, the stipulation, "Taxes of 1875 to be paid by owners respectively," applied to the property each was selling, and not to what each was receiving.—*Morrison v. Watson*, 79 Ind. 477.

[f] (App. 1905)

Plaintiffs were the owners of city real estate in Indiana of the value of \$1,500, and defendant was the owner of 100 acres of arid land in Kansas, situated 11 miles from the county seat, of the value of \$200. Defendant told plaintiffs that his land was "raw prairie land," was arable, was situated within four miles of the county seat, and that he held it at \$10 per acre. Plaintiffs said that if the land was rich, black, prairie soil, and would produce cereals, they would exchange their city property for it, but otherwise they would not. Thereupon defendant informed plaintiffs that the land was just as represented by him, and the exchange was made; a valuation of \$1,800 being placed on each property. The trade was made in Indiana, and neither party had any knowledge of, or had even seen, the Kansas land. *Held*, that plaintiffs were entitled to a rescission of the contract, and it was immaterial, as affecting that right, that the land in question was worth as much as it would have been, had it been located only four miles from the county seat.—*Gardner v. Mann*, 76 N. E. 417, 36 Ind. App. 694.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 3, 5, 7.

See, also, 17 Cyc. pp. 831-833.

§ 5. — Modification or rescission.

[a] (Sup. 1894)

A party seeking to rescind a contract for fraud must tender back to the other party whatever of value he received for the property which he seeks to recover.—*Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269.

If a party, upon the discovery of fraud, fails to offer to return whatever of value he has received under the contract, he affirms the contract.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 6, 8-10.

See, also, 17 Cyc. pp. 830-847.

§ 6. — Performance of contract.

[a] (App. 1896)

Defendant's testator contracted in writing to convey to plaintiff, in exchange for certain lands, part of the consideration for which was to be paid in money, certain lands in one county, and of a certain tract in another county a quantity sufficient to amount to a certain sum in value, to be selected by plaintiff, and such quantity thereof to be determined by testator's agent. The contract was performed by plaintiff and on the part of testator as to the payment of the money and the conveyance of the first-mentioned lands; but through the failure of testator's agent, on being notified of such selection by plaintiff, to determine the quantity of the second tract to be conveyed to him, none thereof was so conveyed. *Held*, that it was testator's duty, in order to render the description of such lands sufficiently certain, to see that such determination was made by his agent, whose default cannot defeat plaintiff's right to damages for such breach of contract.—*Lingeman v. Shirk*, 15 Ind. App. 432, 43 N. E. 33.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. § 11.

See, also, 17 Cyc. pp. 833-835.

§ 7. — Rights and liabilities of parties.

[a] (Sup. 1868)

Where, at the time of the conveyance of land by warranty deed in exchange for other land, it is agreed that the taxes due on the land so mutually exchanged shall be set off against each other, if it be considered that the warranty of the vendor is broken, still the vendee can agree on the damages, and payments by the vendor before action brought of the taxes due on the land received by him in exchange will satisfy the breach.—*Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674.

[b] (*Sup.* 1892)

Plaintiff, having been induced to exchange lands by fraudulent and false representations as to the value of the land received, is entitled to a vendor's lien on the land conveyed to defendants for the difference between the true and the represented value of the land received.—*Williamson v. Woten*, 31 N. E. 791, 132 Ind. 202.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 12-14.

### § 8. — Remedies.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 296.

Matter of inducement in pleading, see PLEADING, § 58.

Rescission of contract, see ante, § 5.

[a] (*Sup.* 1880)

In an action upon a written contract to recover the difference in value between a stock of goods transferred to the defendant in exchange for real estate, which the defendant promised to pay, the complaint need not aver that the goods transferred were of the kind and quality contracted for, or that they were free from liens.—*Sharp v. Radebaugh*, 70 Ind. 547.

[b] (*Sup.* 1888)

Where a contract of exchange of property was procured by fraud, it is proper to prove the value of the land given in exchange in a suit to rescind such contract.—*Johnson v. Culver*, 19 N. E. 129, 116 Ind. 278.

[c] (*Sup.* 1894)

Where prior to an action for breach of contract for exchange of land one of the parties had sold and transferred the land received in exchange, the court could not remit the parties to their original rights in respect to the subject-matter of the contract. The only effectual redress is the action for damages by the party aggrieved.—*Balue v. Taylor*, 36 N. E. 269, 136 Ind. 368.

[d] (*Sup.* 1897)

On allegations seeking to recover the value of land agreed to be conveyed by defendant to plaintiff, it is improper to render a judgment for the value of the land conveyed by plaintiff to defendant in consideration therefor.—*Lowe v. Turpie*, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 14-18.

See, also, 17 Cyc. pp. 836-847.

### § 9. Exchange of personal property.

Application of statute of frauds, effect of part payment, see FRAUDS, STATUTE OF, § 95.

Nominal damages for breach of agreement where actual damages alleged but not proved, see DAMAGES, § 12.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 19-30.

### § 12. — Warranties.

[a] (*Sup.* 1846)

Where two persons exchange horses with the privilege to one to return within a given time, and such party fails within that time to return the horse, a breach of warranty as to one of the horses will not affect the validity of the sale.—*Johnson v. McLane*, 7 Blackf. 501, 43 Am. Dec. 102.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. § 23.

### § 13. — Remedies.

[a] (*Sup.* 1877)

Where a contract under which chattels have been exchanged proves to have been fraudulent as against one of the parties thereto, he cannot replevy the chattel parted with, either from the opposite party or a subsequent purchaser, without first rescinding the contract, by tendering back to the other party whatever thing of value he received from him in such exchange. Where, in such case, the things received by the plaintiff are a sum of money and a forged promissory note, it is not necessary to tender back the latter.—*Haase v. Mitchell*, 58 Ind. 213.

[b] (*Sup.* 1880)

If one who exchanges property desires to recover what he surrendered, he must tender back what he received, although the exchange may have been an enforced one produced by violence. The fact that the amount received by plaintiff is proportionally small makes no difference. Nor does a refusal by defendant to surrender the property, on demand, excuse plaintiff from making his tender.—*Reynolds v. Copeland*, 71 Ind. 422.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. §§ 25-29.

### § 14. — Conditional exchange.

[a] (*Sup.* 1846)

If two persons exchange horses, with the privilege to one of the parties to return, within a given time, the horse received by him in exchange, and such party fail, within the time, to return the horse so received, the contract becomes absolute.—*Johnson v. McLane*, 7 Blackf. 501, 43 Am. Dec. 102.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exch. of Prop. § 30.

# EXCHANGES.

## *Scope-Note.*

[INCLUDES bodies formed by the incorporation or association of persons engaged in business of the same nature for the purpose of facilitating and regulating the transaction of such business among the members.

[EXCLUDES matters relating to corporations or unincorporated associations in general (see *Corporations; Associations*); liability of seats or memberships in exchanges to levy of execution (see *Execution*); and arbitration of differences between members of exchanges (see *Arbitration and Award*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

- § 1. Nature and status in general.
- § 13. Quotations of prices and transactions.

## *Cross-References.*

### *See—*

ASSOCIATIONS.

Rights, duties, and liabilities of brokers in general. **BROKERS.**

### § 1. Nature and status in general.

[a] (Sup. 1906)

A "bucket shop," while using the terms and outward forms of an exchange, differs from an "exchange," in that there is no delivery of goods pretended to be sold, and no expectation or intention of delivering the same.—*Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exchanges, § 1.

See, also, 17 Cyc. p. 849.

### § 13. Quotations of prices and transactions.

[a] (Sup. 1906)

A requirement of a board of trade that every applicant for its continuous market quotations shall, as a condition precedent, obligate himself not to use them for conducting a bucket shop, is a reasonable regulation, and will be enforced by the courts.—*Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 76 N. E. 100, 165 Ind. 492, 3 L. R. A. (N. S.) 153.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Exchanges, § 16.

See, also, 17 Cyc. pp. 869, 870; note, 61 C. C. A. 2.

## EXCISE.

### *See—*

Imposition of as regulation of commerce. **COMMERCE**, §§ 75-77.

**INTERNAL REVENUE.**

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## EXCLAMATIONS.

Res-gestæ, see **EVIDENCE**, § 127.

## EXCLUSION.

### *See—*

Implied exclusion in statute by express mention. **STATUTES**, § 195.

Implied, etc.—(Cont'd).

Warranty by express warranty, refusal to warrant. **SALES**, § 267.

Members of corporations in general. **CORPORATIONS**, § 173.

## EXCLUSIVE JURISDICTION.

Of courts in general, see **COURTS**, §§ 472-488.

## EXCLUSIVE PRIVILEGES.

### *See—*

Constitutional prohibition of grant of special privileges or immunities. **CONSTITUTIONAL LAW**, § 205.

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 Ferry franchise. **FERRIES**, § 16.  
**FRANCHISES**, § 4.  
 Grants by carriers. **CARRIERS**, § 14.  
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     **MUNICIPAL CORPORATIONS**, § 686.  
     **STREET RAILROADS**, § 29.  
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## **EXCLUSIVE REMEDIES.**

For enforcement of mortgages, see **MORTGAGES**, § 390.

## **EXCURSION RATES.**

See **CARRIERS**, § 256.

## **EXCUSABLE HOMICIDE.**

See **HOMICIDE**, §§ 101-125.

## **EXCUSABLE NEGLECT.**

See—

Equitable relief from judgment. **JUDGMENT**, § 436.

Opening or vacating judgment. **JUDGMENT**, §§ 143, 344, 363-367, 386.

Review of judgment. **JUDGMENT**, § 335.

## **EXCUSE.**

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Default. **JUDGMENT**, § 143.

Default or delay in delivery of goods sold. **SALES**, §§ 177-175.

In payment of price of land. **VENDOR AND PURCHASER**, § 186.

Delay in filing motion for new trial. **NEW TRIAL**, § 120.

In filing record on appeal. **APPEAL AND ERROR**, § 628.

In giving notice of injuries insured against. **INSURANCE**, § 668.

In performance of contracts in general. **CONTRACTS**, § 300.

Delay, etc.—(Cont'd).

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Disobedience by servant of rules of master. **MASTER AND SERVANT**, § 243.

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To interpose defense as affecting right to equitable relief against judgment. **JUDGMENT**, §§ 431-438.

To make or insufficiency of tender. **TENDER**, § 16.

To present claim against estate of decedent. **EXECUTORS AND ADMINISTRATORS**, § 232.

To produce proof of loss required by insurance policy. **INSURANCE**, § 544.

To return goods on breach of warranty. **SALES**, § 287.

To set out copy of policy in action on insurance policy. **INSURANCE**, § 631.

**HOMICIDE**, §§ 101-125.

Laches in bringing suit. **EQUITY**, §§ 74-83.

Nonpayment of insurance premium or assessment. **INSURANCE**, §§ 362, 754.

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Nonperformance or defects in performance of contract. **CONTRACTS**, § 303.

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## **EXECUTED CONTRACTS.**

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**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EXECUTION.

## *Scope-Note.*

[INCLUDES enforcement of judgments and orders in civil actions and proceedings in general, by final process, against property or against the person; nature of such process in general and of different forms of writs of execution; property subject to execution in general; issuance, requisites, and validity of executions, and correction and amendment thereof; levy or service, and lien of executions; quashing or setting aside executions, affidavits of illegality, restraining enforcement or stay of execution, discharge of poor debtors, and other relief from executions; claims of third persons to property levied on, and trial of right of property; sales under execution, redemption of property sold, or conveyance thereof by officer to purchaser; return of executions, satisfaction and discharge thereof, and distribution of proceeds; proceedings supplementary to execution; and liabilities of persons other than officers for wrongful procuring, issuance, levy, etc., of executions.

[EXCLUDES executions against particular classes of persons (see *Infants; Executors and Administrators*; and other specific heads); executions in particular forms of action, or on particular causes of action, or in proceedings other than actions (see specific heads); enforcement of decrees and orders, other than for payment of money, in suits in equity (see *Receivers; Sequestration; Judicial Sales; Assistance, Writ of; Contempt*), or admiralty (see *Admiralty*), or in proceedings under insolvent acts (see *Insolvency*) or bankrupt acts (see *Bankruptcy*); execution of sentence in criminal cases (see *Criminal Law; Prisons*; and title of particular classes of crimes); executions on judgment of justices of the peace (see *Justices of the Peace*); property exempt from execution, and protection of rights of exemption (see *Exemptions; Homestead*); suits in aid of executions (see *Creditors' Suit*), and levy on and proceedings to reach property conveyed in fraud of creditors (see *Fraudulent Conveyances*); revival of judgment for purpose of issuing execution (see *Judgment*); supersedeas of execution (see *Supersedeas*); stay of execution pending appeal or error (see *Appeal and Error*) and pending proceedings under insolvent acts (see *Insolvency*) or bankrupt acts (see *Bankruptcy*); and duties and liabilities of officers in respect of issuance, levy, and return of executions (see *Clerks of Courts; Sheriffs and Constables*; and titles of other specific officers). For complete list of matters excluded, see cross-references, post.]

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## I. NATURE AND ESSENTIALS IN GENERAL.

### § 5. Judgment, decree, or order.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 5-27, 49.

See, also, 17 Cyc. pp. 924-931.

### § 7. — Nature and form.

[a] (Sup. 1836)

One execution cannot be issued on two separate judgments, but each judgment must carry its own execution.—*Doe ex dem. Wilkins v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368.

[b] (Sup. 1864)

A power of attorney provided that the judgment should be payable by installments, "and execution is to be stayed accordingly upon said installments, respectively." Held, that this provision meant that no execution was to issue, except to collect the installments as they fell due, and none should issue within the period specified in the power of attorney, and that the stay of execution by agreement of the parties was intended, and not by replevin bail.—*McPheeters v. Campbell*, 5 Ind. 107.

[c] (Sup. 1881)

A personal judgment, rendered for alimony in divorce suit, where notice to defendant was given by publication only, and there was no appearance by or on his behalf, is not sufficient to support an execution for the sale of his real estate.—*Sowders v. Edmunds*, 76 Ind. 123.

[d] (Sup. 1887)

A judgment for the purpose of issuing execution under it is not rendered void by the lapse of 10 years, whereby it has ceased to be a lien on real estate. Such a judgment is only voidable by direct proceedings to have it set aside or annulled.—*Yeager v. Wright*, 112 Ind. 230, 13 N. E. 707.

[e] (Sup. 1889)

A judgment of a court of general jurisdiction, which is valid on its face, is prima facie sufficient to support a sheriff's sale.—*Langedale v. Woollen*, 120 Ind. 16, 21 N. E. 659.

[f] (App. 1893)

Though a mere finding for plaintiff, without assessment of damages, is no proper basis for a judgment, yet the judgment, while it stands, is so far valid as, with the writ of execution, to be evidence in favor of the officer levying thereunder, in replevin for the property seized.—*Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829.

[g] (Sup. 1901)

Where the judgment requires the payment of money, an execution is the proper writ.—*Hord v. Bradbury*, 59 N. E. 31, 156 Ind. 30.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 7-15, 17-20.

See, also, 17 Cyc. pp. 924-929.

### § 8. — Validity.

Sale under execution issued more than a year after judgment as ground for collateral attack, see post, § 258.

Sale under void execution, see post, § 275.

[a] (Sup. 1858)

A plaintiff who purchases at the execution sale stands in the same position as before, with regard to any fraud which may defeat the judgment.—*Leach v. Leach*, 10 Ind. 271.

[b] (Sup. 1859)

Where a court rendering judgment on which an execution was issued had no jurisdiction, a sale under such execution confers no title on the purchaser.—*Marsh v. Sherman*, 12 Ind. 358.

[c] (Sup. 1887)

A sheriff's sale under a void judgment will be set aside.—*Ferrier v. Deutchman*, 111 Ind. 330, 12 N. E. 497.

Where a sheriff's sale is made under several judgments upon writs issued at the same time, and some of the judgments are void, the sale will also be void, though one of the judgments may be valid.—Id.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 16.

See, also, note, 55 L. R. A. 280.

**§ 10. — Transcript of judgment of inferior court or justice of the peace filed in superior court.**

Delay in issuing transcript as ground for collateral attack on sale, see post, § 258.

Form and requisites of writ, see post, §§ 61, 62. Foundation for supplementary proceedings, see post, § 360.

Title of purchaser at sale under execution issued without affidavit of nonpayment of justice's judgment, see post, § 275.

**[a] (Sup. 1842)**

A certificate that "the above is a true transcript from my docket" is sufficient.—Wiley v. Forsee, 6 Blackf. 246.

**[b] (Sup. 1850)**

Under Act 1838 (Rev. St. p. 375), where execution has issued on the judgment of a justice, and been returned *nulla bona*, before the filing of the transcript in the circuit court, it is not necessary to have the transcript recorded.—Davis v. Dietz, 2 Ind. 247.

**[c] (Sup. 1861)**

Where a sale was made upon three several executions, and one of them, being the first to be satisfied, was improvidently issued, the sale was *held* to be thereby rendered invalid, as being based upon an imperfect transcript.—Brown v. McKay, 16 Ind. 484.

The justice's certificate that the foregoing is "a complete transcript of the judgment" is not sufficient to cover the proceedings after judgment which the transcript purports to contain.—Id.

**[d]** It is not necessary in cases of judgment by default that the justice's docket or the transcript should set out the summons in full, if it sets out the fact that summons was issued and returned.—(Sup. 1867) Taylor v. McClure, 28 Ind. 39; (1871) Woodburn Sarven Wheel Co. v. McKernan, Wils. 48.

**[e] (Sup. 1871)**

Where the affidavit of the justice which is required in order to authorize a clerk of court to issue execution on a transcript of a judgment rendered before a justice of the peace contained a misnomer of the defendant in the caption thereof, but all the facts were set forth in the body of the affidavit, so that the clerk was able to place it on file, and attach it to the transcript on which it was made, the misnomer, being insufficient to mislead any one, did not invalidate a subsequent sale.—Woodburn Sarven Wheel Co. v. McKernan, Wils. 48.

... The certificate of a justice of the peace that "the foregoing is a true, correct, and complete transcript from my docket of the proceedings and judgment," complies with the statute.—Id.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 25-27, 49.

See, also, 17 Cyc. p. 931.

**§ 11. Effect of motion for new trial or rehearing.**

**[a] (Sup. 1899)**

Under 1 Burns' Rev. St. §§ 686, 1382, allowing a party for whom judgment has been rendered to enforce it at any time within 10 years after entry thereof, and providing that an execution may issue thereon as soon as the record is read in open court and signed by the judge, the filing of a motion for a new trial after entry of judgment, and within the time allowed, does not stay execution.—Logan v. Sult, 53 N. E. 456, 152 Ind. 434.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 29.

See, also, 17 Cyc. p. 936.

**§ 12. Effect of opening, vacating, or modifying judgment.**

**[a] (Sup. 1825)**

Where a judgment with interest from the previous date was replevied, and afterwards, on a writ of error, altered as respected the instrument, such alteration only operated to control plaintiff as to the amount to be collected on the execution.—Weaver v. Field, 1 Blackf. 334.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 30.

See, also, 17 Cyc. p. 937.

**§ 14. Effect of payment or satisfaction of judgment.**

Title of purchaser under satisfied execution, see post, § 275.

**[a]** If a sale be had under an execution on a satisfied judgment, even a bona fide purchaser acquires no title. The power to sell ceases with the satisfaction of the judgment.—(Sup. 1861) Laval v. Rowley, 17 Ind. 36; (1862) State ex rel. Wilber v. Salyers, 19 Ind. 432.

**[b] (Sup. 1886)**

A sale on a judgment that has been fully paid and satisfied vests no title in one who has either actual or constructive notice of that fact.—Chapin v. McLaren, 105 Ind. 563, 5 N. E. 688.

**[c] (Sup. 1892)**

A sale on a satisfied judgment is illegal and void.—Boos v. Morgan, 30 N. E. 141, 130 Ind. 305, 30 Am. St. Rep. 237.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 28, 32-34, 779.

See, also, 17 Cyc. pp. 934-936.

**§ 15. Particular forms of execution.**

To enforce judgment against property, fraudulent conveyance of which has been set aside, see FRAUDULENT CONVEYANCES, § 316.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 37-40.

See, also, 17 Cyc. p. 932.

**§ 17. Persons entitled to execution.**

[a] (Sup. 1861)

The person in favor of whom a judgment is rendered, or those acting for him, have the exclusive right to order an execution, or to delay it.—*Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 41–43.

See, also, 17 Cyc. pp. 937–939.

**§ 18. Persons against whom execution may issue.**

Alias execution against one joint defendant after levy on property of another, see post, § 99.

[a] (Sup. 1875)

Though the injured party may sue several defendants separately for the assault and battery, and prosecute each action to final judgment, he must then elect against whom he will take his execution.—*Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711.

[b] (App. 1895)

An agreement by a third person to pay a judgment does not authorize the levy on his property under judgment and execution against another.—*Shipman Coal Min. & Mfg. Co. v. Pfeiffer*, 39 N. E. 201, 11 Ind. App. 445.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 44, 45.

See, also, 17 Cyc. p. 939.

**§ 19. Simultaneous and successive executions.**

Alias and pluries writs, see post, § 99.

Conduct of sale under several executions, see post, § 226.

Sale under second execution before sale under first is completed, see post, § 226.

Second execution against same property after replevin by claimant, see post, § 205.

Successive levies under same writ, see post, § 136.

[a] (Sup. 1823)

Where property taken on execution does not sell for enough to satisfy the judgment, the judgment creditor, after sale and return, may take out another execution on the judgment, and make another levy to satisfy the deficiency.—*McIntosh v. Chew*, 1 Blackf. 289.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 46–48.

See, also, 17 Cyc. p. 933.

**II. PROPERTY SUBJECT TO EXECUTION.**

Crop raised on shares before division, see LANDLORD AND TENANT, § 326.

Dependent on specific or general character of legacy, see WILLS, § 756.

Estates conveyed to husband and wife, see HUSBAND AND WIFE, § 14.

Execution from justice's court, see JUSTICES OF THE PEACE, § 135.

Indian lands, see INDIANS, § 20.

Property affected by lien or levy, see post, § 111.

Property fraudulently conveyed by debtor, see FRAUDULENT CONVEYANCES, § 230.

Property of husband in general, see HUSBAND AND WIFE, § 6.

Property which may be reached by supplementary proceedings, see post, §§ 363–368.

**§ 20. Personal property in general.**

Mode of levying execution on personal property in general, see post, § 129.

[a] (Sup. 1871)

A schedule of assessments for benefits upon land and real estate affected by the construction of the work of a draining company, duly recorded, is not assets subject to an ordinary execution.—*Marion Tp. Union Draining Co. v. Norris*, 37 Ind. 424.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 49, 49½, 56, 58–60.

See, also, 17 Cyc. p. 940.

**§ 21. Real property in general.**

Mode of levying execution on real property, see post, § 133.

[a] (Sup. 1830)

Real estate may be sold on a *fi fa*.—*Frakes v. Brown*, 2 Blackf. 295.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 49, 49½, 68–75.

See, also, 17 Cyc. p. 940.

**§ 22. Public property and institutions.**

[a] (Sup. 1859)

Where a piece of land within the city has been dedicated to the public, it cannot be sold on an execution against the city.—*Indianapolis & B. R. Co. v. City of Indianapolis*, 12 Ind. 620.

[b] (Sup. 1884)

A county public square cannot be sold on execution to pay a street-improvement assessment.—*Lowe v. Board of Com'rs of Howard County*, 94 Ind. 553.

[c] (App. 1893)

Execution may issue against a county, and be levied upon any property owned by it, not needed for governmental or public purposes.—*State ex rel. Courter v. Buckles*, 8 Ind. App. 282, 35 N. E. 846, 52 Am. St. Rep. 476.

[d] (App. 1908)

Property of a public corporation held for public or governmental purposes cannot be sold under legal process for the debts of a city or for assessments for public improvements.—*City of*



Indianapolis v. City Bond Co., 42 Ind. App. 470, 84 N. E. 20.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 133.

See, also, 17 Cyc. pp. 978, 979.

### § 23. Interests in public lands.

[a] (Sup. 1853)

Where a certificate for canal land has been assigned before final payment, a levy and sale of the assignor's equitable interest, on a judgment rendered against him before the assignment, conveys no title to the purchaser.—Dickerson v. Nelson, 4 Ind. 160.

[b] (Sup. 1863)

One in possession of school land under a certificate conditioned for the execution of a title at the expiration of 10 years, provided the holder had within that time paid the purchase price, has no legal interest in the land subject to execution.—Jeffries v. Sherburn, 21 Ind. 112.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 85, 747.

See, also, 17 Cyc. pp. 955, 956.

### § 24. Crops.

Crops raised on estate by entirety, see HUSBAND AND WIFE, § 14.

[a] (Sup. 1848)

A growing crop of corn on rented land, sold by the tenant by parol in good faith, is not subject to an execution afterwards issued against him.—Northern v. State, ex rel. Lathrop, 1 Ind. 113, Smith, 71.

[b] (Sup. 1856)

Where defendant in execution rented land with a stipulation that his tenant should pay one-third of the wheat as rent, until the wheat was delivered to the judgment debtor it was not subject to an execution against him.—Williams v. Smith, 7 Ind. 539.

[c] (Sup. 1860)

Growing crops are subject to sale under execution.—Matlock v. Fry, 15 Ind. 483.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 59, 60.

See, also, 17 Cyc. pp. 941-943; note, 23 L.

R. A. 258; notes, 31 Am. Dec. 410, 55 Am. Dec. 161.

### § 25. Fixtures.

[a] (Sup. 1862)

If fixtures may be rightfully removed by their owners from the premises, while in the occupation of another, they are personal property, as between such owners and occupants, and are liable to be taken on execution against the owners.—State v. Bonham, 18 Ind. 231.

[b] (Sup. 1863)

S. purchased a flouring mill incumbered by liens and mortgages, and afterwards procured an engine and boiler which for a time he used in connection with the mill. After he had

ceased so to use them, an execution against him was levied on them, and the day after the levy he sold them with consent of the lien holders, and his vendees claimed them as against the execution plaintiff. Held, that the parties, having agreed to treat the articles as personal property, could not be allowed to say that they were not subject to levy and sale on execution.—Test v. Robinson, 20 Ind. 251.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 63.

See, also, 17 Cyc. pp. 945, 946.

### § 28. Corporate property used for public purpose.

[a] (Sup. 1886)

The right of way of a railroad or turnpike company is not subject to sale on judicial process, unless made so by statute. As respects gravel road companies, statutory authority to that end is conferred.—Indianapolis & C. Gravel Road Co. v. State ex rel. Flack, 4 N. E. 316, 105 Ind. 37.

[b] (Sup. 1889)

The franchises of a corporation under the established rule of the common law were not subject to seizure and sale under execution in the absence of express statutory reasons authorizing a sale and describing the method of the transfer, and as a natural sequence the lands, easements, or things essential to the existence of the corporation, and the execution of its corporate duty and without which its franchises would be of no practical use, could not be levied on and sold on an execution at law, so as to detach it from its franchises and destroy its use.—Louisville, N. A. & C. R. Co. v. Boney, 20 N. E. 432, 117 Ind. 501, 3 L. R. A. 435.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 135, 136.

See, also, 17 Cyc. p. 948; note, 20 L. R. A. 737.

### § 29. Corporate stock.

[a] (Sup. 1883)

A by-law of a bank, providing that no transfer of its stock shall be made by a stockholder while indebted to it, will not prevent a levy on the stock under execution against a stockholder who is indebted to the bank, and a transfer of the stock to a purchaser at the execution sale.—State ex rel. Koons v. First Nat. Bank of Jeffersonville, 89 Ind. 302.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 61.

See, also, 10 Cyc. p. 373, 17 Cyc. p. 944.

### § 31. Particular estates or interests.

Estate by entirety, see HUSBAND AND WIFE, § 14.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 70-82, 86, 87.

See, also, 17 Cyc. pp. 951-956.

**§ 33. — Real property.**

Death of husband during life of wife as affecting title of purchaser at sale of wife's land on execution against husband, see post, § 265. Sale for inadequate price without exhausting personalty, see post, § 251.

[a] (App. 1891)

A testatrix devised to her son for life her one-third interest in certain land, and declared in the will: "He shall have the rents and profits arising from my interest in said property for his own use and support, but no part thereof shall be subject to payment of his debts, and he shall not incur the same." *Held* that, no trust having been created, the son's life estate was subject to levy and sale for payment of his debts.—*Thompson v. Murphy*, 10 Ind. App. 464, 87 N. E. 1094.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 76-82, 86, 87.

See, also, 17 Cyc. pp. 951-956; note, 23 L. R. A. 642; note, 11 Am. Dec. 193.

**§ 36. Property mortgaged or otherwise incumbered.**

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 51, 95-102.

See, also, 17 Cyc. pp. 961-967.

**§ 37. — Personal property.**

[a] The equity of redemption of mortgaged chattels may be sold on execution.—(Sup. 1862) *Heimberger v. Boyd*, 18 Ind. 420; (1863) *Schrader v. Wolfen*, 21 Ind. 238; (1878) *Headrick v. Brattain*, 63 Ind. 438; (1879) *Olds v. Andrews*, 66 Ind. 147; (1882) *Louthain v. Miller*, 85 Ind. 161.

[b] (Sup. 1863)

Since the equity of redemption of mortgaged chattels may be sold on execution, the sheriff is entitled for that purpose to levy on and take possession of the chattels.—*Schrader v. Wolfen*, 21 Ind. 238.

[c] (Sup. 1874)

The fact that a mortgagor of personal property has surrendered the same to the mortgagee does not prevent the sheriff, holding executions against the mortgagor in favor of other creditors, from levying and selling the equity of redemption until the mortgagee has cut off such equity of redemption by legal notice and sale of the goods, or by judicial foreclosure.—*Landers v. George*, 49 Ind. 309.

[d] (Sup. 1880)

Since 2 Rev. St. 1876, p. 207, § 436, authorizes levy and sale of mortgaged chattels under execution against the mortgagor, and section 469, p. 218, provides that personal property sold shall be present and subject to the view of those attending the sale, a constable was au-

thorized, under an execution against a mortgagor, to levy the same and take possession of the mortgaged chattels for the purpose of selling the interest of the mortgagor therein.—*Sparks v. Compton*, 70 Ind. 393.

[e] (Sup. 1881)

Where corporate stock was mortgaged prior to the entry of a judgment against the stockholder, the judgment creditor only acquired a right to sell under execution the equity of redemption therein, though such stock had not been transferred on the books of the corporation, since corporate stock, as personal property, is subject to mortgage, and the judgment creditor only acquired the interest of his debtor therein when his lien attached.—*Manns v. Brookville Nat. Bank*, 73 Ind. 243.

[f] As against the mortgagee, the officer is entitled to the possession of mortgaged chattels for the purpose of making the sale, under the statute authorizing the sale of such chattels subject to the mortgage to satisfy an execution against the mortgagor.—(1881) *Emmons v. Hawn*, 75 Ind. 356; (1884) *Foster v. Bringham*, 99 Ind. 505.

[g] (Sup. 1881)

Under the statute providing that the mortgagor's equity of redemption in goods and chattels may be sold on execution, the mortgagee takes his mortgage subject to this provision, and, if he is in possession, that possession may be temporarily interrupted for the purpose of disposing of the equity of redemption.—*Hackleman v. Goodman*, 75 Ind. 202.

[h] (Sup. 1885)

Under Rev. St. 1881, §§ 722, 751, mortgaged chattels may be levied on and sold under an execution against the mortgagor, and the officer levying the writ is entitled to possession of the same, as against the mortgagee, for the purpose of making the sale.—*Foster v. Bringham*, 99 Ind. 505.

[i] (App. 1892)

Rev. St. 1881, § 722, provides that goods and chattels pledged, assigned, or mortgaged as security for any debt or contract may be levied on and sold on execution against the person making the pledge, assignment, or mortgage subject thereto, and that the purchaser shall be entitled to the possession on complying with the conditions of the pledge, assignment, or mortgage. *Held*, that though for the purpose of levy and sale the officer may, under the statute, take the property in possession as against both the mortgagor and mortgagee, it is the duty of the officer to exercise due care for the protection of the interest of the mortgagee in the property, and he is prohibited, not only from diverting the property from the security of the mortgage, but from doing anything which has the effect of diminishing its value as such a security.—*Collins v. State ex rel. Hutchinson*, 30 N. E. 12, 3 Ind. App. 542, 50 Am. St. Rep. 208.

[J] (*App.* 1899)

Under the express provisions of Burns' Rev. St. 1894, § 734, mortgaged chattels may be levied on and sold subject to the mortgage, and an officer has the right of possession of the chattels for the purpose of making the sale.—*Kahn v. Hayes*, 53 N. E. 430, 22 Ind. App. 182.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 51, 95-97, 101, 103.

See, also, 17 Cyc. pp. 962, 965.

### § 38. — Real property.

[a] (*Sup.* 1841)

An equity of redemption on a mortgage in fee, whether the mortgagor be in possession or not, provided there be no adverse possession, may be sold on an execution at law.—*Watkins v. Gregory*, 6 Blackf. 113.

[b] (*Sup.* 1861)

A sheriff levied an execution on a judgment in foreclosure, and also executions on other judgments in favor of other parties against the mortgagor on the mortgaged premises. *Held*, that the levy of the executions in favor of third parties on the mortgaged premises was legal, even though the mortgagor had other property in the county subject to execution.—*Dean v. Phillips*, 17 Ind. 406.

[c] (*Sup.* 1862)

A railroad corporation's deed of trust to secure its bonds and coupons operates as a mortgage, leaving in the company an equity of redemption subject to levy and sale on execution.—*Coe v. Johnson*, 18 Ind. 218.

[d] (*Sup.* 1864)

A deed of trust executed by a railroad company to a trustee to secure the payment of certain bonds, and giving certain powers to the trustee touching the operation of the road, leaves in the company a right of redemption which is liable to be sold on execution.—*Coe v. McBrown*, 22 Ind. 252.

[e] (*Sup.* 1870)

Where a mortgage on real estate is foreclosed, and the property sold, there being at the commencement of the suit a judgment lien on said real estate junior to the mortgage, an execution issued on such judgment before the expiration of the statutory lien of the same, and after the expiration of one year from the foreclosure sale, the property not having been redeemed, and a deed therefor having been executed by the sheriff to the purchaser, may be levied on said real estate, and the same may be sold subject to the mortgage as if it had not been foreclosed.—*Holmes v. Bybee*, 34 Ind. 262.

[f] (*Sup.* 1832)

Where one had conveyed land to secure a good-faith indebtedness, his judgment creditors had no lien on the land in the absence of any fraud, and it was not subject to sale under executions without first applying to a court of

equity and making the grantor's interest in the land subject to the judgment.—*Evans v. Feeny*, 81 Ind. 532.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 51, 98-102.

See, also, 17 Cyc. pp. 964, 965; note, 23 L. R. A. 642.

### § 39. Rights or interests secured by liens.

[a] (*Sup.* 1867)

J. entered into a contract to build a boat for a ferry company, to be paid for by installments as the work progressed. Installments were paid from time to time, and the money used by J. in purchasing materials and paying for work upon the boat. The company employed an agent to superintend the building, and placed a watchman in charge. J., being unable to finish the boat, surrendered her to the company, who employed others to complete the work. *Held*, that the property in the vessel passed to the company, and it was not subject to the lien of executions on judgments against J.—*Sandford v. Wiggins Ferry Co.*, 27 Ind. 522.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 49, 52.

### § 40. Equitable estates or interests in general.

Equity of redemption in mortgaged property, see ante, §§ 36-38.

In public lands, see ante, § 23.

Trust estates, see post, § 41.

[a] (*Sup.* 1857)

An equitable interest in land cannot be seized and sold on execution.—*Hutchins v. Hanna*, 8 Ind. 533.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 50, 88-94.

See, also, 17 Cyc. pp. 957, 958.

### § 41. Trust estates.

Rights and remedies of creditors of cestui que trust, see TRUSTS, § 151.

Rights and remedies of creditors of trustee, see TRUSTS, § 136½.

[a] A trust estate is not subject to an execution issued against the trustee.—(*Sup.* 1829) *Elliott v. Armstrong*, 2 Blackf. 198; (1877) *Hollingsworth v. Trueblood*, 59 Ind. 542.

[b] (*Sup.* 1851)

If a party who has paid the consideration for real estate, and is entitled to a deed, conveys the land to another for his use, the latter holds the land only in trust for the former, and it is liable to execution, under the statute, upon any judgment against the party for whose use it is held.—*Tevis v. Doe*, 3 Ind. 129.

[c] (*Sup.* 1853)

Lands conveyed to a trustee to be sold and the proceeds accounted for were, under Rev. St.

1843, p. 453, liable to levy and sale on execution on a judgment against the beneficiary.—*State Bank v. Macy*, 4 Ind. 362.

[d] (*Sup.* 1882)

As an express trust in lands cannot be created by parol, such a trust will not interfere with the levy of an execution against the land as belonging to the trustee.—*Dunn v. Dunn*, 82 Ind. 42.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 49, 89–94.

See, also, 17 Cyc. pp. 958–960; notes, 32 Am. Dec. 242, 97 Am. Dec. 304; notes, 9 Am. St. Rep. 405, 24 Am. St. Rep. 686.

§ 42. Interests under contracts in general.

[a] (*Sup.* 1831)

The provisions of the statute of frauds authorizing the sale of a trust estate on execution against a cestui que trust do not extend to the equitable interest possessed by the obligee of a title bond.—*Modisett v. Johnson*, 2 Blackf. 431.

[b] (*Sup.* 1855)

Where a vendee of land, having a right to rescind the contract because of the partial failure of his vendor's title, elects to affirm the contract, he has an equitable interest in the land to be conveyed, to the extent of his vendor's title, which is subject to execution against him in equity.—*Dart v. McQuilty*, 6 Ind. 391.

[c] (*Sup.* 1857)

The interest of one to whom a deed of land had been made out and left with a third person, but who died before paying the money, is not subject to execution.—*Hutchins v. Hanna*, 8 Ind. 533.

[d] (*App.* 1895)

One who buys and takes possession of personal property under a contract to pay the price in installments, with an agreement that the title shall remain in the seller until the price is paid, acquires no interest which is subject to levy and sale.—*Keck v. State ex rel. National Cash Register Co.*, 12 Ind. App. 119, 39 N. E. 899.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 53, 104–116.

See, also, 17 Cyc. pp. 968–971; note, 21 L. R. A. 623.

§ 45. Interests of devisees or legatees.

[a] (*Sup.* 1878)

A legacy of money was left to A., payable out of certain stock owned by the testator, and a judgment creditor of A. levied an execution thereon upon a number of such shares equal in value to the legacy to A. The administrator with the will annexed of said testator's estate brought a suit to enjoin the sale of such stock on the execution. *Held*, that the legacy was not a specific one, and that legacies in the

hands of an executor, or administrator with the will annexed, pending the settlement of the estate, whether general, demonstrative, or specific, were not subject to levy and sale under an execution against the legatee.—*Stout v. La Follette*, 64 Ind. 365.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 141, 142.

See, also, 17 Cyc. pp. 983, 984; note, 44 Am. Dec. 338.

§ 46. Money of debtor.

[a] (*Sup.* 1853)

Rev. St. 1843, c. 40, § 381, which provides that, "upon execution, the officer may levy upon any current gold or silver coin or current bank notes belonging to the judgment debtor," does not authorize him to levy an execution issued on a judgment against the debtor upon gold or silver coin or bank notes in his hands collected on an execution in favor of the debtor.—*Winton v. State ex rel. Ezra*, 4 Ind. 321.

[b] (*Sup.* 1863)

Q. sued R. and M. It appeared that R. owed Q. money, and undertook to make a payment by giving to Q. an order on the township trustee for money due to him (R.) as school teacher; that the trustee gave Q. his check for the amount, which Q. drew; but that M., being a sheriff, seized under execution against R. the money paid over to Q. before Q. had had time to take it up from the bank counter. *Held*, that there was not such title to the money in R. as would, previous to its delivery to him, enable the sheriff to seize it as his property.—*Moorman v. Quick*, 20 Ind. 67.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 57.

See, also, 17 Cyc. pp. 940, 941.

§ 47. Rights of action in general.

Mode of levying execution on rights of action, see post, § 132.

[a] (*Sup.* 1854)

Choses in action are not subject to sale on execution.—*Shaw v. Aveline*, 5 Ind. 380.

[b] (*Sup.* 1881)

Code, § 438, providing that any debt or thing in action legally or equitably assignable may be levied on, when given up by the defendant, and sold on execution; and section 439, providing that the sheriff making the sale of any such debt or thing in action shall assign and deliver the same to the purchaser, and the assignment shall have the same effect as if made by the execution defendant at the time of making the levy thereon, and shall be delivered as so made,—when construed together, must be taken to mean that the debt or thing in action which may be given up by an execution defendant, and levied on and sold by the sheriff, and afterwards assigned and delivered by him, must be some tangible and well-identified cause of action, on which suit may be brought by the pur-

chaser in the same manner as might have been done by the execution defendant, and capable of being assigned and delivered to the purchaser, such as a paper writing signed by some third person, or a duly-itemized account or other chose in action, described upon or by some paper.—*Bay v. Saulspough*, 74 Ind. 397.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 117.

See, also, 17 Cyc. p. 971.

**§ 48. Instruments and securities for payment of money.**

[a] (Sup. 1830)

Promissory notes are not the subject of levy on execution.—*McClelland v. Hubbard*, 2 Blackf. 361.

[b] (Sup. 1843)

A note for the payment of money cannot, without the defendant's assent, be taken and sold on an execution.—*Johnson v. Crawford*, 6 Blackf. 377.

Whether the sale of a note on execution would be valid if authorized or assented to by the defendant, *quære*.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 118.

See, also, 17 Cyc. p. 971.

**§ 50. Ownership or possession of property.**

Persons against whom execution may issue, see ante, § 18.

Public property, see ante, § 22.

Sufficiency of sale to defeat execution creditors of vendor, see **VENDOR AND PURCHASER**, § 213.

Sufficiency of sale to sustain execution by creditors of purchaser, see **VENDOR AND PURCHASER**, § 216.

Supplementary proceedings, see post, § 304.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 119-136.

See, also, 17 Cyc. pp. 973-980; note, 23 L. R. A. 258.

**§ 51. — In general.**

[a] (Sup. 1818)

If goods purchased at constable's sale be taken from the vendee by virtue of a search warrant, that is no proof they were not the property of the execution debtor.—*Morgan v. Fencer*, 1 Blackf. 10.

[b] (Sup. 1854)

Where defendant in replevin claimed the property in pursuance of a constable's sale, and when the execution was issued and while it was in the constable's hands, the property was in the possession of the plaintiffs as their property, the execution never was a lien on the property and the levy was void and the sale to defendant inoperative.—*Louden v. Day*, 6 Ind. 7.

[c] (Sup. 1857)

The interest of a judgment debtor in real estate in his possession under a contract of purchase, the legal title being in his vendor, may be appropriated to satisfy a judgment in the mode prescribed by statute. 2 Rev. St. p. 152, § 519.—*Figg v. Snook*, 9 Ind. 202.

[d] (Sup. 1862)

The vendee's interest in property, sold subject to a condition to be performed within a definite time, the right of possession in the interval being in the vendee, is not liable to seizure and sale on execution.—*Hanway v. Wallace*, 18 Ind. 377.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 119, 124-136.

See, also, 17 Cyc. p. 973.

**§ 54. — Property in custody of agent or depositary.**

Supplementary proceedings, see post, § 306.

Town agent as owner of proceeds of town bonds, see **TOWNS**, § 48.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 122, 123.

See, also, 17 Cyc. p. 976.

**§ 55. Property in custody of the law.**

Property in possession of receiver, see **RECEIVERS**, § 78.

[a] (Sup. 1853)

Silver and bank notes, while in the sheriff's possession, are in the custody of the law, and are not subject to execution.—*Winton v. State ex rel. Ezra*, 4 Ind. 321.

[b] (Sup. 1853)

Money collected on execution, and paid by the sheriff to the clerk of the court, does not become the property of the execution plaintiff, nor as such subject to execution, till he has accepted it.—*Sibert v. Humphries*, 4 Ind. 481.

[c] (Sup. 1853)

Where judgment was recovered before a justice of the peace against a party who paid the amount in bank notes to the justice, it was held that the notes in the justice's hands were not subject to an execution against the judgment creditor.—*Hooks v. York*, 4 Ind. 636.

[d] (Sup. 1832)

Where A. brought replevin against the sheriff for goods levied on by virtue of an execution against B., and under the writ the goods were delivered to A., and while the action was pending the sheriff seized them by virtue of another execution against B., the second levy was unlawful, since the chattels were in the custody of the law.—*Pipher v. Fordyce*, 88 Ind. 436.

[e] (App. 1892)

Where, after an execution sale, a sheriff has a surplus left in his hands which a claim-

ant alleged belonged to him, while other creditors of the execution debtor sought to subject it to his debts, the claimant could not urge that the sheriff could not levy an execution in his hands for collection on said surplus, for, if the surplus was in fact the property of the debtor, the claimant had no right thereto, and, if it was the property of the claimant, the sheriff had no right in any event to levy execution against the debtor thereon.—*State ex rel. Danforth v. Ruff*, 33 N. E. 124, 6 Ind. App. 38.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 137-140.  
See, also, 17 Cyc. pp. 980-983; note, 53 Am. Dec. 264; note, 2 Am. St. Rep. 403.

#### § 57. Salaries of public officers or employés.

Supplementary proceedings to reach, see post, § 368.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 66, 117.

### III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

Copy of writ as documentary evidence, see EVIDENCE, § 340.

Defects ground for vacating sale, see post, § 248.  
In justice's court, see JUSTICES OF THE PEACE, § 135.

Necessity of issuance and return of execution against property to authorize execution against the person, see post, § 426.

Quashing or vacating writ, see post, §§ 159-163.  
Restraining execution against interest of heir, see EXECUTION, § 171.

Return, see post, §§ 333-347.

#### § 60. Authority of particular courts and officers.

Authority of court setting aside fraudulent conveyance to order sale under judgment of another court, see FRAUDULENT CONVEYANCES, § 316.

Authority to issue execution on judgment affirmed by appellate court, see APPEAL AND ERROR, § 1204.

Necessity for direction to clerk to issue, see post, § 76.

[a] (Sup. 1880)

An execution should be issued only by the clerk of the court in which the judgment was rendered.—*Robinson v. Clement*, 73 Ind. 29.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 146, 147.  
See, also, 17 Cyc. pp. 985-987.

#### § 61. Issuance on transcript of judgment of inferior court or justice of the peace.

Affidavit of nonpayment on application for execution on transcript, see post, § 72.

As judgment on which execution may be had, see ante, § 10.

Counties to which justice's judgment may be certified, see post, § 66.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 148-150.  
See, also, 17 Cyc. pp. 997-1002.

#### § 62. — In general.

Validity of sale under execution on transcript without affidavit of nonpayment, see post, § 275.

[a] (Sup. 1881)

An execution issued upon the transcript from a justice's court is not invalid because in the name of five plaintiffs, when there were only four named in the judgment; the names of these four being correctly given, and the judgment fully identified.—*Hume v. Conduitt*, 76 Ind. 598.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 148, 149.  
See, also, 17 Cyc. pp. 997-999.

#### § 64. Counties to which execution may issue.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 49½, 148, 151, 152.  
See, also, 17 Cyc. pp. 987-991.

#### § 65. — In general.

[a] (Sup. 1817)

A judgment was rendered by the circuit court of Sullivan county in favor of the plaintiff for a certain sum of money. An execution was afterwards issued on the judgment, directed to the sheriff of said county, commanding him that of the goods and lands in his bailiwick of the judgment debtor he should make the amount of the judgment. The sheriff levied said execution on the debtor's land in Vigo county, and sold the same by virtue of the execution. *Held*, that such levy and sale were void.—*Stephenson v. Doe ex dem. Wait*, 8 Blackf. 508, 46 Am. Dec. 489.

[b] (Sup. 1848)

Act 1838 authorized the issuing of a *fi. fa.* in the first instance, directed to the sheriff of any county in the state; and the defendant's real property in the county into which the execution was so sent, he having no personal property there, was subject to such execution.—*Raub v. Heath*, 8 Blackf. 575.

[c] (Sup. 1849)

On a judgment against joint defendants, execution may issue to any county in which one of them resides, without indorsement of the affidavit, required by Rev. St. 1843, that the defendants have not sufficient property in the county where they reside.—*Doe ex dem. Cooper v. Harter*, 1 Ind. 427.

[d] (Sup. 1850)

On a judgment against several joint defendants, an execution may issue, without an affidavit indorsed thereon that the defendants have not sufficient property in the county in which they reside to satisfy said judgment, to any county in which any one of the defendants may reside.—*Doe ex dem. Cooper v. Harter*, 2 Ind. 252.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 49½, 151.

See, also, 17 Cyc. p. 987.

**§ 66. — Docketing or filing transcript of judgment.**

[a] (Sup. 1843)

The transcript of a justice's judgment and proceedings can be certified, for the purpose of procuring execution against the real estate of the judgment debtor, only to the circuit court of the county in which the judgment was rendered.—*Stroud v. Davis*, 6 Blackf. 539.

[b] (Sup. 1884)

Execution issued by the circuit court of one county on a transcript of a judgment by the circuit court of another county is void.—*Shattuck v. Cox*, 97 Ind. 242.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 148, 152.

See, also, 17 Cyc. pp. 990, 991.

**§ 68. Death of creditor before issue of writ.**

[a] Where a judgment creditor dies before the issuance of execution, his administrator may have execution issued on the original judgment without revivor.—(Sup. 1875) *Armstrong v. McLaughlin*, 49 Ind. 370; (1879) *Mavity v. Eastridge*, 67 Ind. 211.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 154.

See, also, 17 Cyc. pp. 991-997; note, 61 L. R. A. 353.

**§ 69. Death of debtor before issue of writ.**

Death of debtor after issue of writ, see post, § 118.

Execution against deceased debtor and replevin bail, see post, § 177.

[a] (Sup. 1841)

After the death of the principal in a case where a judgment in the circuit court in a personal action was replevied, and within a year after the principal's death, a fi. fa. was issued on the judgment against the principal and bail, describing the latter as replevin bail. *Held*, that the execution was unobjectionable.—*Carnahan v. Brown*, 6 Blackf. 93.

[b] An execution issued on a judgment after the death of defendant is void.—(Sup. 1850)

*Whitehead v. Cummins*, 2 Ind. 58; (1881) *Faulkner v. Larrabee*, 76 Ind. 154.

[c] (Sup. 1881)

2 Rev. St. 1876, p. 197, art. 22, § 406, provides that, after the lapse of 10 years from the entry of judgment, an execution can be issued only on leave of court on motion after ten days personal notice to the adverse party, unless he be absent or a nonresident or cannot be found, when service may be made by publication. *Held*, that such section only applied to executions against a living judgment debtor, and did not authorize the issuance of an execution against lands of a deceased person on notice and motion.—*Decker v. Gilbert*, 80 Ind. 107.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 155-158.

See, also, 17 Cyc. pp. 991-997; note, 61 L. R. A. 353.

**§ 70. Notice and demand.**

[a] (Sup. 1840)

The terre-tenants named in a petition to have execution against the lands of a decedent should have notice of the petition.—*Elliott v. Moore*, 5 Blackf. 270.

[b] (Sup. 1861)

Notice by W. to S. to appear to a motion that he (W.) is going to make to obtain execution on a judgment which he holds against S., stating date, amount, etc., of the judgment, under 2 Rev. St. p. 129, § 406, is a sufficient complaint.—*Simpson v. Wilson*, 16 Ind. 428.

[c] (Sup. 1863)

Where plaintiff recovered judgment against a consolidated railroad company, and after judgment rendered the consolidation was dissolved by the courts, a motion for execution on the judgment on a notice served on each of the original companies was sufficient.—*Ketcham v. Madison, I. & P. R. Co.*, 20 Ind. 260.

[d] (Sup. 1864)

Under 2 Gav. & H. St. p. 230, § 406, the court may award execution upon an existing judgment, upon constructive service of notice against the defendants, but cannot render any personal judgment against them upon such notice.—*Gibson v. Green*, 22 Ind. 422.

[e] (Sup. 1881)

Where execution on a justice's judgment is procured by the replevin bail to issue within the time allowed by law for the stay thereof, without his filing the affidavit and notice required by 2 Rev. St. 1876, p. 635, such execution is unauthorized, and the constable may return it without making a levy.—*Palmer v. Galbreath*, 74 Ind. 84.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 159.

See, also, 17 Cyc. pp. 1027, 1031, 1032.

### § 71. Leave of court.

Motive for leave as civil action within statute relating to change of venue, see *VENUE*, § 36. Notice of application, see *ante*, § 70.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 148, 160-162.

See, also, 17 Cyc. pp. 1027-1032.

### § 72. — In general.

#### [a] (Sup. 1856)

In a suit of scire facias to obtain an execution on a judgment, a plea that the defendant was a householder, etc., and that the property was exempt from execution, was *held* bad for not averring that the defendant was a resident householder; such only being entitled to the privilege of the statute. A second plea—that no execution was issued, and that the defendant was ready and willing at the time of judgment, and still was, to surrender sufficient property to pay the debt and costs—was *held* bad in the court below, but good by this court.—*Hoagland v. Roe*, 8 Ind. 275.

#### [b] (Sup. 1861)

In proceedings to obtain execution on a judgment, the *ex parte* affidavit of the plaintiff is not proper proof of the nonpayment of the judgment. The party should be sworn on the hearing.—*Simpson v. Wilson*, 16 Ind. 428.

#### [c] (Sup. 1831)

Where a controversy as to the facts upon which the right of a replevin bail to execution rests is likely to arise, there is a manifest propriety in obtaining an order for execution before proceeding to enforce the judgment he has replevied for his own use; but there is no statutory provision requiring such an order to be first obtained.—*Jones v. Rhoads*, 74 Ind. 510.

#### [d] (Sup. 1834)

An application by one not the plaintiff for leave to issue execution, which avers that applicant owns the judgment, without setting out the facts supporting that conclusion, is sufficient.—*Martin v. Orr*, 96 Ind. 491.

#### [e] (Sup. 1835)

An affidavit for an execution upon a transcript of a judgment of a justice of the peace need not negative payment of the judgment to the clerk.—*Dehority v. Wright*, 101 Ind. 382.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 148, 160, 162.

See, also, 17 Cyc. p. 1027.

### § 73. — Lapse of time.

#### [a] (Sup. 1864)

It is not necessary, where leave is sought to issue execution on a judgment rendered more than five years ago, to set forth the judgment or a copy of it.—*Verden v. Coleman*, 23 Ind. 49.

#### [b] (Sup. 1870)

Under Acts 1867, p. 102, § 406, which provides for the issuing of execution on a judgment after the lapse of 10 years upon certain conditions, no pleadings are contemplated or required. A simple motion, to be heard by the court in a summary way, is all that is necessary.—*Plough v. Reeves*, 33 Ind. 181; *Same v. Williams*, Id. 182.

#### [c] (Sup. 1874)

Under an answer to a motion for leave to issue execution after the lapse of 10 years, denying that the judgment is unpaid, and pleading affirmatively that it has been paid and satisfied, the judgment defendant may show that it has been satisfied in consequence of the judgment plaintiff having received money on collaterals, or show that by negligence and failure to collect collaterals he has become chargeable with their amount.—*Reeves v. Plough*, 46 Ind. 350.

Upon a motion for leave to issue execution upon a judgment after the lapse of 10 years from its rendition, the judgment defendant may appear, and in answer to the motion plead payment or satisfaction of the judgment; but, whether he appear or not, no execution can issue unless it be established, by the oath of the judgment plaintiff or other satisfactory proof, that the judgment or a part thereof remains unpaid.—*Id.*

#### [d] (Sup. 1889)

Rev. St. 1881, § 675, which provides that after the expiration of 10 years execution can only issue on leave of court, relates wholly to the remedy and applies to the issuing of execution on all judgments, whether rendered before or after its enactment, and is clearly within legislative authority.—*Leonard v. Broughton*, 22 N. E. 731, 120 Ind. 536, 16 Am. St. Rep. 347.

#### [e] (App. 1892)

On motion for leave of court to issue execution on a judgment after 10 years from its entry, a finding that the judgment was rendered in the court in which the motion was made cures the omission from the motion of a statement to that effect.—*Van Devanter v. Nixon*, 5 Ind. App. 304, 31 N. E. 203.

On motion of a judgment creditor for leave of court to issue execution on a judgment after 10 years from its entry the fact that the lower court determined the question on pleadings cannot be the basis for an assignment of error on appeal by the judgment debtor, though Rev. St. 1881, § 675, relating to such motions, neither contemplates nor requires the use of pleadings.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 161, 162.

See, also, 17 Cyc. p. 1028.

### § 75. Time for issuance.

#### [a] (Sup. 1861)

Whether 2 Rev. St. 1852, p. 176, § 428, which provides that at the expiration of the



stay it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors, and the replevin bail, should not be construed to be directory as to the manner of the execution, rather than a direction to issue upon the expiration of the stay, *quære*.—*Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

[b] (Sup. 1862)

To determine the time when after the stay of a judgment, an execution may issue, the day on which the replevin bail is entered should be counted.—*Tucker v. White*, 19 Ind. 253.

[c] (Sup. 1863)

Under Prac. Act, § 405, authorizing execution to be issued at any time within five years after the entry of judgment, it may issue on request of the plaintiff at the term of the rendition of judgment without an order of court.—*Carpenter v. Vanscoten*, 20 Ind. 50.

[d] (Sup. 1863)

Code, § 527 (2 Gav. & H. St. p. 264), must be so construed as to require that the time during which a party to a judgment may be restrained from proceeding to collect it, by agreement of the parties entered of record, shall be certain and fixed, and not uncertain or determinable by future events.—*Ristine v. Early*, 21 Ind. 103.

[e] (Sup. 1876)

Execution upon a judgment of foreclosure of a note secured by mortgage may be issued in term time, immediately after signing the minutes of the judgment.—*Willson v. Binford*, 54 Ind. 569.

[f] (Sup. 1878)

The provision of 2 Rev. St. p. 6, § 22, that no process shall issue on any judgment until the proceedings have been read and signed, is merely directory. A single judgment may be read and signed separately from the other proceedings, and execution at once issued thereon.—*Jones v. Carnahan*, 63 Ind. 229.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 164–170.

See, also, 17 Cyc. pp. 1002–1008; note, 49 L. R. A. 233.

§ 76. *Præcipe or direction to issue.*

Priority of præcipe, as affecting priority of lien, see post, § 112.

[a] (Sup. 1861)

In the absence of a statutory provision to the contrary, the clerk has no authority to issue an execution without the direction of the plaintiff or his attorney.—*Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

Perhaps an execution defendant could not complain where a clerk issues an execution without authority from the plaintiff, if the plaintiff afterward acquiesces in, and ratifies

the act; nor could the plaintiff, in such case, object that the clerk had no authority to issue the execution.—*Id.*

[b] (Sup. 1863)

Under 2 Rev. St. 1852, p. 176, § 428, providing that, at the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors, it is not the duty of the clerk to issue the execution on the expiration of the stay, without an order from plaintiff or his attorney.—*Nunemacher v. Ingle*, 20 Ind. 135.

2 Rev. St. 1852, § 428, provides that at the expiration of the stay of execution it shall be the duty of the clerk to issue a joint execution against the property of all judgment debtors and the replevin bail. *Held*, that such statute should be construed as a direction as to the manner or form of the execution, when it issues, rather than a direction to issue on the expiration of the stay.—*Id.*

[c] (Sup. 1863)

Where there is an agreement, on the entry of judgment, that execution shall not issue within a specified period, except in a certain event, it is not the duty of the clerk to issue such execution without directions from plaintiff or his agent or attorney.—*State v. Wilkins' Adm'r*, 21 Ind. 216.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 146, 171, 174; 10 CENT. DIG. Clerks of C. § 95.

§ 78. *Form and requisites in general.*

One execution on two judgments, see ante, § 7.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 174.

See, also, 17 Cyc. p. 1009.

§ 81. *Description of and recitals as to parties.*

[a] (Sup. 1825)

Since an execution should not be issued on a joint judgment against one of the defendants alone, without an averment of the death of the other two and the survivorship of the defendant against whom execution was sought to be issued, an execution cannot be issued against the goods of a deceased joint judgment debtor, in the absence of an averment that the other two had also died, and that the third, against whose estate execution was sought to be issued, had survived them.—*Graham v. Smith*, 1 Blackf. 414.

[b] (Sup. 1828)

An execution commanding the sheriff that of the goods of A., B., and C. he make, etc., which D. had recovered against the said A. and others, is not objectionable for not stating the recovery to have been against the said defendants, A., B., and C.; the expressions being

substantially the same.—*McCoy v. Elder*, 2 Blackf. 183.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, § 177.  
See, also, 17 Cyc. pp. 1015-1017.

### § 83. Statement of amount.

[a] (App. 1898)

That an execution is for five cents more than the judgment does not render it void, or subject to collateral attack.—*Grim v. Adkins*, 51 N. E. 494, 21 Ind. App. 106.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, § 179.  
See, also, 17 Cyc. p. 1011.

### § 86. Directions as to property to be taken.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, §§ 182-184.  
See, also, 17 Cyc. pp. 1020, 1021.

### § 87. — In general.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, § 182.  
See, also, 17 Cyc. p. 1020.

### § 94. Seal.

Absence of seal as ground for collateral attack, see post, § 103.  
Amendment by addition of seal, see post, § 97.

[a] (Sup. 1839)

A circuit court in Indiana may adopt a scrawl as the seal of the court and an execution so executed is sufficiently sealed.—*Dixon v. Doe ex dem. Lasselle*, 5 Blackf. 106.

[b] An execution without a seal is not void, but merely voidable.—(Sup. 1884) *Rose v. Ingram*, 98 Ind. 276; (1890) *Warmoth v. Dryden*, 125 Ind. 355, 25 N. E. 433.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, § 189.  
See, also, 17 Cyc. p. 1025; note, 35 Am. Dec. 153.

### § 95. Indorsements.

Of levy of execution, see post, §§ 138-140.  
Of recognizance for stay on writ, see post, § 158.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, § 190.  
See, also, 17 Cyc. p. 1026.

### § 97. Amendment.

[a] (Sup. 1836)

If the execution on which land is sold varies as to the amount from the judgment, the purchaser, or one claiming under him, may have the execution amended by the judgment.—*Doe ex dem. Wilkins v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368.

[b] (Sup. 1838)

A mere clerical error in the amount of an execution is amendable.—*McCall v. Trevor*, 4 Blackf. 496.

[c] (Sup. 1852)

Clerical mistakes, made in the issuing of an execution, may be amended by the judgment.—*Hutchens v. Doe ex dem. Smith*, 3 Ind. 528.

[d] (Sup. 1884)

An execution which is voidable because of the absence of the seal may be amended at any time.—*Rose v. Ingram*, 98 Ind. 276.

FOR CASES FROM OTHER STATES,  
SEE 21 CENT. DIG. Execution, §§ 192-194.  
See, also, 17 Cyc. pp. 1043-1047; note, 101 Am. St. Rep. 550.

### § 99. Alias and pluries writs.

Exemptions, see EXEMPTIONS, § 130.  
Second execution against same property after replevin by claimant, see post, § 205.  
Simultaneous and successive executions, see ante, § 19.

[a] (Sup. 1845)

Where a fieri facias levied on certain property to satisfy a judgment was returned that the property was unsold for want of buyers, an alias fieri facias issued five months thereafter was void, since the first levy was not disposed of at the time the alias was issued.—*Macy v. Hollingsworth*, 7 Blackf. 349.

[b] (Sup. 1850)

A prior levy, not amounting to satisfaction of the judgment, having been made, the issue of a subsequent execution before a return to the former, or other proceedings to effect a vacation of the levy having been had, will be considered at most but an error which will render the execution voidable and not void.—*Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510.

[c] (Sup. 1853)

The issuing of an alias fi. fa. while the levy under the first is undisposed of cannot affect the lien of the judgment.—*Doe ex dem. Murphy v. Hayes*, 4 Ind. 117.

[d] (Sup. 1853)

Under Rev. St. 1843, a second fi. fa., levied while the lien of the first continues, is irregular, but does not prevent the issue of a vendi. on the return of the first, at any time before the expiration of the lien.—*Wolfe v. Wolfe*, 4 Ind. 255.

[e] (Sup. 1853)

If the sheriff makes the execution defendant his agent to keep the property levied upon, and it is lost by the latter's fault, or converted to his own use, this may be regarded as a sufficient disposition of the levy to authorize the issue of another execution.—*Cooley v. Harper*, 4 Ind. 454.

[f] (Sup. 1861)

The issuing of a subsequent void writ, while the original valid one is still in the officer's hands, does not vitiate action under the original.—*Ewing v. Hatfield*, 17 Ind. 513.

[g] (Sup. 1869)

Where a joint judgment has been rendered against persons not sureties as between themselves, and each has paid his share thereof, except one, on whose property an execution has been levied, and by direction of the judgment creditor such levy is released and the creditor causes an alias execution to issue, he may direct such balance to be made out of defendants who have so paid a part of the judgment.—*Starry v. Johnson*, 32 Ind. 438.

[h] (Sup. 1881)

An execution against A., B., and C. was levied on land of A., on which there was a prior judgment, but which was worth more than both judgments. It was sold to satisfy the former judgment, and, the execution on the latter being returned unsatisfied, an alias was issued which was levied on land of B. *Held*, that the levy of the first execution, until legally disposed of, satisfied that judgment, and that the sale did not divest that lien so that levy could be made on land of B.—*Neff v. Hagaman*, 78 Ind. 57.

[i] (Sup. 1884)

Where the complaint to set aside a fieri facias alleged a prior execution to have been levied on sufficient property, and returned, showing no disposition of the levy, an answer alleging that the levy was abandoned was bad on demurrer, since the creditor had no right to abandon the levy and issue a new execution without showing some necessity therefor.—*McIver v. Ballard*, 96 Ind. 76.

Where an execution was levied on sufficient property and returned, showing no sale or other disposition of the levy, an alias execution should be quashed.—*Id.*

[j] (Sup. 1887)

An alias execution issued by the clerk without the order of the execution plaintiff is not void, and a sale made thereon to the judgment creditor is valid. The failure of the clerk to comply with Rev. St. 1881, § 678, in that respect, is a mere irregularity.—*Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 46, 195–202, 324, 376, 607.

See, also, 17 Cyc. pp. 1034–1043.

### § 103. Collateral attack.

See ante, § 83.

[a] (Sup. 1878)

An irregularity in issuing execution can be taken advantage of only by the defendant,

and in a direct proceeding.—*Jones v. Carnahan*, 63 Ind. 229.

[b] (Sup. 1884)

An execution without a seal cannot be attacked collaterally, since it is not void, but only voidable.—*Rose v. Ingram*, 98 Ind. 276.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 206.

See, also, 17 Cyc. p. 1048.

### § 104. Presumption of validity.

[a] (Sup. 1889)

The facts that a sheriff advertised property, had it appraised, sold it, executed a certificate of purchase, returned the order of sale with proper receipts for the proceeds of sale, and executed a deed, are sufficient to show that the execution had properly issued, and was in the hands of the officer when he made the sale.—*Peters v. Banta*, 120 Ind. 410, 22 N. E. 95, 23 N. E. 84.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 191.

### § 105. Effect of invalidity.

Ground for collateral attack on sale, see post, § 258.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 207.

## IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

Defects affecting title of purchaser at sale, see post, § 275.

Duties of officers making levy on exempt property, see EXEMPTIONS, § 114.

Duties of sheriffs or constables, see SHERIFFS AND CONSTABLES, § 88.

Execution lien prior to assignment for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 337.

Jurisdiction of one state court to enjoin levy of execution issued by another state court, see COURTS, § 480.

Levy on exempt property as denial or infringement of right of exemption, see EXEMPTIONS, § 133.

Liability of sheriff or constable for delay in making levy or taking or delivering possession of property, see SHERIFFS AND CONSTABLES, § 107.

Liability of sheriff or constable for failure to levy or take or deliver possession of property, see SHERIFFS AND CONSTABLES, § 106.

Liability of sheriff or constable for making excessive levy, see SHERIFFS AND CONSTABLES, § 109.

Validity of lien as against trustee in bankruptcy, see BANKRUPTCY, § 190.

Waiver by proof of claim in bankruptcy, see BANKRUPTCY, § 364.

**§ 107. Creation and existence of lien.**

Execution levied on realty as creating lien on personalty, see post, § 111.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 200-212.

**§ 110. Commencement of lien.****[a] (Sup. 1845)**

A fieri facias binds the goods of the debtor from the time it is delivered to the sheriff, though the latter fail to indorse on it the time of such delivery.—*Johnson v. McLane*, 7 Blackf. 501, 43 Am. Dec. 102.

[b] Personal property of a judgment debtor is bound by an execution from the time the writ is placed in the hands of the officer for service.—(Sup. 1860) *Cones v. Wilson*, 14 Ind. 465; (1885) *Durbin v. Haines*, 99 Ind. 463.

**[c] (Sup. 1880)**

On the issue of whether the lien of an execution pursuant to which defendant had purchased certain lumber had attached to the lumber before title thereto became vested in plaintiff, a charge that, if the title to any part of the lumber did not pass to and vest in plaintiff before the lien of the execution had attached thereon, then as to such part of the lumber the jury must find for defendant, was proper.—*Stott v. Smith*, 70 Ind. 298.

**[d] (Sup. 1882)**

The lien of an execution is not dependent on a levy, but attaches at the time of its delivery to the officer, and when possession is taken under levy the lien relates back to the time of such delivery.—*Dixon v. Duke*, 85 Ind. 434.

**[e] (App. 1906)**

An execution is a lien on the judgment debtor's personal property from the time it comes into the proper officer's hands.—*Hubbard v. Security Trust Co.*, 38 Ind. App. 156, 78 N. E. 79.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 213-215.

See, also, 17 Cyc. pp. 1050-1052.

**§ 111. Property or interests affected, and extent of lien.****[a] (Sup. 1876)**

Where mill machinery belonging to two persons is put on and attached to realty belonging to one of them, but is treated and regarded by them as personalty, and an execution against the owner of such realty is levied thereon, he may demand that the realty be set off to him as exempt from execution, by an appraisement which will not include such mill property.—*Young v. Baxter*, 55 Ind. 188.

**[b] (Sup. 1900)**

An execution issued on a judgment against a debtor is not a lien on property purchased by, and in the possession of, another creditor be-

fore the issuance of the execution.—*Owens v. Gascho*, 56 N. E. 224, 154 Ind. 225.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 216-225.

See, also, 17 Cyc. pp. 1052, 1053.

**§ 112. Priorities between executions.**

Priority of judgment lien, as affected by date of execution, see JUDGMENT, § 784.

**[a] (Sup. 1838)**

The priority of executions levied on the same property by different officers depends on the time of the levy, and not on that of the delivery of the execution to the officer.—*McCall v. Trevor*, 4 Blackf. 496.

If the execution first levied be recalled, the lien of the execution subsequently levied stands in full force.—*Id.*

**[b] (Sup. 1848)**

If a judgment debtor acquires land subsequently to the rendition at divers times of several judgments against him, the executions subsequently issued and levied take preference in the order of their priority.—*Michaels v. Boyd*, 1 Ind. 259, *Smith*, 100.

**[c] (Sup. 1859)**

If, in an attachment suit, several claimants recover judgment and obtain several executions against the same property, some of them collectible without appraisement, a sale without appraisement, or for less than two-thirds of the appraised value, will be valid, as in such cases the sale must be on all the executions at once, no one of the judgments having priority.—*Shirk v. Wilson*, 13 Ind. 129.

**[d] (Sup. 1860)**

Where two writs against the same person are in the hands of the same officer, if plaintiff in the elder writ directs the officer not to levy the same, it will operate as a withdrawal or waiver of his prior lien, and make it the duty of the officer to levy any junior writ in his hands.—*Moore v. Fitz*, 15 Ind. 43.

**[e] (Sup. 1864)**

A delay of 26 days in issuing a writ of vendi, does not operate ipso facto to divest the lien of a levy on execution, in a race of diligence between execution plaintiffs.—*Zug v. Laughlin*, 23 Ind. 170.

The order of plaintiff that property levied on by a sheriff under an execution in his favor should remain in defendant's hands is constructively fraudulent, and void as against subsequent executions, which will be entitled to prior satisfaction.—*Id.*

**[f] (Sup. 1868)**

Where two writs against the same person are in the hands of the same officer, he must, unless otherwise directed, first levy the writ which first came into his hands.—*Bragg v. State ex rel. Davis*, 30 Ind. 427.

## [g] (Sup. 1870)

Where land sold on execution for less than the amount of the judgment on which such execution was issued is redeemed by the judgment defendant under Act 1861 (2 Gav. & II. St. p. 251), the priority of the lien of such judgment for the remainder of the amount thereof over other judgment liens continues as if such sale had not been made.—State ex rel. Allen v. Sherill, 34 Ind. 57.

## [h] (Sup. 1879)

Where property levied on was left with the owner with permission to sell, and another levy was placed on it, the first levy was void as against the second.—Wunderlich v. Roberts, 67 Ind. 421.

## [i] (Sup. 1884)

On precepes filed in immediate succession on judgments against the same defendant, rendered and signed the same day, executions were issued and delivered to the sheriff within one minute of each other. *Held*, that there was no priority, and that the executions should have been satisfied pro rata.—State ex rel. Clark v. Cisney, 95 Ind. 265.

## [j] (Sup. 1886)

In 1865, T. obtained a deed by which it was attempted and intended to convey certain real estate, including that in controversy, but, by mutual mistake of the parties and scrivener, the description did not include such real estate. In 1879 appellant obtained a sheriff's deed thereto on a sale on a judgment against T. in 1872. In 1875 appellee obtained a judgment against T.'s grantor, after he had parted with all interest in the real estate except the naked legal title, and in 1885 he obtained a sheriff's deed therefor, on a sale on said judgment made in 1884, but, at T.'s request, his grantor made a deed to his wife, correcting the mistake, in 1879, and she made a deed to appellant in 1884. T. and appellant have continued in possession. *Held*, that appellant's equity is superior, and he is entitled to have his title quieted as against appellee.—Wells v. Benton, 108 Ind. 585, 8 N. E. 444, 9 N. E. 601.

## [k] (Sup. 1888)

The delivery of an execution to an officer with instructions not to levy for a specified time suspends the lien of the execution during that time.—Syfers v. Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 226-240.  
See, also, 17 Cyc. pp. 1054-1063.

## § 113. Priorities between executions and other liens or claims.

Between execution and widow's allowance, see EXECUTORS AND ADMINISTRATORS, § 182.  
Liens for taxes, see TAXATION, § 509.  
Lien of bailee, see BAILMENT, § 18.

Priorities of mortgages, see CHATTEL MORTGAGES, § 138.

Title of purchaser at sale as against prior liens, see post, § 208.

## [a] (Sup. 1882)

An execution against a mortgagor in possession was levied on growing crops, but before sale the mortgagee, in a suit to foreclose, having shown that the mortgagor was insolvent, had a receiver appointed. *Held*, that the receiver acquired no rights to the crops as against the execution creditor.—Favorite v. Deardorff, 84 Ind. 555.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 241-248.  
See, also, 17 Cyc. pp. 1064-1067.

## § 115. Transfers of property pending or subject to execution.

Estoppel by assent to judicial proceeding, see ESTOPPEL, § 91.

Rights of purchaser at execution sale as affected by acceptance of mortgage thereafter, see CHATTEL MORTGAGES, § 138.

## [a] (Sup. 1838)

A sale of goods by an execution defendant, though bona fide and for value, if made after the delivery of the execution to the sheriff, does not affect the lien of the execution.—McCall v. Trevor, 4 Blackf. 496.

## [b] (Sup. 1858)

While an execution was in the hands of an officer, and the property in the hands of the execution defendant, the writ was a lien on his personal property in the county, and the sale of the property did not divest the lien.—Vandibur v. Love, 10 Ind. 54.

## [c] (Sup. 1873)

Where execution was issued on a judgment on the 13th day of May, and on the 25th day of the next July the execution defendant sold his interest in a field of corn growing on his lands, which had been planted and cultivated by tenants, and of which, by contracts with the tenants, he was to receive a portion when the corn matured in the field at cutting-up time, but each party was to save and take care of his own share, and the sheriff levied on the interest of the execution defendant on the 4th day of August thereafter, *held*, that the corn was subject to execution and sale as the property of the execution defendant; that the execution was a lien thereon from the time it came into the hands of the sheriff, and the subsequent sale of the corn by the execution defendant in no manner impaired such lien.—Lindley v. Kelley, 42 Ind. 204.

## [d] (Sup. 1881)

The owner of property levied on under execution may sell it, and the sale will be lawful, if otherwise valid, on payment of the execution.—Schenck v. Sithoff, 75 Ind. 485.

[e] (Sup. 1885)

Where the only property of a judgment defendant is exempt from levy, an execution in the sheriff's hands does not constitute a lien, and a mortgage of the exempt property by the debtor is valid as against the judgment creditor.—*Durbin v. Haines*, 99 Ind. 463.

[f] (Sup. 1890)

An execution being by Rev. St. 1881, § 689, a lien to the extent of the judgment debtor's interest from the levy, a finding in favor of the purchaser thereunder is proper, in an action to quiet title, as against plaintiff, to whom the debtor had previously executed a deed intended as a mortgage, though he executed a second deed after the levy.—*Hamilton v. Byram*, 122 Ind. 283, 23 N. E. 795.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 257-265, 377.

See, also, 17 Cyc. pp. 1068-1071.

### § 116. Duration of lien.

[a] (Sup. 1853)

Under Rev. St. 1843, p. 750, where execution is levied on property, and returned with an indorsement that the property is not sold for want of bidders, the lien continues, without an alias writ, until the return term next after the term to which the writ is returnable.—*Wolfe v. Wolfe*, 4 Ind. 235.

[b] (Sup. 1864)

Under 2 Gav. & H. Rev. St. p. 244, §§ 453, 454, when any property levied upon remains unsold, and the sheriff returns the execution and appraisal, stating in his return the failure to sell, and the cause of the failure, the lien of the levy upon the property shall continue. The continuance of the lien is not limited by time, but an unreasonable delay would be a matter of grave consideration in a race of diligence between execution plaintiffs.—*Zug v. Laughlin*, 23 Ind. 170.

[c] (Sup. 1888)

A lien on personalty, obtained under a levy made December 7, 1880, and kept alive by alias writs until July 14, 1883, from which time until April 21, 1885, no alias writ was issued, though the property was in the officer's hands all the time, is lost, under Rev. St. 1881, § 741, providing that the lien on personalty obtained by levy of an execution shall continue only 30 days from the return of the writ, unless an alias writ shall be issued.—*Wheeler v. Haines*, 114 Ind. 108, 15 N. E. 827.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 266-271.

See, also, 17 Cyc. pp. 1071-1076.

### § 118. Death of debtor after issue of writ.

[a] (Sup. 1844)

A lien obtained by a valid levy in execution is not destroyed by the death of defendant in execution pending the sale.—*Doe ex dem. Wolf v. Heath*, 7 Blackf. 154.

[b] (Sup. 1849)

A fi. fa. was levied on a dower estate, and the levy was set aside because a demand of personal property had not been first made. The order setting aside the levy provided that the execution should be a lien on the personal property. The sheriff returned the execution that the levy had been set aside, and that there was not time to make a new levy. Plaintiff directed a new execution to issue, without specifying what kind. A venditioni exponas issued, but before a sale was made defendant died insolvent. *Held*, that the execution was not a lien on her personal property.—*Jeanes v. Anderson*, 1 Ind. 492, Smith, 394.

[c] (Sup. 1853)

Where a fi. fa. has been levied on land in the lifetime of the execution defendant, the sale is valid, though on a vendi. issued after his death.—*Doe ex dem. Murphy v. Hayes*, 4 Ind. 117.

[d] (Sup. 1903)

Burns' Rev. St. 1901, § 2484, provides that no proceeding shall be instituted before the end of one year from the death of a decedent to enforce the lien of any judgment rendered against decedent in his lifetime, etc. Section 802 provides that the death of a defendant after the execution is placed in the hands of the sheriff shall not affect proceedings thereon, etc. *Held*, that section 2484 applies only to the institution of proceedings, and does not render invalid the enforcement against a decedent's property of an execution issued before his death.—*Blumenthal v. Tibbits*, 66 N. E. 159, 160 Ind. 70.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 273.

See, also, 17 Cyc. p. 1074; note, 61 L. R. A. 353.

### § 121. Control of writ, and directions to officer.

[a] (Sup. 1843)

The assignor has no control of an execution taken out by the assignee.—*State ex rel. Board of Com'rs v. Herod*, 6 Blackf. 444.

[b] (Sup. 1885)

After execution in the hands of the sheriff has been levied, he has the right to proceed with the collection thereof until legal steps are taken to arrest his action, and he is not bound to take even the receipts of the judgment plaintiff in settlement.—*Kirland v. Robinson*, 24 Ind. 105.

[c] (Sup. 1878)

Both plaintiff and his attorney may authorize the sheriff to depart from the regular and ordinary course of executing a writ of execution.—State ex rel. Share v. Boyd, 63 Ind. 428.

[d] (Sup. 1881)

A replevin bail cannot direct or control an execution issued on a judgment after the expiration of the stay of execution thereon, unless he has first paid off the judgment.—Palmer v. Galbreath, 74 Ind. 84.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 276.

See, also, 17 Cyc. pp. 1076, 1077; note, 95 Am. Dec. 425.

### § 123. Authority to levy.

Authority of constable to deliver unexecuted writ to his successor in office, see SHERIFFS AND CONSTABLES, § 84.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 278; 43 CENT. DIG. Sheriffs, §§ 100, 101, 103–106, 109–113.

See, also, 17 Cyc. pp. 1079–1081.

### § 124. Powers of officer in making levy.

Levy on real estate situated outside of county to which writ issued, see ante, § 65.

[a] (Sup. 1892)

Where an officer has in obedience to a writ and in its partial execution taken possession of property, he may on his return to complete the levy, if necessary, break open an outer door.—State ex rel. McPherson v. Beckner, 31 N. E. 950, 132 Ind. 371, 32 Am. St. Rep. 257.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 279.

See, also, 17 Cyc. pp. 1080, 1081.

### § 125. Time for levy.

[a] (Sup. 1883)

A levy pursuant to a writ of execution is in time, though made on the return day of the writ.—Lowry v. Reed, 89 Ind. 442.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 280, 281.

See, also, 17 Cyc. p. 1081.

### § 126. Mode and sufficiency of levy.

Paper levy as sufficient possession of officer to authorize replevin against heirs, see REPLEVIN, § 10.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 282–317.

See, also, 17 Cyc. pp. 1082–1112.

### § 127. — In general.

[a] (Sup. 1879)

Under 2 Rev. St. p. 205, § 433, the service of an execution is the communication of its

contents to the execution defendant, followed by a demand for its satisfaction, and the natural order thereof precedes its levy.—Terrell v. State ex rel. Grubbs, 66 Ind. 570.

[b] (Sup. 1879)

Where property levied on under execution is left by the officer in the hands of the execution defendant with the power of selling the same, the levy is invalid.—Wunderlich v. Roberts, 67 Ind. 421.

[c] (App. 1901)

If Rev. St. 1881, § 719, requires service of an execution on the debtor before levy thereof, failure to make such service was not material where it did not appear that, at the date of the issuance of the execution or the sale thereunder, the debtor was ready to pay the judgment or had other property which he might have designated and was ready to turn out on the execution.—Lahr v. Ulmer, 60 N. E. 1009, 27 Ind. App. 107.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 282–286.

See, also, 17 Cyc. p. 1082.

### § 128. — Demand and selection of property.

Failure of return to show demand for personal property as affecting title of purchaser of realty, see post, § 345.

Title of purchaser as affected by sale of property other than that turned out by debtor, see post, § 275.

[a] (Sup. 1870)

Where defendants in execution did not, when first called on, designate the property to be levied on, but finally did before a levy was made, the sheriff was not bound to allow plaintiff to designate the property.—State ex rel. Farnham v. Willis, 33 Ind. 118.

[b] Under a statute requiring the sheriff to levy first upon the property designated by the execution defendant, the sheriff is not bound to seek the execution defendant and demand from him such designation.—(Sup. 1873) Drake v. Murphy, 42 Ind. 82; (1881) Nelson v. Bronnenburg, 81 Ind. 193.

[c] (Sup. 1882)

The want of personal property or the direction of the debtor is sufficient reason for the sheriff having a general execution in his hands to levy the same on the debtor's real estate.—Nutter v. Fouch, 86 Ind. 451.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 287–289.

See, also, 17 Cyc. pp. 1083, 1084.

### § 129. — Personal property in general.

[a] (Sup. 1881)

Levy of execution on personalty without actual seizure is invalid, but the defect is cured by the officer afterwards taking posses-

sion of the property.—*Dawson v. Sparks*, 77 Ind. 88.

[b] (Sup. 1892)

The test of the validity of a levy on personal property is whether or not the acts of the officer under his writ have been such as would make him liable as trespasser but for the protection afforded by such writ.—*State ex rel. McPherson v. Beckner*, 31 N. E. 950, 132 Ind. 371, 32 Am. St. Rep. 257.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 290-304.

See, also, 17 Cyc. pp. 1085-1087; note, 38 Am. Dec. 709.

### § 132. — Rights of action in general.

[a] (Sup. 1892)

In an action to set aside the execution sale of a judgment, a complaint alleging that the judgment was not given up by the owner thereof, to be levied on, is sufficient under Rev. St. 1881, § 724, providing for levy on choses in action when so given up.—*Steele v. McCarty*, 130 Ind. 547, 30 N. E. 516.

An answer admitting that plaintiff did not give up the judgment for levy and sale, but alleging that it was levied on by her direction and with her consent, is bad on demurrer, as it fails to state matter sufficient to avoid the confession therein made.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 306, 307.

See, also, 17 Cyc. p. 1089.

### § 133. — Exhaustion of personalty before levy on realty.

Direction of debtor to levy on realty, see ante, § 128.

[a] A sheriff need not levy an execution on the personalty before proceeding to levy on the real estate of a debtor, if the personalty is so incumbered that it would probably not produce anything.—(Sup. 1855) *Detrick v. State Bank*, 6 Ind. 439; (1881) *Nelson v. Bronnenburg*, 81 Ind. 193.

[b] (Sup. 1862)

An execution defendant turned out to the sheriff two notes, and no other personal property. Afterwards he requested the return of these notes on conditions, and turned out no other personal property. The fact of such return was left to be inferred, and neither the amount nor value of the notes was shown. *Held*, that the sheriff's subsequent levy and sale of real estate would be presumed to be regular.—*West v. Cooper*, 19 Ind. 1.

[c] (Sup. 1873)

When an execution is issued on a judgment rendered against several persons, none of whom are sureties, the sheriff is not bound to exhaust the personal property of all defendants before levying on the real estate of any of them. He may levy on the real estate of

any one of the defendants who has no personal property.—*Drake v. Murphy*, 42 Ind. 82.

[d] (Sup. 1881)

A sheriff is not in fault for selling land on execution, if he has no knowledge of personal property on which he could levy, and there is no evidence that by the exercise of reasonable diligence he could discover such.—*Nelson v. Bronnenburg*, 81 Ind. 193.

[e] (Sup. 1882)

The vendee of a judgment debtor is entitled to an order requiring that the debtor's property be exhausted before an execution be levied on the land; but, if he fails to ask for such order, the sale may be valid.—*Sansberry v. Lord*, 82 Ind. 521.

[f] (Sup. 1900)

Under Burns' Rev. St. 1894, § 585, providing that, when a judgment is to be executed without relief from appraisement laws, it shall be so ordered in the judgment, an answer which set up as a defense to an action to set aside a sale of property without appraisement that the sale was made to satisfy a judgment for costs in an action, consisting of the fees of clerks and sheriffs of several counties, and was, therefore, collectible without relief from appraisement laws, constituted no defense, where a sale without appraisement was not ordered in the judgment.—*Bollman v. Gemmill*, 57 N. E. 542, 155 Ind. 33.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 308-310.

See, also, 17 Cyc. pp. 1090-1092.

### § 135. Levy on property taken under other process.

Second execution on same judgment, see ante, § 99.

[a] (App. 1892)

When property is in the actual or constructive possession of an officer by virtue of a levy, the receipt by him of a subsequent writ operates as a constructive levy thereof on the property so in his possession.—*Brown v. Loesch*, 29 N. E. 450, 3 Ind. App. 145.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 318, 319.

See, also, 17 Cyc. pp. 1095, 1096.

### § 136. Successive levies under same writ. Alias and pluries writs, see ante, § 99.

Levy under alias execution after levy under original writ, see ante, § 99.

[a] (Sup. 1843)

Where an execution has been levied on sufficient real property to satisfy the judgment, a levy on personalty under the same execution is void.—*Miller v. Ashton*, 7 Blackf. 29.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 320-324.

See, also, 17 Cyc. pp. 1096, 1097.



**§ 138. Indorsement or entry of levy.**

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 330-341.

See, also, 17 Cyc. pp. 1098-1101.

**§ 140. — Description of property.**

[a] (Sup. 1864)

A levy is not void for uncertainty which describes the goods seized as "all the stock in trade, of every kind and description, of the defendant B., now in the brick building on S. street, between M. and the river, including one fireproof safe and office fixtures," when taken in connection with the inventory and appraisal.—*Zug v. Laughlin*, 23 Ind. 170.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 334-341.

See, also, 17 Cyc. pp. 1099, 1100.

**§ 141. Inventory and appraisal.**

See, also, post, §§ 225, 226.

Appraisal as estoppel, see ESTOPPEL, § 91. Construction of return silent as to appraisal, see post, § 341.

Excess of land over acreage supposed when appraisal was made as ground for setting aside sale, see post, § 256.

Failure of return to show appraisal as affecting title of purchaser, see post, § 345.

In action to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, § 316.

Presumptions as to appraisal, see post, § 259.

Sale without appraisal as ground for collateral attack, see post, § 258.

Title of purchaser as affected by sale without appraisal, see post, § 275.

[a] (Sup. 1846)

Land sold after the passage of the act of 1842 on execution, on a judgment which was rendered in 1841 on a contract the date of which did not appear, was correctly valued under the appraisal law of 1841.—*Hunt v. Gregg*, 8 Blackf. 105.

[b] (Sup. 1847)

Act 1841 provided that the appraisal of land to be sold under execution shall be made by three disinterested freeholders to be selected by the sheriff. Act 1843 required one appraiser to be selected by the plaintiff, another by the defendant, and the third by the sheriff; or, in case the parties refused or neglected to select, the sheriff might appoint appraisers. *Held*, that a sale under an appraisal certified by only two appraisers should be set aside, since it was not within Act 1841, requiring three appraisers, and did not show the contingency of disagreement of parties mentioned in Act 1843.—*Harrison v. Stipp*, 8 Blackf. 455.

[c] Where a contract upon which a judgment is rendered was executed and is to be performed out of the state, the state law on the subject of appraisal cannot enter into and

constitute a part of such contract, and the appraisal law in force at the date of the judgment will govern the sale on execution.—(Sup. 1848) *Doe ex dem. Holman v. Collins*, 1 Ind. 24, Smith, 58; (1862) *Hutchins v. Barnett's Ex'r*, 19 Ind. 15.

[d] Where it does not appear when the contract on which a judgment is obtained was made, the appraisal law in force at the rendition of the judgment must control.—(Sup. 1850) *Morss v. Doe ex dem. O'Neal*, 2 Ind. 65; (1800) *Indiana Cent. Ry. Co. v. Bradley*, 15 Ind. 23.

[e] (Sup. 1850)

A sheriff's sale under a judgment obtained on a note executed after June 1, 1843, stipulating for a waiver of valuation and appraisal laws, is void, in the absence of anything to show that the consideration of the note was all advanced after the date mentioned, as required by Act Feb. 13, 1843.—*Doe ex dem. Vail v. Craft*, 2 Ind. 359.

[f] (Sup. 1851)

A. became replevin bail on a judgment against B., and A.'s property was afterwards sold on execution to satisfy the debt, and subsequently A. obtained judgment against B. for the amount made by the sale of his property, and B.'s land was sold to satisfy the same without appraisal. *Held*, that the sale of B.'s land without appraisal was right, since there was no law requiring the appraisal of land sold on execution when A. became bail.—*Tevis v. Doe*, 3 Ind. 129.

[g] (Sup. 1853)

If the law at the date of a contract on which judgment has been rendered did not require an appraisal before sale of property on execution, a sale without an appraisal is proper.—*Law v. Smith*, 4 Ind. 56.

[h] (Sup. 1854)

Scire facias was brought in the circuit court on a transcript of a judgment before a justice of the peace, and, on an execution issued on the scire facias, defendant's land was levied on and sold by the sheriff. *Held*, that such sale was within the exception contained in Acts 1841, p. 130, § 9, and was good without an appraisal of the land.—*Mercer v. Doe ex dem. Nutting*, 6 Ind. 80.

[i] (Sup. 1859)

Where property cannot be sold by the sheriff without appraisal, it cannot be legally offered for sale without appraisal. Such an offer would be a vain act, which no bidder could be expected to notice.—*Davis v. Campbell*, 12 Ind. 192.

Where a sheriff sold an estate in fee, after first offering the rents and profits, which had not been appraised, the sale of the fee was void, as the sheriff's offer to sell property which he could not legally have sold was of no effect.—*Id.*

## [j] (Sup. 1880)

The rents and profits of lands taken in execution must be appraised, unless the judgment is without relief, etc.; and the failure to make such appraisement is a fatal objection to sales made upon the execution.—*Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23.

## [k] (Sup. 1860)

A sale is void where one of the appraisers did not reside in the township where the lands levied on were situated.—*Richmond v. Marston*, 15 Ind. 134.

## [l] (Sup. 1860)

A householder, assisting in appraising property levied on, need not be sworn; there being no such provision in the statute authorizing the appraisement.—*Will v. Whitney*, 15 Ind. 194.

## [m] (Sup. 1861)

Three judgments were simultaneously rendered. Executions were placed in hands of sheriff all at the same time,—one subject to appraisement; other two, not. Sale of land was had without appraisement, and proceeds applied in full satisfaction of all the executions. *Held*, that the sale was valid.—*Robinson v. Bush*, 17 Ind. 517.

## [n] (Sup. 1863)

A note was executed in 1840, prior to the existence of any law on the subject of appraisement. Judgment was recovered thereon in 1845, after the taking effect of such law; but the judgment was silent as to the mode of its collection, and it was not required by any law then in force to specify the manner of its collection. Real estate was afterwards sold on execution without appraisement to satisfy the judgment, notwithstanding the law in force at the date of the judgment and sale required appraisement. *Held*, that the contract was not merged in the judgment in such sense as to prevent a reference to it to determine the rights of the parties in relation to the mode of collection, as to appraisement.—*Rawley v. Hooker*, 21 Ind. 144.

Act Feb. 11, 1843, known as the "Appraisement Law," provides that no property shall be sold on execution by virtue of any other process issued by any officer of this state for a less sum than its fair value at the time of such sale, after deducting all incumbrances thereon, to be ascertained by appraisement, etc. *Held*, that where a note was executed before, but judgment thereon was not recovered until after, the passage of said act, it was not necessary that the judgment should contain a direction to sell in accordance with said appraisement law.—*Id.*

Act Feb. 11, 1843, relating to the appraisement of property on a sale thereof under an execution, is invalid so far as it attempts to control the enforcement of contracts executed before its passage.—*Id.*

## [o] (Sup. 1864)

Where part of a judgment is directed to be collected without appraisement, and execution

issues, and the defendant consented to the sale being made without appraisement, he is precluded from thereafter setting up the invalidity of the sale for that cause.—*Stockwell v. Byrne*, 22 Ind. 6.

[p] A sale on execution without appraisement, where the law requires an appraisement, is void.—(Sup. 1864) *Evans v. Ashby*, 22 Ind. 15; (1865) *Fletcher v. Holmes*, 25 Ind. 458.

## [q] (Sup. 1870)

Where an injunction has issued to restrain a sheriff from proceeding with a sale of real estate in consequence of an irregularity in the appraisement, the court may order a new appraisement and dissolve the injunction.—*Thompson v. Bragg*, 32 Ind. 482.

## [r] (Sup. 1872)

Levy of an execution without notice to the debtor to appoint an appraiser is void.—*Evans v. Wadkins*, Wils. 114.

An appraisement of the rental value of real estate in gross for a term of years is not such an appraisement as will authorize the offer by the sheriff of the rents and profits.—*Id.*

Under Code, §§ 447, 450, both real and personal property are to be appraised in the same manner when execution is sought to be levied thereon, and appraisers are to be chosen in the same way.—*Id.*

Under the provisions of 2 Gav. & H. St. pp. 242, 243, relating to appraisements, the right of the execution defendant to select one of the appraisers extends to levies on realty as well as personal property.—*Id.*

## [s] (Sup. 1877)

Under 2 Rev. St. 1876, p. 211, § 447, requiring that disinterested householders be selected as appraisers of property seized under execution, one who has acted as an appraiser of real estate so seized is not competent to reappraise the same.—*Bowles v. Stout*, 60 Ind. 267.

## [t] (Sup. 1880)

Code (Rev. St. 1876, p. 210) § 445, provides that no property shall be sold on any execution or order of sale issued out of any court for less than two-thirds of the proposed value thereof, exclusive of liens and incumbrances. Section 381 (2 Rev. St. 1876, p. 188) provides that, when the judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment, and that, if demands subject to the appraisement laws are included in the same action with demands made payable without relief, the court may render separate judgment on such demands. The act to regulate the collection of judgments and sale of property on execution (Acts 1858, p. 39, 2 Rev. St. 1876, p. 188, note 5) in section 1 provides that all judgments recovered against certain named officers and persons for money collected and received in a fiduciary capacity and for the breach of any official duty or for money or other articles of value held in trust for an-

other shall be collected without benefit of the valuation or appraisal laws of the state. The act concerning promissory notes (Acts 1861, p. 145, 1 Rev. St. 1876, p. 636) in section 15 provides that, when any instrument of writing made within the state or elsewhere containing a promise to pay money without relief from valuation or appraisal laws, judgment shall be rendered and execution had accordingly. A note was given for a sum of money and the benefit of the valuation and appraisal laws was waived therein as also in a mortgage given to secure the payment of the note. *Held*, that the plaintiff succeeding in the action on the note and for foreclosure of the mortgage was entitled to a judgment to be executed without relief from valuation or appraisal, and execution should have been had thereon accordingly.—*Reily v. Burton*, 71 Ind. 118.

[u] (*Sup.* 1881)

A sheriff's sale of real estate is voidable, if not void, if made without appraisal, if the judgment does not so direct.—*Stotsenburg v. Stotsenburg*, 75 Ind. 538.

[v] (*Sup.* 1883)

After a levy of execution an appraisal was made of \$1,100, "on the supposition that the title to said lot is clear of incumbrances, but if there are any liens they are to be deducted from the above value." There were in fact liens to the amount of \$2,500. The land was sold for \$1 to the judgment plaintiff. *Held*, that the sale was void for want of a proper appraisal, under Rev. St. 1881, §§ 737, 738, requiring the appraisers to report the value of the property exclusive of incumbrances.—*Stumph v. Reger*, 92 Ind. 286.

[w] (*Sup.* 1884)

Under Acts 1879, p. 176, providing that where a junior judgment creditor, after redeeming from a sale under the prior judgment, has sued out execution, the officer "shall proceed first to levy on and sell the property redeemed," the officer was not bound to make an appraisal of the rents and profits of the property.—*Taylor v. Morgan*, 95 Ind. 456.

[x] (*Sup.* 1885)

An appraisal of lands sold under execution, being properly no part of the sheriff's return, when returned, is not even prima facie evidence.—*Coan v. Elliott*, 101 Ind. 275.

[y] (*Sup.* 1895)

Under Rev. St. 1894, § 746 (Rev. St. 1881, § 734), providing that in case of execution sales the land shall be appraised at its cash value at the time, "deducting liens and incumbrances," the fact that the appraisers, after fixing the value of the land and the amount of the incumbrances, failed to deduct the one from the other, does not invalidate the sale.—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

1 Burns' Ann. St. 1894, § 744, provides that no property shall be sold on execution for

less than two-thirds of the appraised cash value thereof. *Held*, that it is only what remains of the appraised cash value after deducting liens and incumbrances that forms the basis of ascertaining what is the two-thirds of the appraised cash value, and the fact that the appraisers stated the cash value and the incumbrances, but did not state the balance, was immaterial.—*Id.*

[z] (*App.* 1906)

An unimpeached stipulation in a note that it should be collectible without relief from valuation or appraisal laws entitles plaintiff to a judgment so collectible.—*Polley v. Pogue*, 38 Ind. App. 678, 78 N. E. 1051.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 342-358, 682.

See, also, 17 Cyc. pp. 1102-1111.

#### § 142. Amount of property taken, and excessive levy.

Sale in parcels, see post, § 224.

[a] (*Sup.* 1834)

A sale of 100 acres of good land by a sheriff to satisfy an execution on which only \$20 are due is a breach of duty, and will be set aside by a suit in equity.—*Reed v. Carter*, 3 Blackf. 376, 26 Am. Dec. 422.

[b] (*Sup.* 1836)

Where, on an execution for \$80, the sheriff sold a quarter section of land for \$567, and conveyed the same to the purchaser, and 10 years thereafter the execution defendant, without showing any cause for his delay, objected to the sale on the ground of excessive levy, the sale, under such circumstances, will be considered as made in good faith, and will not be disturbed.—*Doe ex dem. Wilkins v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368.

[c] (*Sup.* 1873)

Where real estate is levied on, and it can be divided, it is the duty of the sheriff to sell only so much as may be necessary to satisfy the execution, and a levy on a larger tract or parcel than is necessary, and the advertisement thereof for sale, cannot be objected to on the ground of an unreasonable or excessive levy.—*Drake v. Murphy*, 42 Ind. 82.

[d] (*Sup.* 1877)

The sale by a sheriff of more land than was necessary to satisfy the execution rendered the sale voidable merely, and not void.—*Weaver v. Guyer*, 59 Ind. 195.

[e] (*Sup.* 1895)

There is no law requiring a sheriff to levy on and sell more of the execution debtor's property than is needed to satisfy the execution in his hands, even though the property that he offers for sale is jointly incumbered with other

property of the execution debtor.—*Ross v. Banta*, 34 N. E. 865, 39 N. E. 732, 140 Ind. 120.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 359-363.  
See, also, 17 Cyc. pp. 1112-1114.

**§ 143. Irregularities and objections as to levy, and waiver.**

[a] (Sup. 1881)

One who directs an officer to levy an execution on property designated by him cannot complain that such levy is made.—*Murphy v. Hill*, 77 Ind. 129.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 55, 364-367.  
See, also, 17 Cyc. p. 1114.

**§ 144. Quashing or setting aside levy.**

Quashing or vacating writ, see post, §§ 159-163.

[a] (Sup. 1837)

Where a constable levied on goods of the judgment debtor under an execution, and delivered the goods to the creditor for safe-keeping, and before the return day the execution and levy were set aside, and the creditor refused to deliver the goods to the constable on demand, the constable was not entitled to maintain replevin therefor against such creditor, since by the vacation of the levy he lost all property rights in the goods which he had previously acquired by the levy.—*Walpole v. Smith*, 4 Blackf. 304.

[b] (Sup. 1852)

Where land is to be sold under execution on a judgment which has ceased by lapse of time to be a lien thereon, the proper proceeding to prevent the sale is by motion on the law side of the court to have the levy set aside.—*Stockwell v. Walker*, 3 Ind. 384.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 368-375.  
See, also, 17 Cyc. pp. 1115, 1116.

**§ 145. Operation and effect of levy in general.**

As satisfaction, see post, §§ 351, 352.

Effect of levy on right to issue alias writ against joint defendant, see ante, § 99.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 376-380.  
See, also, 17 Cyc. pp. 1116, 1117; notes, 27 L. R. A. 374, 1 L. R. A. (N. S.) 1062; note, 91 Am. Dec. 313.

**§ 146. Waiver, release, or abandonment, and discharge or extinguishment of levy or lien.**

As affecting subsequent executions, see ante, § 112.

Consent to sale by assignee in bankruptcy, see **BANKRUPTCY**, § 196.

Discharge of replevin bail by failure to maintain levy, see post, § 177.

Effect of appointment of receiver, see **RECEIVERS**, § 77.

Loss of lien by delay in enforcing execution, see ante, § 116.

[a] (Sup. 1845)

After A. and B. had exchanged horses, a fi. fa. against the former was delivered to the sheriff, and after such delivery A. and B. re-exchanged the horses. The sheriff afterwards levied the execution on both horses as A.'s property. *Held*, that such levy was not a relinquishment of the lien of the execution on the horse originally owned by B.—*Johnson v. McLane*, 7 Blackf. 501, 43 Am. Dec. 102.

[b] (Sup. 1879)

An execution plaintiff cannot abandon the levy to the injury of third persons.—*McCabe v. Goodwine*, 65 Ind. 288.

[c] (Sup. 1879)

A judgment creditor's direction to the constable holding the execution to delay proceedings thereon does not affect the lien thereof, where there are no junior liens on the debtor's personal property.—*Griffin v. Wallace*, 66 Ind. 410.

[d] (Sup. 1881)

A sheriff having in his hands a senior and junior execution has no power to discharge the lien of the junior execution after making a sale of the land under the senior execution.—*Neff v. Hagaman*, 78 Ind. 57.

[e] (App. 1892)

After payment of a portion of the money due on an execution, hired watchers in charge of property used in connection with a brewery, which had been levied on, were discharged by the officer, who left the property in the brewery, saying nothing about relinquishing his possession. He instructed his deputy to look after the property, and the deputy considered himself custodian for the officer. *Held* insufficient to show an abandonment of the levy.—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 381-394, 558.  
See, also, 17 Cyc. pp. 1117-1120.

**§ 147. Restoration of levy or lien.**

[a] (Sup. 1849)

A party who has lost a lien on personal property by reason of the issue of a wrong execution has no remedy in equity to have his lien restored or one created.—*Jeanes v. Anderson*, 1 Ind. 492, Smith, 394.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 395-397.  
See, also, 17 Cyc. p. 1121.

### § 148. Rights of officer as to property taken.

[a] (Sup. 1884)

On levy of an execution, an officer, while the execution remains in his hands, has such a special property in the goods levied upon as will enable him to maintain replevin for them or defend the possession against one not an owner.—*Dunkin v. McKee*, 23 Ind. 447.

[b] (App. 1892)

A sheriff or marshal who makes an authorized levy on goods under an execution or attachment acquires thereby a special property in the goods of the defendant on which the levy is made, and is entitled to the possession and control of the property, which by the levy is placed in the custody of the law.—*Brown v. Loesch*, 29 N. E. 450, 3 Ind. App. 145.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 398-401;  
47 CENT. DIG. Trover, §§ 127, 134.

### § 149. Custody and care of property.

Allowing property to go to waste as satisfaction of execution, see post, § 351.

Liability of sheriff or constable for loss of or injuries to property, see SHERIFFS AND CONSTABLES, § 119.

[a] (Sup. 1880)

An officer who levies an execution against a mortgagor upon the mortgaged property is, under Code, §§ 436, 460, entitled to its possession, as against the mortgagee, although, by the terms of the mortgage, the latter is to have possession in case the property is levied upon.—*Sparks v. Compton*, 70 Ind. 393.

[b] As against the mortgagee an officer is entitled to the possession of mortgaged chattels for the purpose of making a sale, under the statute authorizing the sale of such chattels subject to the mortgage to satisfy an execution against the mortgagor.—(Sup. 1881) *Emmons v. Hawn*, 75 Ind. 356; (1884) *Foster v. Bringham*, 99 Ind. 505.

[c] (App. 1892)

Where property subject to chattel mortgage is levied upon by a creditor of the mortgagor, after maturity of debt the officer may, for the purpose of the levying sale, take possession of the property, as against both mortgagor and mortgagee.—*Collins v. State ex rel. Hutchinson*, 3 Ind. App. 542, 30 N. E. 12, 50 Am. St. Rep. 298.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 398-434.  
See, also, 17 Cyc. p. 1121.

### § 150. Delivery of property to bailee or receiptor.

[a] (Sup. 1844)

Where horses seized on execution were delivered to B. by the constable to be kept, a tender by the execution debtor to B. of the

amount of the expense of keeping the horses, with a demand for their surrender, was properly refused.—*Davis v. Crow*, 7 Blackf. 129.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 402-405.  
See, also, 17 Cyc. p. 1123.

### § 151. Delivery of property on forthcoming or delivery bond.

Conveyance to indemnify replevin bail, see MORTGAGES, § 32.

Effect of giving delivery bond on right to claim exemptions, see EXEMPTIONS, § 93.

Estoppel by recital in delivery bond, see ESTOPPEL, § 22.

Priority of claim of surety against receiver, see RECEIVERS, § 152.

Reformation of bond, see REFORMATION OF INSTRUMENTS, § 11.

Right of surety to subrogation on payment, see SUBROGATION, § 7.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 406-433.  
See, also, 17 Cyc. pp. 1124-1135.

### § 152. — In general.

[a] (Sup. 1852)

A bond for delivery of property levied on under execution will not be held to have been fraudulently procured because of misrepresentations by the constable of the obligor's liability thereon, and its not being read or explained to him, it not appearing that the obligor was an illiterate person, or that he had not the means in his power of knowing the truth.—*May v. Johnson*, 3 Ind. 449.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 406, 407.

### § 153. — Requisites and sufficiency of bonds.

[a] (Sup. 1825)

Though St. 1823, p. 84, directs that the bond shall be made payable to the officer who levies the execution, yet a bond to the judgment creditor, if accepted by him, is valid by the common law.—*Thompson v. Wilson*, 1 Blackf. 358.

[b] Under Rev. St. 1888, p. 279, authorizing an officer seizing property on execution to release the same on a bond being given, conditioned for the delivery of the property, at the time and place named in such condition, to such officer, to be sold according to law, a bond conditioned for the delivery of goods taken under execution, which omitted to state to whom the property was to be delivered, was sufficient, since its legal effect was that the property should be delivered to the officer.—(Sup. 1841) *Eldridge v. Yantes*, 6 Blackf. 72; (1843) *Fitch v. Schenck*, Id. 401.

[c] (Sup. 1843)

A forthcoming bond, given to prevent the sale of property seized under a void levy of ex-

ecution, is void.—*Miller v. Ashton*, 7 Blackf. 29.

[d] (Sup. 1849)

An execution defendant may waive the insertion in a delivery bond executed by him of the provision that he may sell the goods at private sale, as prescribed by Rev. St. p. 1045, § 6, and the bond is not void by reason of such omission.—*Patterson v. Brown*, 1 Ind. 567, Smith, 288.

[e] (Sup. 1859)

Under 2 Rev. St. p. 139, § 458, providing that the sheriff, before he delivers property held by him under execution to the defendant giving a bond, shall cause it to be appraised, and the defendant may sell or dispose of it, paying the officer the full appraised value thereof, though the provisions permitting the defendant to dispose of the property should be inserted in the bond, it is for his benefit, so that, if he signs without its insertion, it is a waiver thereof, and the bond is good.—*Paul v. Arnold*, 12 Ind. 197.

[f] (Sup. 1874)

In an action on a delivery bond, where the bond is made payable to the constable, who has levied the execution, instead of to the execution plaintiff, and the bond shows that the execution was levied in favor of the plaintiff, the mistake, as a clerical error, may be corrected, and the bond reformed by making the execution plaintiff the obligee thereof.—*Bell v. Tanguy*, 46 Ind. 49.

[g] (Sup. 1877)

Under 2 Rev. St. 1876, p. 311, § 790, providing that no written undertaking taken by an officer in the discharge of the duties of his office shall be void for want of form or substance, or recital or condition, nor shall the principal or surety be discharged, but they shall be bound by such bond to the full extent contemplated by the law requiring the same, a delivery bond given to secure the release of personal property seized under an execution payable to the officer holding the writs, instead of to the creditor, is not invalid.—*Koeniger v. Creed*, 58 Ind. 554.

[h] (App. 1893)

An error in a delivery bond reciting that certain executions, which were issued by two justices, were issued by only one of them, is not fatal; Rev. St. 1881, § 1221, providing that no bond taken by any officer "shall be void for want of form or substance or recital or condition."—*Midland R. Co. v. Eller*, 7 Ind. App. 216, 33 N. E. 265.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 408-421, 427.

See, also, 17 Cyc. pp. 1124-1127.

§ 154. — Liabilities on bonds.

[a] (Sup. 1843)

It is no defense to a suit on a delivery bond that the officer who took it made a false and fraudulent representation to the defendant respecting the time when the property was to be delivered, and that the bond was not read to or by the defendant.—*Seeright v. Fletcher*, 6 Blackf. 380.

[b] (Sup. 1852)

A bond for delivery of property levied upon under execution will not be held to have been fraudulently procured because of previous misrepresentations by the constable as to the obligor's liability thereon, and its not being read or explained to him, where it did not appear, that the obligor was an illiterate person, or that he had no means of knowing the truth.—*May v. Johnson*, 3 Ind. 449.

[c] (Sup. 1877)

It is a good defense to an action on a delivery bond given to secure the release of personalty seized under executions that the property levied on was, at the time of the levy and the execution of the bond, the property of a third person who has since taken possession of the same.—*Koeniger v. Creed*, 58 Ind. 554.

[d] (App. 1893)

In an action on a delivery bond, defendant is not excused from a subsequent delivery by the fact that on the day named in the bond for the return of the property a temporary injunction, procured by defendant, was in force. He could not thus take advantage of his own wrongful act.—*Midland R. Co. v. Eller*, 7 Ind. App. 216, 33 N. E. 265.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 421-424.

See, also, 17 Cyc. pp. 1129, 1130.

§ 155. — Actions on bonds.

Competency of officer levying execution as witness to show value, see WITNESSES, § 111. Motion to make pleading more definite and certain, see PLEADING, § 367.

[a] (Sup. 1829)

In debt on a bond for the delivery of goods taken on execution which had issued against a judgment debtor and his replevin surety, and on judgment on demurrer for plaintiff, the measure of damages, if they did not exceed the penalty of the bond, was the amount due on the original judgment, with interest and costs; but the assessment cannot exceed the penalty.—*McCoy v. Elder*, 2 Blackf. 183.

[b] (Sup. 1832)

An omission to aver the value of the property in a declaration on a delivery bond is not cause for a general demurrer.—*Hawkins v. Johnson*, 3 Blackf. 46.

Alleging as a breach that the property was not delivered on the day specified in the condition, nor at any other time since the delivery

bond was executed, is sufficient on general demurrer.—Id.

[c] In an action on a delivery bond, the execution defendant is liable on the bond for enough to satisfy the execution and 10 per cent. additional.—(Sup. 1833) *Mitchell v. Denbo*, 3 Blackf. 259; (1879) *Hunter v. Brown*, 68 Ind. 225.

[d] (Sup. 1840)

In debt on a delivery bond, a plea that the defendants have always been, and still are, ready to deliver the goods according to the condition of the bond, is bad.—*English v. Finicey*, 5 Blackf. 298.

In debt on a delivery bond, the plea was that the defendants delivered the goods on the day, at the place, and to the constable in the condition of the bond mentioned. A replication in denial was *held* sufficiently certain.—Id.

[e, f] Where a bond for the delivery of property under execution was conditioned for the delivery of the property at a time and place named therein, but omitted to state "to whom" the property was to be delivered, a declaration on such bond which did not aver that the property had not been delivered to the sheriff was fatally defective.—(Sup. 1841) *Eldridge v. Yantes*, 6 Blackf. 72; (1843) *Fitch v. Schenck*, Id. 401.

[g] (Sup. 1845)

In debt on a delivery bond, the condition recited the *fieri facias*, but not the judgment. The pleas were no consideration, that the bond was obtained by fraud, covin, and misrepresentation, and payment of the judgment before the execution issued. *Held*, on general demurrer, that the pleas were good.—*Atkinson v. Starbuck*, 7 Blackf. 420.

[h] (Sup. 1845)

In debt on a delivery bond, a plea relying on the agreement of the plaintiff, dispensing with the defendant's performance of the condition of the bond, is bad.—*Woodruff v. Dobbins*, 7 Blackf. 582.

[i] (Sup. 1846)

In an action on a delivery bond, a declaration setting up a judgment in favor of two of the plaintiffs, but none in favor of the third, was fatally defective, since it must show a *prima facie* legal title in all of them to sue.—*Strange v. Lowe*, 8 Blackf. 243.

In an action on a delivery bond, the declaration must set out a judgment, etc., and an execution, showing that the sheriff was authorized to seize the property and take the bond.—Id.

[j] (Sup. 1849)

In an action on a delivery bond, the damages allowed by statute (Rev. St. p. 745, § 386) do not authorize damages being given for the costs recovered in the suit in which the

bond was given.—*Patterson v. Brown*, 1 Ind. 567, *Smith*, 288.

[k] (Sup. 1857)

Where L. and T. recovered judgments against M. at the same time, and the sheriff simultaneously levied upon personal property of M., who executed a joint delivery bond, with a surety, but upon the day appointed refused to deliver the property, whereupon the sheriff, with his executions, returned the bond forfeited, it was *held* that L. and T. were properly joined in an action upon the bond.—*Mandlove v. Lewis*, 9 Ind. 194.

[l] (Sup. 1877)

Where a delivery bond is executed to secure the release of personal property which has been seized on several executions having the same priority, against the same execution debtor, and in favor of different execution creditors, the latter may, on a breach of its condition, maintain a joint action on the bond.—*Koeniger v. Creed*, 58 Ind. 554.

[m] (Sup. 1879)

Where a delivery bond given by a defendant in execution specifies the time and place for the delivery of the property which is the subject of the bond, the sheriff need not make any demand at said time and place as a prerequisite to an action on the bond.—*Hunter v. Brown*, 68 Ind. 225.

The allegation, in an action on a delivery bond, that the execution defendant had failed to "pay the cash value" of the property, which had been duly appraised, was equivalent to an allegation of his failure to pay the "appraised value."—Id.

A complaint on a delivery bond, alleging that "said execution remains unsatisfied," sufficiently shows that it is unpaid.—Id.

[n] (App. 1893)

Where an execution defendant gives a delivery bond to enable it to retain possession of certain property levied on under execution, and also unsuccessfully seeks to enjoin the sale of such property under the levy, on the dissolution of a temporary restraining order granted pending appeal from the refusal of the injunction, if defendant fails to return the property, the execution creditor may sue on the bond without waiting for the expiration of the time within which defendant may move for a rehearing of the appeal.—*Midland R. Co. v. Eller*, 7 Ind. App. 216, 33 N. E. 265.

In an action on a delivery bond given in proceedings under an execution, the complaint must show valid judgments in favor of the several plaintiffs, and allegations merely that each of the plaintiffs "recovered judgment," and that afterwards executions issued, were insufficient, as not being equivalent to the requirement under Rev. St. § 369, providing that it shall be sufficient to allege that judgment was "duly given or made."—Id.

Rev. St. 1881, § 1518, provides that "in suits on a delivery bond the amount due on the execution, if the property is worth so much, (if not, the value of the property,) and, in both cases, ten per cent. in addition, shall be the measure of damages." *Held*, that the 10 per cent. is recoverable on the amount due on the execution, and not on the principal alone.—*Id.*

In an action on a delivery bond given to a constable by the execution creditor, it is not necessary that the bond should be indorsed "Forfeited," as provided by Rev. St. 1881, § 747, for bonds given to sheriffs.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 425-433;

8 CENT. DIG. Bonds, § 145.

See, also, 17 Cyc. pp. 1131-1133.

**V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.**

Conveyance to indemnify replevin bail, see MORTGAGES, § 32.

In justice's court, see JUSTICES OF THE PEACE, § 135.

Laws relating to stay of execution as impairing obligation of contract, see CONSTITUTIONAL LAW, § 179.

Mortgage given to stay execution, see MORTGAGES, § 23.

**§ 158. Stay of execution.**

Capacity of married women to execute bond for stay on execution, see HUSBAND AND WIFE, § 87.

Creditor's direction to delay proceedings as discharging lien, see ante, § 146.

Liabilities on bonds, see post, § 177.

On judgment against personal representative, see EXECUTORS AND ADMINISTRATORS, § 454.

Remedy by stay as preventing relief in equity, see post, § 171.

Sale on credit where unable to furnish security for stay, see post, § 227.

Subrogation of surety on bond to stay execution to rights of judgment creditor, see SUBROGATION, § 36.

Suspension of lien by direction to delay levy, see ante, § 112.

Validity of statute authorizing body execution after expiration of stay, see post, § 422.

**[a] (Sup. 1840)**

A judgment rendered before October 1, 1839, could not be replevied under the statute of 1840.—*Conaway v. Conaway*, 5 Blackf. 471.

**[b] (Sup. 1843)**

It is no objection to a replevin bond that, in reciting the judgment on which it is predicated, it omits a credit entered on the judgment.—*Doe ex dem. Burge v. Cunningham*, 6 Blackf. 430.

**[c] (Sup. 1850)**

An agreement of the maker of a note to pay it, without relief from the stay laws, does not authorize a judgment without stay of execution.—*Develin v. Wood*, 2 Ind. 102.

**[d] (Sup. 1850)**

Under Rev. St. pp. 737, 738, a recognizance indorsed on an execution and duly returned to the clerk's office has the force and effect of a judgment, upon which an execution may issue.—*Doe ex dem. Ingram v. Allen*, 2 Ind. 166.

**[e] (Sup. 1850)**

To give a surety the benefit of the statute of 1839 relative to stay of execution, the judgment and execution must show that he was a surety.—*State v. Williams*, 2 Ind. 175.

**[f] (Sup. 1851)**

The fact that a recognizance for a stay of execution was not written immediately under the entry of judgment, as required by statute, furnished no sufficient ground for setting it aside, as the statute was directory only.—*Williams v. Beisel*, 3 Ind. 118.

A. B. recovered a judgment in the Lagrange circuit court against C. D., and in the vacation of the court immediately following, one E. F. acknowledged himself replevin bail for the stay of execution thereon, as follows: "A. B. v. C. D. Comes now E. F., and acknowledges himself replevin bail and security for the payment of the above judgment at the expiration of the time allowed by law for the stay of execution. [Signed] E. F." This entry was entitled in the same manner as the judgment, but several entries intervened on the order book between it and the entry of judgment. E. F., over five years after he had executed the recognizance, moved to set it aside as void. *Held*, that the recognizance was substantially in the form required by the statute.—*Id.*

**[g] (Sup. 1854)**

After the expiration of the period allowed by law for the stay of execution, an entry of replevin bail then made has not the force of a judgment, and will not support an execution.—*Osborn v. May*, 5 Ind. 217.

**[h] (Sup. 1854)**

Acts 1840, p. 40, § 3, permitting a further stay on existing executions, being constitutional, a party who had entered himself replevin bail for such additional stay, and against whom a fi. fa. was issued after the expiration of the six months allowed by the former existing law, was entitled to injunction restraining the sale.—*Strong v. Daniel*, 5 Ind. 348.

**[i] (Sup. 1855)**

A record entry will not operate as a valid recognizance of replevin bail, unless it show upon its face that it is such.—*Montgomery v. Pierson*, 7 Ind. 97.

That a judgment creditor does not object to the terms of an entry made by a third per-



son on the order book by which the latter acknowledged himself secured for the payment of the judgment debt and submitted to a stay of execution until the expiration of a year from the date of entry was not a waiver of an objection that the entry was insufficient as a recognizance of replevin bail.—*Id.*

A judgment having been rendered February 25, 1840, a third person appeared before the clerk on March 12, 1840, and executed a writing under seal on the order book by which he acknowledged himself secured for the judgment debt, interest, and costs accrued, accruing, and to accrue within 12 months from and after the first of March, 1840. *Held*, that the writing was not a recognizance of replevin bail under Rev. St. 1838.—*Id.*

[l] (Sup. 1858)

Though the defendant in a judgment of foreclosure rendered for the full amount due and to become due is entitled to a stay on each installment as it becomes due on entering the proper replevin bail, an order providing "that, upon replevin bail being given for the amount of the first note and interest thereon, and costs, no further bail or stay be required until further demand be made in the premises," is not erroneous, since under such order, when any installment becomes due, previous ones having been paid, defendant will be entitled to give replevin bail for the installment and thereby stay the execution.—*Allen v. Parker*, 11 Ind. 504.

[k] (Sup. 1872)

A complaint alleged that A. recovered a judgment against B. and the defendant, and the court found that the defendant was the surety of B., and ordered that the property of B. should be first exhausted, and that the judgment should not be replevied unless the replevin bail would undertake to discharge the judgment if it could not be made from the property of B.; that B. was then insolvent and left the state, and an execution issued, and the defendant requested the plaintiff to become his replevin bail; that plaintiff offered to loan him the money, but the defendant declined, alleging that he desired to delay the execution plaintiff; and the plaintiff, then, in ignorance of the special order in the case, became replevin bail, and, relying upon the fraudulent representations of the defendant, did not read the instrument, believing it to be the ordinary obligation of a surety; that an execution was afterward issued, and he was compelled to pay the judgment, and he demanded judgment for the amount against the defendant. It was shown on the trial by the record that judgment was taken in the case against B. and the defendant by default, and no issue of suretyship was made, nor was there objection to bail being given. *Held*, that the finding of the court and order as to execution and replevin bail were irregular.—*Laidla v. Loveless*, 40 Ind. 211.

[l] (Sup. 1881)

2 Rev. St. 1876, p. 190, § 385, providing that the party confessing judgment shall at the time make affidavit that the debt is just and owing, and that such confession was not made for the purpose of defrauding creditors, does not require any affidavit in connection with the contract and entry of replevin bail, as such bail is for the payment of the debt of another already in judgment and excluding inquiry concerning the validity.—*Ensley v. McCorkle*, 74 Ind. 240.

Under Rev. St. 1876, p. 202, § 421, providing that the bail for stay of executions may be taken and approved by the clerk, and recognizance entered of record, at any time before the term of stay of execution expired, there being no formal approval, or attestation of such entry, required by the clerk, it is sufficient proof of the clerk's approval where such entry stands upon the docket.—*Id.*

[m] (Sup. 1881)

Under Rev. St. 1881, §§ 690, 691, 697, providing that a recognizance "shall be for the payment of the judgment, interest, and costs," a recognizance of replevin bail for less than the whole of the judgment, interest, and costs is void.—*Sterne v. McKinney*, 79 Ind. 578.

[n] (Sup. 1881)

Under Rev. St. 1876, § 420, providing that undertakings in recognizance shall be for the payment of the judgment, interest, and costs, a judgment debtor must comply substantially with the provisions, and cannot, by procuring bail for one-half the amount of a judgment against him, obtain a stay of execution.—*Vincennes Nat. Bank v. Cockrum*, 80 Ind. 355; *Same v. Hargrove*, *Id.* 364.

[o] (Sup. 1895)

An ex parte order of court procured by the clerk forbidding the issuance of an execution on a judgment procured by plaintiff without notice or service of process on him was void as to him.—*Curran v. Abbott*, 40 N. E. 1091, 141 Ind. 492, 50 Am. St. Rep. 337.

[p] (App. 1900)

Where a debtor, to delay the collection by his creditor of his claim, causes another to bring an action against his creditor, wherein he (the debtor) is joined as a garnishee, he is not entitled to a stay of execution, without bail, on a judgment against him, and in favor of his creditor, in an action brought by the latter against him subsequent to the garnishment proceedings, pending the determination of the action wherein garnishment was issued, to the extent of the amount claimed by the plaintiff in the garnishee proceedings, where the judgment exceeds that amount.—*Nevian v. Poschinger*, 55 N. E. 1033, 23 Ind. App. 695.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 442-465.  
See, also, 17 Cyc. pp. 1135-1151; notes,  
13 Am. Dec. 493, 49 Am. Dec. 513; note,  
127 Am. St. Rep. 707.

**§ 159. Quashing or vacating writ.**

Opening or vacating sale, see post, §§ 246-254.  
 Quashing or setting aside levy, see ante. § 144.  
 Remedy by motion to set aside as preventing relief in equity, see post, § 171.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 466-483.  
 See, also, 17 Cyc. pp. 1152-1163; note, 15 Am. Dec. 92.

**§ 162. — Jurisdiction.**

[a] (Sup. 1859)

Where the setting aside of an execution is all the relief to which a party is entitled, it must be asked for in a court of law.—*Murphy v. Blair*, 12 Ind. 184.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 472.  
 See, also, 17 Cyc. p. 1157.

**§ 163. — Proceedings and determination.**

[a] (Sup. 1820)

Notice of a motion to quash an execution must be given to the opposite party; and, if allowed without notice, the decision will be reversed.—*Cline v. Green*, 1 Blackf. 53.

[b] (Sup. 1862)

In a proceeding to set aside an execution, the execution is not the foundation of the action, in the contemplation of the Code, requiring a copy to be filed with the complaint.—*Fuller v. Indianapolis & C. R. Co.*, 18 Ind. 91.

[c] (Sup. 1895)

Where a motion by the sureties on a replevin bond to quash an execution issued on a judgment rendered on the bond, on the ground that they were not liable on the bond, is denied, they cannot again question their liability thereon.—*Parker v. Obenchain*, 140 Ind. 211, 39 N. E. 809.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 473-483.  
 See, also, 17 Cyc. pp. 1157-1163.

**§ 169. Injunction.**

See JUDGMENT, § 887.

Appellate jurisdiction of actions to enjoin, see COURTS, § 220 (2).

As constituting collateral attack on judgment, see JUDGMENT, § 521.

Conclusiveness of adjudication, see JUDGMENT, § 735.

Equitable relief against judgment, see JUDGMENT, §§ 403-467.

Estoppel of surety in replevin bail to set up invalidity of statute, see CONSTITUTIONAL LAW, § 43.

In justice's court, see JUSTICES OF THE PEACE, § 135.

Jurisdiction of one state court to enjoin collection of execution issued by another state court, see COURTS, § 480.

Right of action by administrator of replevin bail, see EXECUTORS AND ADMINISTRATORS, § 129.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 497-539.  
 See, also, 17 Cyc. pp. 1169-1197; note, 30 L. R. A. 98, 104, 105, 125; note, 111 Am. St. Rep. 97.

**§ 170. — In general.**

[a] (Sup. 1872)

To obtain an injunction to prevent the levy of an execution, it must be shown that the execution is in the hands of an officer, who threatens or is about to levy it illegally.—*Elson v. O'Dowd*, 40 Ind. 300.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 497, 519;  
 30 CENT. DIG. Judgm. §§ 786, 789.

**§ 171. — Grounds.**

[a] (Sup. 1822)

An execution improvidently issued will be stayed on motion at law, and chancery will not interfere unless it be until the motion can be made.—*Lasselle v. Moore*, 1 Blackf. 226.

[b] (Sup. 1834)

A sale of complainant's personal property under an execution against a third person will not be enjoined unless the remedy at law, in damages is shown to be inadequate.—*Henderson v. Bates*, 3 Blackf. 400.

[c] (Sup. 1846)

Where an execution has been issued on a judgment and levied on real estate, and third persons enter themselves replevin bail in the case on the order book of the circuit court, if the recognizance of bail is objectionable, the third persons' remedy is by motion, on the law side of the court, to set it aside, and not by injunction against an execution issued thereon.—*Waynick v. Connelly*, 8 Blackf. 75.

[d] (Sup. 1852)

Upon a bill in chancery by a replevin bail to enjoin the proceedings upon an execution which had been levied on property of the complainant, on the ground that a prior execution, issued on the judgment, had been levied on property of the principal, a bond for the delivery of the property forfeited, and a judgment recovered against the principal and surety on the bond upon which an execution had been issued, and a part of the judgment collected, but not credited, it was held that the proper remedy was to have made a motion in the circuit court to set aside the execution.—*Cline v. Lowe*, 3 Ind. 527.

[e] (Sup. 1853)

Rev. St. 1843, c. 46, § 130, provides that "no injunction shall be granted to stay proceedings after judgment" unless the complainant files a bond in a penalty sufficient to pay the judgment. Section 133 declares that in all

cases not specified in the preceding sections the party obtaining an injunction shall give a bond in such a penalty as the court may require. *Held* that, where the complainant sought an injunction against the levy of execution on property not subject thereto, the amount of the bond was governed by the latter section, and might be less than the amount of the judgment, since the complainants were not seeking a stay of execution, but merely to prevent the levy of execution on property not subject thereto.—*State Bank v. Macy*, 4 Ind. 362.

[f] (Sup. 1854)

A purchaser of land under a junior judgment, on which the lien of a prior judgment existed, may have the sale of the land purchased by him enjoined until the other property of the debtor, levied upon to satisfy the prior judgment, has first been exhausted.—*Russell v. Houston*, 5 Ind. 180.

[g] (Sup. 1854)

A bill in equity will lie to enjoin a sale on an execution, obtained by a creditor of A. and levied upon what was claimed to be his interest in the estate of his father, who had died intestate, leaving real estate, but who, before his decease, had made an advancement to A. exceeding what would have been his portion of his father's estate.—*Dyer v. Armstrong*, 5 Ind. 437.

[h] (Sup. 1864)

When execution is issued upon an erroneous judgment of the Supreme Court, the remedy of the aggrieved party is not by injunction in the common pleas, but by motion in the Supreme Court to set aside the judgment and execution.—*Macy v. Lloyd*, 23 Ind. 60.

[i] An owner of land has a right to enjoin its sale upon a judgment rendered against another person.—(Sup. 1866) *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; (1885) *Petry v. Ambroscher*, 100 Ind. 510.

[j] Where an execution has been issued on a judgment which is confessedly right as to part of its amount, the execution defendant cannot enjoin the collection thereof, without first paying or tendering the part admitted to be right.—(Sup. 1870) *Baragree v. Cronkhite*, 33 Ind. 192; (1886) *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414.

[k] (Sup. 1874)

An injunction will be granted to restrain a sheriff from selling property sold by an execution defendant, after the issuing of the execution, until other property of the defendant subject to execution shall be exhausted; but it will not be granted on the ground that the sheriff, since the sale, has wrongfully permitted the execution defendant to remove from the state and sell other property subject to the lien of the execution.—*Sidener v. White*, 46 Ind. 588.

[l] (Sup. 1875)

An agreement of a judgment creditor to make one-half of the judgment out of the prop-

erty of the judgment debtor, if the replevin bail will pay one-half of the judgment, if without any other consideration, is not binding on the judgment creditor, and the collection by execution of the residue of the judgment will not be enjoined.—*Smith v. Tyler*, 51 Ind. 512.

[m] (Sup. 1878)

A. brought an action against B. for the recovery of certain lands, and obtained judgment. Afterwards an order was granted, setting aside the judgment and granting the defendant a new trial, on subsequent payment of the costs accrued; A. making no objection thereto during several subsequent terms of the court. A. having taken out an execution on such vacated judgment, and begun a new action for the recovery of the lands, B. brought a suit to obtain an injunction restraining A. from proceeding under such execution. *Held*, that the injunction should be granted.—*Marsh v. Prosser*, 64 Ind. 293.

[n] (Sup. 1879)

A junior judgment creditor, who has bought certain land of his debtor at an execution sale, cannot enjoin a senior judgment creditor from selling the same land on execution, unless he shows that the debtor owns other property, or that the senior creditor has acted so as to prevent him from levying on said land.—*Wood v. Rice*, 68 Ind. 320.

[o] (Sup. 1879)

Where executions were levied on defendant's land in his lifetime and it was advertised for sale, his widow cannot maintain a suit to enjoin such sale, as 2 Rev. St. 1876, p. 222, expressly provides that her interest shall not pass by such sale, and hence she cannot be injured thereby.—*Mead v. McFadden*, 68 Ind. 340.

[p] (Sup. 1880)

A complaint alleging that plaintiffs contracted with a certain water company to repair a dam belonging to the company in consideration of the right to collect water rents until they should be reimbursed for the expense of the repairs, and further averring that a judgment had been recovered against the water company, which judgment had been assigned to defendants whose creditors threatened to enforce the judgment, and praying for an injunction restraining enforcement of the judgment until plaintiffs' claim was satisfied, stated a cause of action.—*Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562.

[q] (Sup. 1881)

Where a judgment debtor conveyed land which was subject to the lien of the judgments and then died, the grantees were not entitled to interfere with the creditor's collection of the judgments, but were only entitled to protect themselves by paying the judgment lien and becoming subrogated to the rights of the judgment creditor.—*Decker v. Gilbert*, 80 Ind. 107.

[r] (Sup. 1882)

A complaint in a claimant's suit to enjoin an execution sale, alleging a judgment and execution thereon in the hands of the sheriff, is good on demurrer for want of facts, though it fails to show that the execution debtor has a color of title to the land, since a sale would cloud complainant's title.—*First Nat. Bank of Knightstown v. Deitch*, 83 Ind. 131.

[rr] (Sup. 1882)

A vendor's lien is in no way affected by a judgment lien. Therefore a vendor, having a lien, cannot enjoin a sale under the execution obtained on the judgment. His rights remain the same after as before such sale.—*Messmore v. Stephens*, 83 Ind. 524.

[s] (Sup. 1883)

In an action on a note, the court, after making its finding in favor of defendant, permitted plaintiff to dismiss. Defendant appealed from the dismissal, and the judgment was reversed. The trial court afterwards rendered judgment on its findings in favor of defendant. Pending the appeal, and before reversal, plaintiff brought a second action on the same note and recovered judgment. *Held*, that a failure of defendant to apply for a stay of proceedings in the second action until the appeal was determined in the first was not such negligence as disentitled him to an injunction against the enforcement of the judgment in the second action.—*Walker v. Heller*, 90 Ind. 198.

[t] (Sup. 1884)

A complaint to enjoin a sale under execution, alleging that plaintiff in execution had receipted the same, and that the judgment had been paid in full and returned satisfied three years before complainant bought the land and took possession, *held* sufficient.—*Whitehill v. Fauber*, 97 Ind. 169.

[u] The owner of land upon which a sheriff is about to levy on an execution obtained in a suit to which he was not a party may have the levy enjoined, as likely to cloud his title.—(Sup. 1884) *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; (1899) *Zimmerman v. Makepeace*, 52 N. E. 992, 152 Ind. 199.

[v] (Sup. 1888)

Injunction will lie to arrest the sale of plaintiff's land on execution issued against a third person, and the execution creditor cannot raise the objection that the bill fails to state a cause of action because it alleges that the debtor has no interest in the land, and therefore the sale will not affect the owner's title.—*Scobey v. Walker*, 114 Ind. 254, 15 N. E. 674.

[vv] (Sup. 1890)

Where there is no pretense that a creditor is threatening to levy on land not liable to execution, there is no ground for an injunction.—*Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

[w] (Sup. 1890)

The collection of an execution issued on a judgment for costs will not be enjoined on the ground that the execution is for a larger sum than the costs, as taxed, where it does not appear that the judgment debtor has paid, not only the amount of costs as taxed, but also interest on the same, since a judgment for costs bears interest.—*Eaton v. Markley*, 126 Ind. 123, 25 N. E. 150.

[x] (Sup. 1893)

Equity will not interfere to restrain a sale under execution of personal property belonging to a person other than the judgment debtor, unless such property has a special value, rendering compensation in damages impossible, or such sale would result in consequential damages, or the claim of one party involves or depends on some equitable interest or feature; Rev. St. 1881, § 1266, providing an adequate remedy in other cases for recovering possession of such property.—*Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699.

[y] (Sup. 1894)

The fact that a person who fraudulently obtained a judgment incurred expense in the issuance of an execution on such judgment does not estop the judgment defendant to enjoin such execution.—*Brake v. Payne*, 37 N. E. 140, 137 Ind. 479.

[z] (Sup. 1905)

Injunction will not lie to prevent the sale of shares of stock in a corporation on execution where it is not made to appear that the property is of any peculiar value to the plaintiff, or that the threatened sale will cause the plaintiff any irreparable damage.—*Boone v. Van Gorder*, 74 N. E. 4, 164 Ind. 499, 108 Am. St. Rep. 314.

*Burns' Ann. St. 1901, § 735*, provides that shares of stock in any corporation may be levied on and sold in the county where the office and books of the corporation are kept, that the sheriff shall transfer the stock subject to the rights of the corporation, that the shares levied on shall be bound by the execution from the time of the levy, and that the levy shall constitute a lien on the stock from the time of the levy. Section 5059, relating to manufacturing and mining corporations, provides that the stock shall be deemed personal estate. *Held*, that as the purchaser on an execution sale acquires only the title of the registered owner, subject to any valid, existing title of an equitable owner of which the purchaser has notice at the time of the sale, an equitable owner of a stock certificate in a manufacturing and mining corporation is not entitled to enjoin a levy and sale on execution by attaching creditors of the registered owner.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 497-518;  
30 CENT. DIG. Judgm. §§ 794, 795, 813,  
825.

See, also, 17 Cyc. pp. 1181-1183; note,  
30 L. R. A. 136.

**§ 172. — Actions to restrain execution.**

Admissibility of communications between husband and wife, see **WITNESSES**, § 190.

Application of laches in general, see **EQUITY**, § 75.

Burden of proof to overcome answer in equity, see **EQUITY**, § 346.

Defects in pleading cured by subsequent pleading, see **PLEADING**, § 403.

Filing execution or copy thereof with pleading, see **PLEADING**, § 308.

**[a] (Sup. 1839)**

On judgment in the Martin county court, fieri facias issued directed to the sheriff of Orange county, and was there levied on the defendant's goods. Defendant filed a bill in chancery in the circuit court of Orange county showing these facts, and praying that the proceedings on the execution might be enjoined, etc. *Held*, that the court in which the bill was filed had no jurisdiction of the cause.—*Porter v. Meriam*, 5 Blackf. 86.

**[b] (Sup. 1853)**

Equity will not interfere to restrain proceedings for the enforcement of a judgment at law, except in a case of emergency, where an execution has issued in vacation and a levy and sale are threatened, in which case a temporary injunction may be granted to restrain the proceedings until the next term to give the party an opportunity to make his application to the court that rendered the judgment to correct the alleged mistake therein.—*Cooper v. Butterfield*, 4 Ind. 423.

**[c] (Sup. 1864)**

Where, in an action on an injunction bond given in proceedings to enjoin enforcement of an execution, it was shown that the obligor on the bond had purchased the property from the debtor after the issuance of execution, evidence was admissible to show that at the time of purchasing the property the obligor had told the debtor that, if he would sell the property and leave the state, he would not need to pay the judgment, as such evidence was a part of the transaction, and tended to throw light on the nature of the obligor's claim to the property.—*Starr v. Cass*, 23 Ind. 458.

**[d] (Sup. 1865)**

A complaint for an injunction to restrain the sale under an execution of certain property of the plaintiff on the ground that the plaintiff had received a mortgage of it from the execution defendant, the property not being subject to be taken on execution, had foreclosed the same, and had purchased the property at the foreclosure sale, need not contain copies of the judgments, executions, returns, and the sheriff's deed.—*Hall v. Hough*, 24 Ind. 273.

**[e] (Sup. 1866)**

A grantor of real estate conveyed by deed, with full covenants of warranty, has such an interest in restraining the sale of the land on

an execution issued upon a judgment against a prior grantor, alleged to have been paid, as to make him a proper party plaintiff to a suit instituted for that purpose. His liability to his grantee is in danger of becoming fixed by the sale under the execution.—*McCulloch's Adm'r v. Hollingsworth*, 27 Ind. 115.

**[f] (Sup. 1872)**

In proceedings by plaintiff to enjoin an execution against him because the judgment had not been entered or read and signed, it is not error on defendant's motion to order the entry of the judgment, and to read and sign it, though under 2 Gav. & H. St. p. 9, § 22, no process can issue on a judgment until it shall have been read and signed by the judge.—*Kent v. Fullenlove*, 38 Ind. 522.

**[g] (Sup. 1873)**

A complaint for an injunction alleged that B. had recovered judgment against the complainant and a turnpike company, upon which execution had been issued; that the sheriff had levied the execution on the house and lot of the complainant, it being his homestead and dwelling house; and that at the time of the levy, and before, the complainant and the turnpike company agreed to give up a toll house to be levied on for the satisfaction of the execution. *Held*, that the complaint was bad for not alleging that the toll house belonged to the execution defendants, or to one of them.—*Alexander v. Mullen*, 42 Ind. 398.

**[h] (Sup. 1874)**

A complaint by A. to enjoin the sheriff from selling property alleged to be held in trust by B., on execution against B., should by averments set forth the judgment and execution under which the alleged sale is about to be made with sufficient particularity to give color of right in the sheriff to make the levy and sale, and should sufficiently show color of right to the property in the person alleged to be such trustee.—*Trueblood v. Hollingsworth*, 48 Ind. 537.

To a complaint to enjoin a sheriff's sale of property levied upon under execution, the execution need not be made an exhibit.—*Id.*

**[i] (Sup. 1879)**

In an action to enjoin sale of goods seized on an execution issued in the name of a judgment plaintiff after his death without appointment of any administrator or executor, *held*, that an answer was sufficient which averred that he died free from debt, leaving his widow his only heir; that after the execution had issued, and a partial payment been made thereon, he had extended the time of payment on the judgment debtor's agreement that successive executions might remain in the hands of the sheriff, as a lien on the property; that after his death said agreement was continued by the widow, partial payment made to her, and delivery bonds executed by the debtor as each execution issued; that the debtor had become insolvent, and had no other leviable

property; and that an administrator had been appointed since the filing of the complaint.—*Egbert v. Mercer*, 66 Ind. 305.

[j] (Sup. 1882)

In an action to enjoin the sale of real estate on execution on the ground that the effect of the sale would be to cloud the plaintiff's title, a complaint which alleges a judgment and an execution thereon in the hands of the sheriff sufficiently shows color of right in the sheriff to make the levy and sale.—*First Nat. Bank of Knightstown v. Deitch*, 83 Ind. 131.

In such action, the complaint need not show color of title to the lands in the execution defendant.—*Id.*

In such action, allegations of the complaint that on the — day of —, 187—, plaintiff was and ever since has been the owner of the land in question, that on the — day of —, 1878, the judgment on which the sale was about to be made was obtained and that on the — day of —, 187—, the execution was issued to show that plaintiff may have been the owner of the land either before or after the rendition of the judgment, and rendered the complaint demurrable for failure to affirmatively show that plaintiff had a good cause of action.—*Id.*

[k, l] (Sup. 1882)

An allegation that a defendant did not appear to an action in which judgment was rendered against him, and had no summons served on him to appear, is insufficient to give jurisdiction to enjoin enforcement of the judgment by execution, since there was failure to show that there was no return of service of summons.—*Krug v. Davis*, 85 Ind. 309.

[m] (Sup. 1883)

In a suit by a husband and wife to restrain a sale of land under an execution against the husband on the ground that the land, which was originally the property of the husband's father, was in certain partition proceedings conveyed to the husband and wife as tenants by entirety, an allegation that the heirs "partitioned the lands among themselves by their several deeds thereto" showed that the partition was not by parol, and therefore the objection that the pleading showed a parol partition by which the husband's interest was acquired by him in severalty before the deed was executed to him and his wife was untenable.—*Sedgwick v. Tucker*, 90 Ind. 271.

Where a creditor of a husband sought to sell under execution land conveyed as an estate in entirety to husband and wife in certain partition proceedings, it appeared that two deeds had been made to the husband and wife, and that there was a mistake in the description of the lands in the first deed, and that the second deed on which they relied for title was executed to correct the mistake. *Held*, that the first deed was admissible in an action to enjoin the

enforcement of the execution as a link in the chain of title.—*Id.*

[n] (Sup. 1884)

A. filed a complaint against the sheriff, and alleged that he purchased B.'s land prior to the issuance of an execution to satisfy a judgment against B.; that the execution was returned without sale, and subsequently a venditioni exponas was issued without præcipe under which the sheriff was about to sell the land. *Held*, that a judgment perpetually enjoining a sale of the land was erroneous, and a motion to modify it so as to merely enjoin a sale under the vend. ex. should be sustained.—*Berry v. Nichols*, 96 Ind. 287.

[o] (Sup. 1884)

In a suit to restrain a sheriff from selling lands owned by complainant under execution issued on a judgment rendered against another person the execution plaintiffs were proper, if not necessary, parties, for they were the real parties in interest, and it was proper to bring them into court for the purpose of finally determining the controversy.—*Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731.

[p] (Sup. 1887)

A party who claims as owner or mortgagee of land levied on under a judgment which is not a lien on it may maintain a suit for injunction.—*Shanklin v. Sims*, 11 N. E. 32, 110 Ind. 143.

Under Code, § 608 (Rev. St. 1881), the lien of a judgment on land ceases at the expiration of 10 years, unless the collection of the judgment is restrained by an injunction; and, to take the case out of the statute, the injunction must be against the enforcement of the judgment, and not simply an injunction by a third person restraining the judgment plaintiff from selling a tract of land not owned by the judgment debtor.—*Id.*

[q] (Sup. 1888)

A complaint alleged that the owner of land conveyed it by warranty deed, containing a condition that the grantee should pay to the grantor the sum of \$50 on the 1st day of March of each year for and during the term of the grantor's natural life, and that, in case of failure so to do for the period of three consecutive years, the grantor might revoke the conveyance by recomputing the amount theretofore paid, and by executing and placing upon record a written declaration revoking the deed upon the recording of which declaration, etc., the conveyance was to be null and void, and the title was to revert to the grantor; that the grantee wholly failed to make any payments as required by the deed, and that the grantor had demanded of him more than once a year, each year, after the date of said deed; that he made payment of the money due on account of the provisions of the deed. It was further averred that, while the grantee so held the ti-

tle, a certain company recovered judgment against him upon which execution had been issued, and that the sheriff had levied upon and advertised the land conveyed to such grantee by the grantor for sale, and that the sale was fixed for a certain date. *Held* that, if the grantor waived the performance or became in any way estopped to assert a forfeiture, such facts must be made to appear by answer.—*Royal v. Aultman & Taylor Co.*, 19 N. E. 202, 116 Ind. 424, 2 L. R. A. 526.

[r] (Sup. 1891)

Equity will not entertain a bill by a railroad company to enjoin a constable from selling a locomotive on execution, when it is not alleged that the judgment is invalid, or that it was not rendered for a debt justly due, or that the company is unable to pay the same.—*Midland R. Co. v. Stevenson*, 130 Ind. 97, 29 N. E. 385.

[s] (Sup. 1892)

The complaint in an action to enjoin an execution sale of land must contain a description of the land; and reference to an exhibit said to be attached to the complaint, and to contain a description of the land, is not sufficient.—*Armstrong v. Farmers' Nat. Bank of Frankfort*, 130 Ind. 508, 30 N. E. 605.

[t] (Sup. 1893)

In an action to enjoin a sale of land under execution against one Jacob B. Buroker, where the petition alleges that plaintiff purchased the land at a sale by the executors of the will of Joshua Buroker, who died seised, it states sufficient facts to confer title on plaintiff, and it will not be presumed against the title so alleged that the execution debtor was a son of testator, and that he was not a party to the proceeding by the executors to sell the land, and therefore the petition is not demurrable on the ground that it thus appears that the interest, by descent or devise, of such son was not divested by the executor's sale.—*Goldthait v. Walker*, 134 Ind. 527, 34 N. E. 378.

[u] (Sup. 1896)

In an action to enjoin an execution based on a mere finding of indebtedness, it was not necessary that the complaint should allege that plaintiff did not owe the debt.—*Sare v. Butcher*, 40 N. E. 749, 141 Ind. 146.

[v] (App. 1901)

Where a mortgage foreclosure decree is for plaintiff for less than \$1,000, and judgment is rendered on the cross bill of defendant A. against the mortgagor, which judgment is junior to plaintiff's judgment, and A. enters replevin bail to prevent a sale of the mortgaged premises by plaintiff, which gives plaintiff a lien on unincumbered real estate of the value of \$10,000, an execution sale of the land under the judgment in favor of A. is not an injury to plaintiff that will authorize an injunction restraining the sale.—*Covert v. Bray*, 60 N. E. 709, 26 Ind. App. 671.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 519-539;  
30 CENT. DIG. Judgm. § 892.

See, also, 17 Cyc. pp. 1184-1196; note,  
30 L. R. A. 119.

### § 177. Liabilities on bonds.

Appraisement before sale of property of principal on execution in favor of surety, see ante, § 141.

Motion to quash execution against replevin bail, see ante, § 163.

Persons entitled to question constitutionality of statute relating to, see CONSTITUTIONAL LAW, § 43.

Restraining execution against replevin bail, see ante, § 171.

Right of action against execution debtor and replevin bail to cancel receipt and revive judgment on failure of purchaser to pay, see post, § 233.

Right of administrator of replevin bail to enjoin execution on lands of intestate, see EXECUTORS AND ADMINISTRATORS, § 129.

Right of replevin bail to control execution against principal, see ante, § 121.

Right of replevin bail to redeem from sale, see post, § 293.

Right of replevin bail to surplus proceeds of sale of debtor's property, see post, § 327.

Stay of execution against bail, see ante, § 158.

[a] (Sup. 1825)

Under St. 1817, p. 44, providing that a joint execution may issue at the proper time against the principal on a replevin bail and surety, scire facias may issue against them in order to have such execution.—*Lewis v. Oliver*, 1 Blackf. 412.

[b] (Sup. 1823)

A joint execution may issue against a judgment debtor and his replevin surety.—*McCoy v. Elder*, 2 Blackf. 183.

[c] A person, by becoming bail on a replevin bond in execution, makes himself a joint debtor with his principal.—(Sup. 1841) *Carnahan v. Brown*, 6 Blackf. 93; (1857) *Hutchins v. Hanna*, 8 Ind. 533.

[d] (Sup. 1841)

After a judgment in the circuit court in a personal action had been replevied, the principal died, and within a year of his death a fi. fa. was issued on the judgment against the principal and the bail, describing the latter as replevin bail. *Held*, that the fi. fa., though nominally against the principal and bail, for the sake of conforming to the judgment, could be enforced only against the latter, on account of the death of the principal.—*Carnahan v. Brown*, 6 Blackf. 93.

[e] (Sup. 1846)

A sci. fa. by an administrator to have execution against replevin bail entered on a judgment in favor of the intestate need not allege

that the judgment had been revived.—*Smith v. Smith*, 8 Blackf. 59.

[f] (Sup. 1846)

A creditor having separate judgments against two defendants on their joint and several notes, issued a *fi. fa.* on the judgment against the first defendant, which was levied on real estate. While the execution was in the sheriff's hands, a third party entered into a recognizance on the order book of the court. *Held* that the creditor had his election to collect his money by execution on the recognizance, if valid, or by an execution on a judgment against the execution defendant.—*Waynick v. Connelly*, 8 Blackf. 75.

[g] (Sup. 1846)

An entry of bail for the stay of execution, made after the judgment has ceased to be repleviable, cannot be the foundation of an execution, as such stay is purely statutory, and the requirements must be strictly followed.—*Taylor v. Sanford*, 8 Blackf. 169.

[h] (Sup. 1848)

A replevin bond, executed according to Rev. St. 1831, p. 240, § 14, to stay execution on a judgment of the circuit court of the United States, is a lien on land of the obligor contracted to be sold, and for which a part of the purchase money, but not the whole, has been paid, and the conveyance of which has not been made at the time of filing such bond.—*Simpson v. Niles*, 1 Ind. 196, *Smith*, 104.

[i] (Sup. 1851)

The revival of a judgment against the principal, by *scire facias* issued against him alone, does not release the replevin bail, and on a second *fi. fa.* the creditor is entitled to execution against both principal and bail.—*Stockwell v. Walker*, 3 Ind. 215.

[j] (Sup. 1859)

Under Rev. St. 1838, a replevin bail was required to obtain a judgment before he could have an execution; but he might have judgment on motion when the original judgment was rendered.—*Coon v. Brown*, 13 Ind. 150.

[k] (Sup. 1864)

A judgment was rendered by confession in favor of plaintiff against defendant on an account for a specified sum, and on a bill of exchange for a specified sum, and in respect to the latter sum it was directed that the sum should be collected without appraisement. An execution was issued on the judgment and the property of defendant levied on. At the suggestion of the constable, who held the execution, defendant indorsed on it his consent that the constable should sell under it without appraisement, which was done, and plaintiff became the purchaser. *Held*, in an action on the replevin bond, that an instruction to the effect that the sale was void for want of appraisement was properly refused because it ignored the consent of defendant to the sale.—*Stockwell v. Byrne*, 22 Ind. 6.

[l] (Sup. 1864)

In a suit on a replevin bond for a failure to return the property as stipulated, an answer alleging that, after the property had been delivered to defendant by the officer on the same day, one of the plaintiffs violently and forcibly took it out of his possession and deprived him of the possession thereof, wherefore he could not make return thereof, is perhaps sufficient to bar a recovery for the value of the property or sufficient in mitigation of damages, but does not state facts sufficient to bar an action.—*Story v. O'Dea*, 23 Ind. 326.

[m] A recognizance of replevin bail obtained by the fraud of the judgment defendant will be binding, unless there is also fraud on the part of the judgment plaintiff.—(Sup. 1871) *Lepper v. Nuttman*, 35 Ind. 384; (1878) *Vincennes Nat. Bank v. Cockrum*, 64 Ind. 229.

[n] (Sup. 1873)

A creditor who has a levy on land of defendant in execution, if made a party to an action to enforce a superior mortgage lien, must use reasonable diligence to protect his levy; and if he negligently fails to make a proper defense against a pretended superior lien, the replevin bail not being a party to such action, the execution cannot be levied on the property of the replevin bail.—*Frank v. Brasket*, 44 Ind. 92.

[o] (Sup. 1876)

Where a judgment is recovered on a debt secured by notes, a part of which are due and others are not due, and the judgment recites that plaintiff is entitled to recover the amount due and the several installments as they shall become due, and in default of payment the real estate mortgaged to secure the notes shall be sold, and the property cannot be sold in parcels, a surety on a replevin bail bond for the payment of the judgment "on or before the time allowed by law for a stay of execution" is only bound for the amount of the debt due at the time he signed the bail bond.—*Skelton v. Ward*, 51 Ind. 46.

[p] (Sup. 1876)

An execution plaintiff cannot be required, before proceeding against the property of replevin bail, to resort to real estate of the judgment defendant, which has been duly and legally sold by the sheriff for much less than its value under a prior judgment in favor of another plaintiff against the same defendant, who has no other property subject to execution; the execution plaintiff having the right to redeem such real estate from the sale.—*Edwards v. Haverstick*, 53 Ind. 348.

[q] (Sup. 1877)

A replevin bail, paying a judgment against part of the makers of a note, has not thereby a right of action against the others not joined in the judgment, as he had not contracted to pay any money for them, and the fact that he



paid created no contract.—*Reeves v. Isenhour*, 59 Ind. 478.

[r] (Sup. 1878)

Under 2 Rev. St. 1876, p. 201, §§ 420, 421, providing that execution may be stayed by procuring one or more sureties to give replevin bail, conditioned to pay the judgment, with interest and costs, the person who becomes replevin bail is liable to pay the judgment upon terms the same as the principal, and restrictions in the recognizance to one-half of the judgment cannot be made by the replevin bail.—*Vincennes Nat. Bank v. Cockrum*, 64 Ind. 229.

[s] (Sup. 1881)

Judgment of foreclosure was rendered without any personal judgment, and entry of replevin bail was written and signed immediately following the decree. After the sale of the mortgaged premises, the clerk, without any order of the court therefor, issued an execution against the property of the replevin bail for any balance of such decree that might remain unsatisfied. *Held*, that the execution was properly issued.—*Ensley v. McCorkle*, 74 Ind. 240.

[t] (Sup. 1881)

Mere delay in issuing execution does not release the replevin bail.—*Eltzroth v. Voris*, 74 Ind. 459.

[u] (Sup. 1881)

A proceeding to release a party from a recognizance of replevin bail for the stay of execution may be by motion.—*Eberwine v. State ex rel. Koster*, 70 Ind. 266.

Though a recognizance of replevin bail under Code, § 427, has the effect of a judgment confessed against the person and property of the bail, it is nevertheless not a judgment taken or rendered by a court or by a person exercising judicial functions, so as to preclude its being assailed indirectly on the ground of want of capacity to enter into such recognizance.—*Id.*

[v] (Sup. 1881)

A party who became replevin bail to stay an execution against several judgment co-defendants at the request of one of them paid the execution to prevent the sale of his own property. *Held*, that he could have execution against all the defendants, though some were sureties of the others.—*Reissner v. Dessar*, 80 Ind. 307.

Where K. replevied an execution against the makers and indorser of a note jointly, such replevin bail operated to the benefit of all of the judgment debtors, rendering them all liable therefor.—*Id.*

[w] (Sup. 1884)

The law will not permit one becoming replevin bail to escape liability by showing that he became such bail on a condition not named in the writing which he executed and which constituted a written contract by which his liability was created.—*Jones v. Swift*, 94 Ind. 516.

[x] (Sup. 1884)

A replevin bail on an execution issued on a judgment against three was released by a reversal of the judgment as to one, since on such reversal it ceased to be the one replevied by the bail.—*Baker v. Merriam*, 97 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 460-465.

See, also, 17 Cyc. pp. 1148-1151.

## VI. CLAIMS BY THIRD PERSONS.

Execution in collusive action as fraud on creditors, see FRAUDULENT CONVEYANCES, § 29. In justice's court, see JUSTICES OF THE PEACE, § 135.

Replevin by third persons, see REPLEVIN, § 15. To property sought to be reached by supplementary proceedings, see post, § 414.

Validity of execution as to creditors, see FRAUDULENT CONVEYANCES, § 31.

### § 179. Claims or liens prior or superior to execution.

[a] (Sup. 1875)

In an action for the recovery of possession of personal property, proof that the defendant is a constable, holding the property by virtue of a levy made thereon by him under an execution issued on a judgment against a third person owning the property jointly with the plaintiff, will defeat recovery by the plaintiff.—*Branch v. Wiseman*, 51 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 544.

### § 180. Rights of claimants of property.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 544-547.

See, also, 17 Cyc. pp. 1199-1201.

### § 181. — In general.

[a] (Sup. 1842)

A. mortgaged certain goods to B., but was to continue in possession of them, by the terms of the contract, for a definite time. An execution against A., in favor of a third person, was afterwards levied on the same goods in A.'s possession and B. filed a claim to them under the statute regulating the trial of the right of property; but the time for which A. was to possess the goods had not expired when the claim was filed. *Held*, that the claim could not be sustained; the claimant not having a right to the immediate possession of the goods.—*Hamilton v. Mitchell*, 6 Blackf. 131.

[b] (Sup. 1843)

On a trial of the right of property, the claimant cannot recover unless he prove himself entitled to the immediate possession of the goods.—*Philbrick v. Goodwin*, 7 Blackf. 18.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 544-546,

557.

### § 184. Notice or demand by claimant, and affidavit of claim.

[a] (Sup. 1835)

An affidavit of a claimant of goods taken in execution against another, alleging that the claimant filed claim to the goods, that they were his, that his claim was just and legal, and that he made affidavit that the claim was true in substance and in matter of fact, was sufficient.—*Hankins v. Ingols*, 4 Blackf. 35.

[b] (Sup. 1838)

If the affidavit of a claimant of property taken on execution fails to show whether the claim is absolute or conditional, the court below may permit the claimant to amend on payment of costs.—*Norris v. Detar*, 5 Blackf. 31.

The affidavit of a claimant of goods, taken in execution as the property of another, must show whether the claim is absolute or conditional, and, if it be conditional, whether it is by deed or by parol.—*Id.*

[c] (Sup. 1905)

In replevin against a sheriff by a claimant of property taken under execution, the failure of plaintiff to demand the possession of the property before the commencement of the action is immaterial, where defendant's answer admits the possession and is permitted by the court to turn over the property to the custody of the clerk.—*J. F. Seiberling & Co. v. Porter*, 165 Ind. 7, 74 N. E. 516.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 549-551;  
42 CENT. DIG. Replev. §§ 83, 84.  
See, also, 17 Cyc. pp. 1201-1203.

### § 186. Actions by claimant for recovery of possession.

Actions for damages by mortgage of chattels, see CHATTEL MORTGAGES, § 177.

Actions for possession or other remedy, see post, § 188.

By mortgagee or mortgagor of chattels, see CHATTEL MORTGAGES, § 173.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Proceedings in actions for possession, see post, §§ 187-203.

[a] (Sup. 1850)

If the officer voluntarily or collusively suffers property to be retained by the replevin plaintiff, after judgment in the officer's favor, it is an injury to the execution defendant; and it is the duty of the officer to use ordinary diligence to procure a proper judgment on the replevin bond.—*Stewart v. Nunemaker*, 2 Ind. 47.

[b] (Sup. 1882)

Under 2 Rev. St. 1876, p. 88, § 128, providing that, when goods are wrongfully taken from the owner on execution, he may bring an action for the possession thereof, where the sheriff, by direction of plaintiff, who was present, levied on goods which did not belong to the

execution defendant, the owner may maintain replevin against both the sheriff and plaintiff, though neither of them had actual possession of the goods at the commencement of the suit.—*Hadley v. Hadley*, 82 Ind. 93.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 561.

See, also, 17 Cyc. pp. 1206-1209; note, 20 Am. Dec. 696; note, 25 Am. St. Rep. 256.

### § 187. Proceedings for establishment and determination of claims.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 559-584.

See, also, 17 Cyc. pp. 1206-1226.

### § 188. — Nature and form of remedy.

Injunction, see ante, § 161.

[a] (Sup. 1843)

The owner of goods wrongfully levied on under an execution by the marshal of the federal court may maintain an action of replevin against the marshal, or may file his claim to the goods before a justice of the peace, and have the right of property tried under the statute of 1838.—*Hanna v. Steinberger*, 6 Blackf. 520.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 560, 562, 563.

See, also, 17 Cyc. pp. 1206-1209.

### § 191. — Process or notice, and appearance.

[a] (App. 1903)

*Burns' Rev. St. 1901, §§ 1613, 1614*, provide that where an officer has seized personal property under an execution issued by a justice, and doubts whether some other person than the execution defendant has not a claim to such property, he may give written notice to such person to assert his claim by law within 20 days, and any person so notified who does not institute proceedings within 20 days to try the right of property, and prosecute the same to final judgment with reasonable diligence, shall be barred from any action on account thereof against the officer or a purchaser of the property. *Held*, that a claimant of property, having actual knowledge of its seizure under execution, who instituted an action against the officer, but dismissed the same without fault of the officer, was barred from afterwards prosecuting his claim, although he was not served by the officer with the statutory notice.—*Small v. Finch*, 66 N. E. 1015, 31 Ind. App. 18.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 566.

See, also, 17 Cyc. p. 1211.

### § 192. — Pleading.

[a] (Sup. 1880)

2 Rev. St. 1876, p. 605, § 7, relative to intervention proceedings to try title to land on

which an execution is levied requires amendments to the claimant's complaint in such proceedings to be verified.—*Raymond v. Parisho*, 70 Ind. 256.

On a complaint, under 2 Rev. St. 1876, p. 665, to try the rights of property in chattels seized on execution, if the complaint alleges absolute ownership in the plaintiff, the latter cannot recover as mortgagee thereof.—*Id.*

[b] (*Sup.* 1882)

In an action to recover possession of personal property seized by a sheriff, an answer which does not show that the property, when the execution issued or was levied, or between those dates, was owned by the execution plaintiff, is defective in failing to show the ordinary lien of an execution.—*Fordyce v. Pipher*, 84 Ind. 86.

In a suit against an execution plaintiff and a sheriff to recover personal property levied upon, a special answer claiming that the execution plaintiff had a lien on the property under Act March 13, 1877, but which does not state when or where the notice was filed, nor where it was recorded, is bad on demurrer.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 567-570.

See, also, 17 Cyc. pp. 1211, 1212.

#### § 194. — Evidence.

Hearsay evidence, see EVIDENCE, § 317.

[a] (*Sup.* 1837)

On a trial of the right of property taken in execution, the debtor's possession of the goods, after his executing an absolute bill of sale of them to the claimant, may be shown not to be fraudulent.—*Foley v. Knight*, 4 Blackf. 420.

[b] (*Sup.* 1880)

In replevin of property levied on under an execution in favor of defendant against plaintiffs' father, the uncontradicted testimony of one of plaintiffs that the property was purchased by him and his co-party with their own means, and that it had never been owned by any other member of their family, is sufficient to entitle plaintiffs to recover.—*Thomas v. Patton*, 71 Ind. 241.

[c] (*Sup.* 1884)

In an action to recover crops raised by S. upon the plaintiff's land, and levied on by the sheriff as the property of S., the evidence showed that S. was not employed to raise the crops, and that he lived on the products of the farm, insured them in his own name, paid taxes upon them, sold them, and used the proceeds, without accounting therefor to the plaintiff. *Held*, on appeal by the plaintiff, that a finding that the plaintiff owned one-half of the corn and hay and two-thirds of the wheat should not be disturbed upon the weight of the evidence.—*Simpson v. De Haven*, 93 Ind. 411.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 571-574.

See, also, 17 Cyc. pp. 1213-1218.

#### § 201. — Judgment and enforcement thereof.

Conclusiveness of adjudication, see JUDGMENT, § 743.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 581, 582.

See, also, 17 Cyc. pp. 1222, 1223.

#### § 203. — Costs.

[a] (*App.* 1898)

Costs in replevin against a marshal and execution creditor for goods taken on the execution cannot be recovered against the execution creditor, it appearing that the property was detained by the marshal, and that the execution creditor never had possession thereof, and it not appearing that he advised the levy thereon, or had demand made on him therefor.—*Grim v. Adkins*, 51 N. E. 494, 21 Ind. App. 106.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 584.

See, also, 17 Cyc. pp. 1225, 1226.

#### § 204. Operation and effect of determination.

[a] (*Sup.* 1818)

The act of assembly authorizing a trial of the right of property taken in execution, while giving claimant of the property a summary mode of asserting his right and recovering possession, can be considered in this respect as a possessory remedy only, leaving the absolute right of property undetermined, and where plaintiff appeals from the decision of the triers to the circuit court, his right to the property is not concluded by a verdict against him even if it resulted in the return of the property, and he still has a right of action for any injury sustained by being kept out of the possession.—*Colyer v. Johnson*, 1 Blackf. 533.

[b] (*Sup.* 1828)

Goods found in possession of A., an execution defendant, were levied on by the sheriff. B. claimed the goods as his, and a jury, summoned to try the right of property, found that they belonged to A. *Held*, in replevin by B. against the sheriff, that the finding of the jury was not conclusive against B.—*Chinn v. Russell*, 2 Blackf. 172.

[c] (*Sup.* 1881)

Where personal property on which an execution has been levied is replevied from the execution creditor and officer by a third person, and in such replevin suit final judgment is rendered in favor of the creditor and officer the fact that the creditor can have execution on the replevin judgment or a remedy on the replevin bond will not prevent an execution sale

under the original judgment.—*Dawson v. Sparks*, 77 Ind. 88.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 585-587.  
See, also, 17 Cyc. pp. 1226-1228.

#### § 205. Replevin on property.

[a] (Sup. 1850)

When property is taken from an officer by a writ of replevin, he cannot return that fact, and take out another execution until the suit is determined.—*Stewart v. Nunemaker*, 2 Ind. 47.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 588.  
See, also, 17 Cyc. p. 1228.

#### § 208. — Indemnitors of officer.

See SHERIFFS AND CONSTABLES, §§ 126-130, 144, 145.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 592.  
See, also, 17 Cyc. pp. 1232, 1233.

### VII. SALE.

Amount of property taken and excessive levy and sale, see ante, § 142.

Application of statute of frauds to sales, see FRAUDS, STATUTE OF, § 78.

As bar of dower, see DOWER, § 46.

As satisfaction, see post, § 353.

As vesting of inchoate dower interest, see DOWER, § 36.

Breach of oral agreement to bid in land for another as creating constructive trust, see TRUSTS, § 100.

Estoppel by permitting sale, see ESTOPPEL, § 94.

Fees of sheriff or constable for making sale, see SHERIFFS AND CONSTABLES, § 48.

Jurisdiction of one state court to enjoin sale under execution issued by another state court, see COURTS, § 480.

Liability of sheriff or constable for irregular or invalid sale, see SHERIFFS AND CONSTABLES, § 120.

Limitation of actions to recover land sold on execution, see LIMITATION OF ACTIONS, § 19.

Of exempt property as denial or infringement of right of exemption, see EXEMPTIONS, § 133.

Presumptions as to official action, see EVIDENCE, § 83.

Right of purchasers to raise question of constitutionality of statute, see CONSTITUTIONAL LAW, § 42.

Secondary evidence of, see EVIDENCE, § 158.

#### (A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

Appraisement law as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 181.

Defects affecting title of purchaser, see post, § 275.

Inventory and appraisement, see ante, § 141.

#### § 213. Nature and requisites in general.

[a] The sale of real and personal property upon execution on a judgment on contract must be governed by the law in force when the contract was made.—(Sup. 1846) *Stewart v. Vermilyea*, 8 Blackf. 56; (1846) *Lane v. Fox*, Id. 58; (1847) *Harrison v. Stipp*, Id. 455; (1848) *Doe ex dem. Holman v. Collins*, 1 Ind. 24, Smith, 58.

[b] (Sup. 1848)

Where a judgment was rendered in the circuit court in 1843, in a suit on a contract made in Illinois in 1839, and the debtor's land was sold under an execution on the judgment, the sale must be governed by the laws of Indiana in the absence of proof as to the execution law of Illinois.—*Doe ex dem. Holman v. Collins*, 1 Ind. 24, Smith, 58.

[c] (Sup. 1881)

The general rule is that one who claims by sheriff's sale must show a judgment and execution thereon and a levy and sale according to law.—*Heavilon v. Farmers' Bank of Frankfort*, 81 Ind. 249.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 600.

#### § 215. Authority to sell.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 601-612.  
See, also, 17 Cyc. pp. 1233-1236.

#### § 217. — Venditioni exponas

Authority of executor to sue to vacate writ, see EXECUTORS AND ADMINISTRATORS, § 57.

Issuance after death of debtor on execution levied before, see ante, § 118.

Issuance on alias writ after expiration of original, see ante, § 90.

[a] (Sup. 1822)

Under Act 1810, real property could not be sold on a writ of fieri facias; that statute only authorizing its sale on a venditioni exponas.—*Armstrong v. Jackson*, ex dem. Elliott, 1 Blackf. 210, 12 Am. Dec. 225.

[b] (Sup. 1826)

Under the statute of 1817, relating to the judicial sale of real estate, such property might be sold on execution or fieri facias, without an inquiry as to the value of the rents and profits, or a venditioni exponas, unless the execution defendant required an inquest.—*Doe ex dem. Wayman v. Naylor*, 2 Blackf. 32.

[c] (Sup. 1843)

Under Laws 1818, p. 187, providing that, where real estate shall be seized on execution and the officer shall return that he could not sell the same for want of buyers, a levam facias should issue, where the sheriff returned a writ of fi. fa. that the land was not sold for want of time, a venditioni exponas issued thereon was not invalid, since the writ of levam facias provided by the statute is substantially a ven-

ditioni exponas.—Doe ex dem. Burge v. Cunningham, 6 Blackf. 430.

A fieri facias was returned levied on certain land, which was not sold for want of time. *Held*, that a venditioni exponas might issue, under Act 1818, commanding the sheriff to sell the land.—Id.

[d] (Sup. 1864)

A writ of vendi, is not void, because it has not a fieri facias added to it.—Zug v. Laughlin, 23 Ind. 170.

It is the right of an execution plaintiff, on the return of an execution against the property of the execution defendant levied upon, but not sold, to have a vendi, with a conditional fieri facias added thereto.—Id.

[e] (Sup. 1878)

Where a return states that the property levied on was sold to a named person for a specified price, but that the purchase money was not paid, a venditioni exponas is properly issuable under 2 Rev. St. § 453.—Dawson v. Jackson, 62 Ind. 171.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 607–612.  
See, also, 17 Cyc. pp. 1235, 1236.

#### § 218. Powers of officer in making sale.

[a] (App. 1906)

A sheriff, in making an execution sale, is a special agent, and can only pass title to property sold in accordance with the express provisions of the law.—Fuller v. Exchange Bank, 78 N. E. 206, 38 Ind. App. 570.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 620.  
See, also, 17 Cyc. pp. 1233–1236.

#### § 219. Mode of sale.

[a] (Sup. 1863)

Where there has been a change in the law between the date of a contract and the recovery of judgment, the sheriff, in order to determine the proper mode of sale, may examine the record of the judgment to ascertain the date of the contract, or may ascertain the same from evidence de hors the record, and the same evidence will be competent to sustain the validity of the sale in any action concerning the title so acquired.—Rawley v. Hooker, 21 Ind. 144.

[b] (Sup. 1876)

Property of the value of several hundred dollars, which had been levied upon by, and was in the possession of, an officer, under a writ against the property of the owner thereof, was while so held sold by him to a third person for the sum of \$1, but possession thereof was not and could not be given by such owner to such purchaser; and the latter thereupon brought suit against the former to recover the possession of such property. *Held*, that the sale was invalid, and the action could not be maintained.—Gregory v. Schoenell, 55 Ind. 101.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 621.  
See, also, 17 Cyc. pp. 1236–1238.

#### § 220. Place of sale.

Waiver of objections, see post, § 245.

[a] (Sup. 1857)

A United States marshal must advertise and sell real estate in the county where it is situated, in accordance with the law of the state as it existed when adopted by the circuit court of the United States under the act of congress.—Jenners v. Doe ex dem. Pomeroy, 9 Ind. 461.

[b] (Sup. 1872)

Personal property must be present and subject to the view of those attending a constable's sale (2 Gav. & H. St. p. 250, § 460), and the sale in good faith by a constable of a hog in a pen from 100 to 200 rods from the place of the sale, and entirely out of sight, is unauthorized.—Gaskill v. Aldrich, 41 Ind. 338.

[c] (Sup. 1875)

An execution sale in one county of land located in another was void, though the sale was at the door of the state house by virtue of an execution obtained in the United States court.—Thacher v. Devol, 50 Ind. 30.

[d] (Sup. 1881)

A failure of a sheriff to sell on execution at the place specified in the notice of sale avoids the sale.—Murphy v. Hill, 77 Ind. 129.

The fact that property sold by the sheriff under execution was not present at the place of sale is sufficient to render the sale invalid.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 622–625.  
See, also, 17 Cyc. pp. 1239, 1240.

#### § 221. Time of sale.

Computation of time, see TIME, § 9.

[a] The sale of property under an execution after the return day is not void, if the levy was made before that day.—(Sup. 1841) Tillotson v. Doe ex dem. Gregory, 5 Blackf. 590; (1883) Lowry v. Reed, 89 Ind. 442.

[b] (Sup. 1879)

Under 2 Rev. St. pp. 207, 630, §§ 76, 436, a sale after due notice of goods covered by a mortgage is not void, though made by virtue of an execution issued immediately after judgment, if upon the creditor's affidavit that delay will endanger its collection.—Conrad v. Wilson, 66 Ind. 437.

[c] (Sup. 1883)

Where the enforcement of an execution has been commenced before, it may be completed after, the return day.—Lowry v. Reed, 89 Ind. 442.

[d] (Sup. 1884)

A sale is not void because made five days after the return day of the execution.—*Rose v. Ingram*, 98 Ind. 276.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 626-628.

See, also, 17 Cyc. pp. 1240-1243; notes, 15 Am. Dec. 522, 76 Am. Dec. 83; note, 28 Am. St. Rep. 120.

**§ 222. Notice of sale.**

Computation of time of, see TIME, § 9.

Insufficient notice as ground for collateral attack, see post, § 258.

Title of purchaser as affected by defective notice, see post, § 275.

Waiver of objections, see post, § 245.

[a] (Sup. 1846)

The notice to an execution debtor of a motion for an order on the sheriff to sell property without appraisal stated the judgment to be for \$225.83. The record showed that the judgment in the case was for \$255.03. *Held*, that the notice was insufficient.—*Davis v. Hubbs*, 8 Blackf. 184.

[b] (Sup. 1885)

A sale of personal property upon an execution to the execution creditor is void when only nine days' notice of the time and place of sale is given.—*Keen v. Preston*, 24 Ind. 395.

[c] (Sup. 1875)

A sale of real estate located in Shelby county was made in 1841 by the United States marshal under an execution issued on a judgment obtained in 1838 in the United States Circuit Court for the District of Indiana at the the statehouse door in Indianapolis, in Marion county, no notice of sale having been given except in the counties of Marion and La Porte, though there were weekly newspapers of general circulation in Shelby county. *Held*, that the sale did not divest the title of the judgment defendant, but it was in him unaffected by limitations, when in 1852 dower was abolished by the Legislature and an estate in fee simple substituted therefor.—*Thacher v. Devol*, 50 Ind. 30.

[d] (Sup. 1875)

The law does not require that the last publication of an advertisement for the sale of land by a sheriff must be 20 days before the day of sale.—*Rhoades v. Delaney*, 50 Ind. 468.

[e] (Sup. 1882)

The provisions of the statute in relation to advertising sheriff's sales for at least 20 days successively refers to the posted notices, and does not qualify or control the provision requiring publication in a newspaper for 3 weeks successively, which means for 21 days, excluding the day of the first publication and the day of sale.—*Smith v. Rowles*, 85 Ind. 264.

[f] (Sup. 1884)

Under Rev. St. 1881, § 757, requiring notice of a sheriff's sale to be published "for three

weeks successively next before the day of sale," and section 1290, providing that the time within which an act is to be done "shall be computed by excluding the first day and including the last," notice published January 24th and 31st and February 7th, of a sale to occur February 14th, was sufficient.—*Hill v. Pressley*, 96 Ind. 447.

[g] (Sup. 1895)

Where an execution, issued out of the supreme court to its sheriff for the enforcement of a judgment for costs, is transmitted by him to the sheriff of the county where it is to be enforced, as provided by Rev. St. 1881, § 5834, the fact that the notice of sale was signed by the county sheriff in his official capacity as such sheriff, and not as the deputy of the sheriff of the supreme court, will not invalidate the sale.—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 629-633.

See, also, 17 Cyc. pp. 1243-1248; notes, 44 Am. Dec. 238, 75 Am. Dec. 704.

**§ 223. Postponement.**

[a] (Sup. 1866)

Where, after notice has been given of a sale of real estate on execution, the sale is enjoined, it is not proper to give oral notice of an adjournment to another day, and after the dissolution of the injunction to sell without a new publication. In such case the notice required by the statute must be given de novo.—*Patten v. Stewart*, 26 Ind. 395.

[b] (Sup. 1879)

Irregularities in the postponement of a sale under execution by an arrangement between the parties for a perpetuation of the lien, having been committed under an agreement with the execution defendant and for his benefit, were waived by him.—*Egbert v. Mercer*, 66 Ind. 305.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 634, 635.

See, also, 17 Cyc. pp. 1248, 1249; note, 26 Am. Dec. 536; note, 97 Am. St. Rep. 653.

**§ 224. Sale in parcels.**

Excessive sale, see ante, § 142.

Failure to sell in parcels combined with inadequacy of price as ground for setting aside sale, see post, § 251.

Failure to sell in parcels ground for collateral attack, see post, § 258.

Presumptions as to offering in parcels, see post, § 259.

Waiver of objections to sale in gross, see post, § 245.

[a, b] (Sup. 1847)

If, after a sheriff has levied an execution on a tract of land, the execution debtor lay off the land into town lots, the sheriff will not be bound, on the mere request of such debtor,

to sell the lots separately.—*Kiser v. Ruddick*, 8 Blackf. 382.

[c] (Sup. 1849)

In making sale of land on execution, it is the duty of the sheriff to exercise a sound discretion, and not to sell under unfavorable circumstances, or to sell the whole of land capable of division into parcels, one of which would be of as great value as the amount of the judgment.—*Sherry v. Nick of the Woods ex dem. Lockwood*, 1 Ind. 575, Smith, 289.

[d] (Sup. 1855)

An execution defendant is not bound to furnish the sheriff a map or plan of his real estate, showing that it consists of several parcels, in order to have it sold by the several parcels, but the sheriff is bound to ascertain this.—*Reed v. Diven*, 7 Ind. 189.

Where real estate levied on under Rev. St. 1852, is divisible, the sheriff should sell no more of it than is necessary to discharge the execution, but, where the entire tract is required to satisfy the execution, the whole may be offered for sale.—*Id.*

[e] (Sup. 1858)

Under the statute directing sheriffs to divide real estate taken on execution, if it may be done, and sell enough only to satisfy the judgment, the sheriff has a duty laid upon him, performance of which need not be demanded by the execution defendant.—*State ex rel. Robinson v. Leach*, 10 Ind. 308.

[f] (Sup. 1862)

When the sheriff is about to sell land on an ordinary judgment, it is the right of the execution defendant, and perhaps of the creditor, to claim a sale in parcels, and to direct which parcel shall be sold first; and, if the land can be thus well sold, it is the sheriff's duty so to sell it, and, if he does not, his sale, though not void, is voidable.—*Patton v. Stewart*, 19 Ind. 233.

[g] (Sup. 1864)

Where a sheriff sells on execution an estate which consists of several lots, without offering them separately, or sells more of them than is necessary to satisfy the execution, the sale will be set aside.—*Catlett v. Gilbert*, 23 Ind. 614.

[h] Property in its nature divisible must be sold in parcels.—(Sup. 1868) *Piel v. Brayer*, 30 Ind. 332; (1870) *Gregory v. Purdue*, 32 Ind. 453; (1873) *Bardeus v. Huber*, 45 Ind. 235; (1877) *Id.*, 60 Ind. 132; (1881) *Stotsenburg v. Stotsenburg*, 75 Ind. 538; (1883) *Brake v. Brownlee*, 91 Ind. 350.

[i] (Sup. 1872)

Where 80 acres of land, consisting of two 40-acre lots, were put up for sale by the sheriff, and he, instead of offering the two lots separately, and then, if necessary, the whole 80 acres, chose rather to offer one lot only, and then the whole, held void, since the sher-

iff failed to comply strictly with the statute.—*Voss v. Johnson*, 41 Ind. 19.

[j] (Sup. 1875)

A sale by the sheriff on execution of real estate as an entirety, which is palpably and clearly susceptible of division and sale in parcels to satisfy the execution, is void, as where, to satisfy a judgment of \$365.80 and costs, there were sold four acres, one part of which had on it a two-story dwelling house, a stable, and an orchard, and was worth from \$1,500, to \$2,000, and was separated by a fence and wagon road from the other part, which had on it a saw and a grist mill, and was worth from \$2,000 to \$2,500.—*Bardeus v. Huber*, 45 Ind. 235.

[k] (Sup. 1875)

Where land was sold on execution subject to inchoate dower prior to the statute abolishing dower and substituting one-third in fee simple and the debtor died after such statute took effect, the facts that the land consisted of several distinct parcels, and the sheriff, as returned by him, sold it as a whole after offering it in separate parcels, did not entitle the widow to redeem the land or render the sale void.—*Taylor v. Sample*, 51 Ind. 423.

[l] (Sup. 1877)

Under section 446, 2 Rev. St. 1876, p. 217, where a sheriff has offered for sale separately each of several tracts, lots, or parcels of land levied upon, and has received no bid therefor, he may offer and sell some or all of the tracts, lots, or parcels together. It would have been judicious in such case, after offering each parcel separately, to have offered an additional parcel to the previous offer, and so on, until it had been ascertained that nothing less than the whole would be sufficient, before offering the whole.—*Weaver v. Guyer*, 59 Ind. 195.

Notwithstanding the sheriff's privilege, under 2 Rev. St. p. 217, § 446, to sell en masse when no bids are offered on any separate parcel, he ought first to add an additional parcel to the previous offer, and so on, until it is ascertained that nothing less than the whole is sufficient.—*Id.*

[m] (Sup. 1881)

The failure of a sheriff to sell in separate parcels land occupied by joint defendants as a single lot held not to absolutely void the sale, but only to make it voidable.—*Jones v. Kokomo Bldg. Ass'n*, 77 Ind. 340.

[n] (Sup. 1881)

Where, after making a proper offer of rents and profits and of the fee simple different parcels of real estate, no bids are made, the sheriff on execution sale may then offer and sell the parcels together in satisfaction of an execution.—*Mugge v. Helgemeier*, 81 Ind. 120.

Where a sheriff offers land in parcels at an execution sale, and receives no bids, he may put it up as one lot.—*Id.*

[n] (Sup. 1881)

A sheriff's discretion in selling real estate on execution in one lot, instead of in several, will not be supervised, if it is doubtful whether the real estate was susceptible of division.—*Nelson v. Bronnenburg*, 81 Ind. 193.

[o] (Sup. 1887)

A sheriff's sale will not be set aside unless the sheriff has abused the discretion vested in him; and where he offers each of several lots severally, and receives no bids, there is no abuse of discretion in offering for sale all of the lots together.—*Nix v. Williams*, 110 Ind. 234, 11 N. E. 36.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 636-639, 705.

See, also, 17 Cyc. pp. 1249-1251.

## § 225. Order of offering for sale.

Presumptions as to order of offering, see post, § 259.

Waiver of objections, see post, § 245.

[a] (Sup. 1836)

After a town lot had been sold on execution, the execution debtor brought ejectment for the lot against the purchaser at the sheriff's sale. *Held*, that plaintiff, in order to impeach defendant's title, might prove that at the time of the sale it was known to defendant that the rents and profits had not been offered for sale.—*Doe ex dem. Maguire v. Smith*, 4 Blackf. 228.

[b] (Sup. 1858)

Where the term of seven years was offered at the sheriff's sale, as provided by statute, and there was no bid to discharge the execution for that interest in the land, the sheriff need not offer a less term, but may sell the fee at once.—*Thurston v. Barnes*, 10 Ind. 289.

[c] (Sup. 1859)

Where a debtor was not allowed by the sheriff to choose whether his real estate or his personality should be first offered for sale at a sheriff's sale, such sale may be set aside in a direct proceeding for that purpose.—*Davis v. Campbell*, 12 Ind. 192.

[d] (Sup. 1868)

In selling real estate, consisting of several parcels, the sheriff is only required to offer the rents and profits of each parcel before offering the fee of that lot or parcel.—*Adler v. Sewell*, 29 Ind. 598.

[e] (Sup. 1873)

Where, on execution, the rents and profits of real estate have been offered for sale, and no bid has been received therefor, the fee simple may be sold.—*Piel v. Watson*, 44 Ind. 447.

[f] (Sup. 1877)

The sale of a turnpike by a sheriff is not rendered invalid by the fact that the rents and profits were first offered, and then the fee.—*Hunter v. Burnsville Turnpike Co.*, 56 Ind.

213; *Sidener v. Columbus & H. Turnpike Co.*, 56 Ind. 598.

[g] (Sup. 1883)

If, at execution sale, lots carved out of the land covered by the execution are offered in the inverse order of their alienation, but no sale can be made in that order, the sheriff may vary the order.—*Ritter v. Cost*, 99 Ind. 80.

[h] (App. 1892)

A sale of land upon an execution, where the judgment does not waive appraisement, is irregular, unless the rents and profits of the land for a term of seven years be appraised and offered for sale before the fee simple is sold, and such sale will be set aside in an action brought for that purpose.—*Mehrhoft v. Diefenbacher*, 31 N. E. 41, 4 Ind. App. 447.

[i] (Sup. 1893)

Where a judgment does not direct a sale of real property without appraisement, and the rents and profits are offered without appraisement, and no bid is received therefor, and the fee simple which has been appraised is sold, there is no valid offer of the rents and profits, and the sale of the fee simple is void.—*Milburn v. Phillips*, 34 N. E. 983, 36 N. E. 360, 136 Ind. 680.

[j] (Sup. 1898)

*Burns' Rev. St. 1894, §§ 765-768 (Hornor's Rev. St. 1897, §§ 753-756)*, requiring, in a certain case, the rents and profits of the real estate of the debtor, for a period not exceeding seven years, to be first offered on execution sale, and, if no one bids enough therefor to pay the judgment, requiring the sheriff to offer the fee simple, does not prevent the sale of the fee, though the rents and profits for seven years exceed in value the judgment, if no one bids such amount therefor.—*Marmon v. White*, 51 N. E. 930, 151 Ind. 445.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 640.

See, also, 17 Cyc. p. 1253.

## § 226. Conduct of sale in general.

[a] (Sup. 1847)

Where a sheriff has in his hands several executions (the laws as to a sale under them being different), and the real estate levied on is divisible, it seems that he should commence with the execution first to be satisfied, and sell enough of the property, under the law governing such sale, to satisfy that execution, and that he should afterwards sell under the other executions, in their order, according to the same rule, until all are satisfied or the property is exhausted; but, if the property is not susceptible of division, the same should be sold under the execution first to be satisfied.—*Harrison v. Stipp*, 8 Blackf. 455.

[b] (Sup. 1850)

On a trial of right of property, the plaintiff gave in evidence three executions in his favor, and which were all levied on the prop-



erty. On the first and third the law did not require an appraisement of property before sale, but on the second it did. The sale was nominally made on all the executions without appraisement, and the plaintiff became the purchaser, but at a price not sufficient to pay the first execution, upon which the amount bid was paid. The plaintiff left the property in the possession of the execution defendant. A young colt was sold at the said sale, with the mare (a part of the property), at the execution defendant's request; but no return of that fact was made by the constable. *Held*, that the sale to the plaintiff was valid.—*Clark v. Watson*, 2 Ind. 399.

[c] (Sup. 1860)

The sheriff should levy upon enough property in the first instance to satisfy the execution; but if, failing to do this, he makes a second levy, and sells the property last levied on while a portion of the first levy yet remains unsold, the second sale is not thereby avoided.—*Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23.

[d] (Sup. 1862)

A sheriff, offering property for sale under an execution, announced that he should sell, and did sell, only a conditional estate, redeemable in a year, and gave a certificate instead of a deed for the fee simple. *Held*, that the sale was invalid.—*Ewald v. Coleman*, 19 Ind. 66.

[e] (App. 1901)

Where the sheriff gave notice of the sale of land under execution, as required by statute, it was not essential that he should take actual possession of it in order to exercise his power to sell.—*Lahr v. Ulmer*, 60 N. E. 1009, 27 Ind. App. 107.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 613-619.

See, also, 17 Cyc. pp. 1236-1238; note, 43 Am. Dec. 143.

#### § 227. Terms and conditions.

Bids must be unconditional and for cash, see post, § 230.

[a] (Sup. 1846)

A conveyance by a sheriff of land sold at sheriff's sale without receiving the purchase money is void; he having no authority to sell except for cash.—*Chapman v. Harwood*, 8 Blackf. 82, 44 Am. Dec. 736.

[b] (Sup. 1859)

Under Acts 1843, p. 52, §§ 3, 4, where a defendant is unable to give security to stay a sale of his lands, the property may be sold upon a certain credit. *Held*, that in such case the defendant must notify the officer of his inability, and request a sale on credit, or he would waive his rights.—*Lemasters v. Johnson*, 12 Ind. 385.

[c] (Sup. 1874)

All sales upon executions or orders of sale must be for cash; but inasmuch as the sheriff, in case of nonpayment, may re-expose the property on the same or a subsequent day, it may be reasonably inferred from the power to re-expose on a subsequent day that he may give reasonable time to the purchaser for the payment of his bid, provided a proper memorandum of the sale has been made.—*Ruckle v. Barbour*, 48 Ind. 274.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 641.

#### § 228. Persons who may purchase.

Executor, see EXECUTORS AND ADMINISTRATORS, § 152.

Foreign corporations, see CORPORATIONS, § 656.

Right of bank to purchase, see BANKS AND BANKING, § 95.

[a] (Sup. 1859)

An administrator cannot buy trust property for his own benefit at a sale on execution in his favor levied before he assumed the trust.—*Martin v. Wyncoop*, 12 Ind. 266, 74 Am. Dec. 209.

[b] (Sup. 1861)

A deputy clerk, without authority from the judgment plaintiff, and without any direction from his principal so to do, issued an execution upon a judgment and became a purchaser at the sale. *Held*, that he acquired no title by the purchase, even though no actual fraud entered into the transaction.—*Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 642-647.

See, also, 17 Cyc. pp. 1253-1255.

#### § 229. Bids.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 648-653, 698.

See, also, 17 Cyc. pp. 1255-1257; note, 70 Am. Dec. 572.

#### § 230. — In general.

[a] (Sup. 1830)

The sheriff is not obliged to take the mere word of any person who may bid at a sheriff's sale that he is the agent of the execution creditor.—*Cowgill v. Wooden*, 2 Blackf. 332.

[b] If a bidder at a sheriff's sale of real estate prevent others from bidding, by representations respecting the object of his bid, and then buy the property at the sale at a price much below its value, the sale is void, as against public policy, and as a fraud upon the judgment debtor and his creditors.—(Sup. 1844) *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226; (1857) *Gilbert v. Carter*, 10 Ind. 16, 68 Am. Dec. 655.

[c] In selling land upon execution, a sheriff can receive only an unconditional cash bid.—

(Sup. 1854) *Swope v. Ardery*, 5 Ind 213; (1857) *Reeves v. Clark*, 8 Ind. 409.

[d] (Sup. 1854)

At a sale upon execution of real estate belonging to A., several judgment creditors who attended the sheriff's sale and intended to bid upon the land were prevented from so doing by promises made by B. that the creditors should be paid, and thereupon the land was sold to B. for very much less than its real value. A. remained in possession of the premises for five years, and it was then sold by B. to C. for something more than he gave for it, but still for not more than half its value. *Held*, that these facts were sufficient to support a bill in equity, brought to set aside the deed and to enjoin a suit in ejectment against A.—*Plaster v. Burger*, 5 Ind. 232.

[e] (Sup. 1854)

An execution sale, at which the execution creditor, intending to bid in the property, makes false representations to deter other bids, is voidable for fraud.—*Vantrees v. Hyatt*, 5 Ind. 487.

[f] (Sup. 1855)

Where, at a sale of land on execution, the execution plaintiff prevents competition by fraudulently representing that he is buying the land for the purpose of letting the execution defendant redeem, and thus obtains the land for a price much below its value, the sale will be set aside in equity.—*Forelander v. Hicks*, 6 Ind. 448.

[g] (Sup. 1857)

Where the representations of the buyer concerning the property sold by the sheriff only influenced the judgment creditor, and it did not appear he would have bid more than the amount of his debt, and the property was sold for that amount, though much below its real value, the sale may well be valid.—*Gilbert v. Carter*, 10 Ind. 16, 68 Am. Dec. 655.

[h] (Sup. 1861)

A purchaser at sheriff's sale who has by fraud prevented the attendance of other purchasers will not be permitted to hold the land so purchased.—*Arnold v. Cord*, 16 Ind. 177.

[i] (Sup. 1884)

A sheriff's sale will not be set aside simply on the ground that the purchaser prevented others from bidding, unless he thereby secured the land at less than its value.—*Lynch v. Reese*, 97 Ind. 360.

FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, §§ 648-652, 698.

See, also, 17 Cyc. p. 1255.

§ 231. — Acceptance or rejection.

[a] (Sup. 1850)

A sheriff, in making sales upon execution, is not obliged to take the bid of an irresponsible person.—*Hobbs v. Beavers*, 2 Ind. 142, 52 Am. Dec. 500.

[b] (Sup. 1891)

A debtor, through his attorney, bid for the separate parcels less than enough to satisfy the execution, which bids were held in abeyance until the land was offered as a whole, at which time his bid was the highest; but, the sheriff refusing to give a few days' time to procure more money from his client, the attorney withdrew all his bids, and the land was struck off to another. *Held*, that the sale was valid, as the debtor, having withdrawn all his bids, could not object that the bids for the separate parcels were held in abeyance.—*Barnes v. Zoercher*, 126 Ind. 434, 26 N. E. 172.

[c] (Sup. 1891)

It is a proper exercise of the sheriff's discretion in making sales of real estate to withhold approval or acceptance of the bids made on several tracts separately, if for less than the debt and costs, until he has offered each tract and all the tracts in all the modes prescribed by law, unless at any time before all have been offered he receives a bid sufficient in amount to discharge the entire debt and costs.—*Barnes v. Zoercher*, 26 N. E. 769, 127 Ind. 105.

FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, § 653.

See, also, 17 Cyc. p. 1256.

§ 232. Payment of bid.

As prerequisite to right to deed, see post, § 306.

False receipt as fraud on creditors, see FRAUDULENT CONVEYANCES, § 24.

Presumptions as to payment, see post, § 259.

FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, §§ 654-658.

See, also, 17 Cyc. pp. 1257-1264.

§ 233. — In general.

[a] (Sup. 1880)

Where a sheriff gives a receipt for the amount of a purchaser's bid at an execution sale, without receiving any money, the judgment plaintiff may maintain a suit against the defendant and his replevin bail to correct the execution by erasing the receipt therefrom, and to expunge such receipt from the records, and to revive the judgment on which the execution issued; the purchaser having acquired no title to or possession of the property sold, and neither the judgment debtor nor his replevin bail having suffered any loss by reason of such sale.—*McCormick v. Walter A. Wood Mowing & Reaping Mach. Co.*, 72 Ind. 518.

[b] (App. 1906)

Where property was sold under an execution to a purchaser other than the judgment creditor, no title passed until the purchase price was paid to the sheriff, and the execution of a receipt to the sheriff by the execution creditor under an arrangement with the purchaser was

insufficient.—*Fuller v. Exchange Bank*, 78 N. E. 206, 38 Ind. App. 570.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 654–657½.

See, also, 17 Cyc. p. 1257.

**§ 234. — Purchase by creditor.**

[a] (Sup. 1901)

In order to make a sheriff's deed effective where the land is purchased by a judgment creditor, it is only necessary that the amount of his bid should, with his direction and authority, be properly credited on the execution.—*Robertson v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

[b] (Sup. 1896)

Where the creditor himself purchases at the execution sale, he is entitled to have the payment of his debt, evidenced by his receipt, credited as a payment on his bid, in lieu of cash, where there is no question that his debt is a first lien on the purchase price.—*Boots v. Ristine*, 146 Ind. 75, 44 N. E. 15.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 658.

See, also, 17 Cyc. p. 1258.

**§ 235. Failure to comply with bid.**

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 659–666.

See, also, 17 Cyc. pp. 1259, 1260.

**§ 236. — In general.**

[a] (Sup. 1853)

Where a sheriff, having several executions on decrees of foreclosure against the same land, sells it on the senior execution, the fact that the purchaser does not fully pay the purchase money does not authorize the sheriff to sell upon the execution next having preference.—*Benton v. Shreeve*, 4 Ind. 66.

[b] (Sup. 1865)

Where lands are sold on execution, and the purchaser fails to pay the amount of the bid, and judgment is taken against him for the amount of the bid and damages, there is no equitable lien on the land in favor of the execution plaintiff for the purchase money.—*Day v. Vallette*, 25 Ind. 42, 87 Am. Dec. 353.

[c] (Sup. 1874)

Where lands were properly offered for sale by the sheriff, and were struck off to a bidder, but the purchase money was not paid, nor any valid memorandum of the sale made by the sheriff, and the grantee of the judgment debtor offered to pay, and tendered, the amount due on the judgment, which tender was refused, the fact that the sheriff had indulged the purchaser for several months on account of arrangements for payment made by the purchaser with the execution plaintiff could not affect the rights of the execution defendant

or his grantee.—*Ruckle v. Barbour*, 48 Ind. 274.

Where lands were properly offered for sale by the sheriff and were struck off to a bidder, but the purchase money was not paid, nor any valid memorandum of the sale made by the sheriff, and the grantee of the judgment debtor offered to pay and tendered the amount due upon the judgment, which tender was refused, *held*, that he had a right to make such payment, and that the effect of the tender could not be avoided by a subsequent execution of a certificate of purchase.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 659.

See, also, 17 Cyc. p. 1259.

**§ 237. — Resale.**

Effect of statute of frauds on liability of original purchaser after resale, see FRAUDS, STATUTE OF, § 78.

[a] (Sup. 1840)

A sheriff sold certain real estate on execution to B, who failed to pay the purchase money. A few days afterwards, without having adjourned the sale and without advertising it again, the sheriff re-exposed the property to sale and sold it to C, who had notice of the facts. *Held*, that the sale to C. was void.—*Givan v. Doe ex dem. Crawford*, 5 Blackf. 200.

[b] (Sup. 1889)

A sheriff may readvertise and resell, under the same execution, land already struck off to a bidder at a former sale, which has been abandoned by mutual consent of the sheriff and the bidder, and of which no memorandum was made to satisfy the statute of frauds.—*Maher v. Aetna Life Ins. Co.*, 116 Ind. 486, 19 N. E. 305, 9 Am. St. Rep. 880.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 660, 661.

**§ 238. — Liabilities of bidders.**

[a] (Sup. 1846)

If the execution plaintiff buy land at a sheriff's sale at a price exceeding the amount of the execution, and refuse to make payment, the sheriff may, by motion against the purchaser, recover the excess, with 10 per cent. damages thereon.—*Hunt v. Gregg*, 8 Blackf. 105.

[b] (Sup. 1851)

The maxim, "Caveat emptor," is usually applied with strictness to the purchase of goods at execution sales. The sheriff does not warrant the title of the execution defendant, but sells whatever title or interest the latter may have, and, if the buyer chooses to purchase a doubtful title to the property offered for sale, he cannot claim to be released from the payment of his bid upon the ground that the title was imperfect.—*Rodgers v. Smith*, 2 Ind. 526.

## [c] (Sup. 1852)

Where land has been sold at a sheriff's sale, subject to alleged incumbrances, which did not exist at the time of the purchase, the purchaser cannot be compelled to take the land at a price consisting of the amount of his bid and the amount of such of the incumbrances as had been removed.—*Gregg v. Strange*, 3 Ind. 366.

## [d] (Sup. 1866)

Where the judgment defendant has no title whatever to the lands sold at sheriff's sale, there is no consideration for the promise of the purchaser to pay the purchase money, and where a bid is made under a mistake of fact in this respect the bidder is not bound to complete the purchase.—*Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460.

## [e] (Super. 1873)

The purchaser of property at a sheriff's sale is held only for the amount bid, and not for the value of the property.—*Mazelin v. Martin*, Wils. 423.

## FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, §§ 662-664;  
11 CENT. DIG. Contracts, § 303; 48 CENT.  
DIG. Ven. & Pur. § 14.

See, also, 17 Cyc. pp. 1260-1262.

## § 239. — Actions on bids.

## [a] (Sup. 1834)

In an action by a sheriff for purchase money of land sold by him on execution, his return to the execution must be stated in the declaration.—*Ennis v. Waller*, 3 Blackf. 472.

## [b] (Sup. 1843)

A purchaser of land on execution having failed to pay the purchase money, the sheriff afterwards sold the land to another person for a less price than it first sold for. *Held* that, in the statutory proceeding by notice and motion against the first purchaser for the difference in amount between the first and second sales, the notice must aver an offer by the sheriff to convey the land to the defendant before the second sale.—*Williams v. Lines*, 7 Blackf. 46.

## [c] (Sup. 1845)

Under Rev. St. 1838, p. 286, where a purchaser refused to pay the price of property sold on execution, he was liable, on motion by the officer making such sale, to a judgment for the amount of the price. *Held*, that a motion by plaintiff in the execution for such a judgment was properly refused.—*Laverty v. Chamberlain*, 7 Blackf. 556.

## [d] (Sup. 1846)

There is an irregularity in going to trial, on motion of a sheriff to recover the purchase money of land sold on execution, without an issue.—*Hunt v. Gregg*, 8 Blackf. 105.

A sheriff cannot proceed by motion to recover the purchase money of land sold on execution, unless he has previously offered the

purchaser a deed for the land, provided he would pay the purchase money.—*Id.*

It is questionable whether an action at common law can be sustained by a sheriff on a contract of sale on execution effected through his own agency in the capacity of auctioneer; but the objection, if valid, to a common-law suit in such case, is not applicable to the form of action by motion, which is expressly authorized by statute whenever the sheriff makes a valid sale on execution and the purchaser refuses to pay his bid.—*Id.*

## [e] (Sup. 1847)

The notice by a sheriff, to a purchaser of land on execution, of a motion to be made for judgment against such purchaser for the purchase money, need not set out the sheriff's return to the execution.—*Steele v. Hanna*, 8 Blackf. 326.

## [f] (Sup. 1896)

A creditor in execution who receives from a purchaser at an execution sale a check for the deed, and does not offer to rescind the contract, or tender back the check when payment thereof is refused, is not entitled to the summary remedy provided by Rev. St. 1894, § 772, for recovering judgment for the amount at which land is sold by the sheriff on execution.—*Sutton v. Baldwin*, 45 N. E. 518, 146 Ind. 361.

## FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, §§ 665, 666.  
See, also, 17 Cyc. pp. 1262-1264; note, 69  
Am. Dec. 365.

## § 241. Certificate of sale.

Title and rights of assignee of certificate, see post, § 289.

## [a] (Sup. 1874)

The sheriff has no authority to execute a certificate of purchase until the purchaser has paid his bid or caused the judgment to be satisfied to that extent.—*Ruckle v. Barbour*, 48 Ind. 274.

## [b] (Sup. 1882)

The rule that, where redemption money has been accepted, the holder of the certificate loses his character of purchaser, does not apply where a third person pays money, not to redeem, but to become the owner of the certificate or to acquire title.—*Hays v. Wilstach*, 82 Ind. 13.

## FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, § 668.  
See, also, 17 Cyc. pp. 1264, 1265.

## § 243. Persons who may question validity of sale.

By collateral attack, see post, § 258.

Parties, see post, § 256.

Right of execution creditor as purchaser to set aside sale on failure of title, see post, § 285.

## FOR CASES FROM OTHER STATES.

SEE 21 CENT. DIG. Execution, §§ 673-686.  
See, also, 17 Cyc. pp. 1267-1272.

**§ 244. — In general.****[a] (Sup. 1854)**

A purchaser of land under a void mortgage brought suit to recover possession of the premises, and sought to attack the title of the defendant by proof that the latter purchased the same upon execution at a price so inadequate as to furnish conclusive evidence of fraud. *Held* that, the plaintiff having no title, the question of the validity of the defendant's title could not arise.—*State v. State Bank*, 5 Ind. 353.

**[b] (Sup. 1860)**

Where a complaint for relief from execution sale on the ground that it was fraudulent, oppressive, and void, shows that the person whose property was sacrificed was the principal debtor, and he does not complain, and it is not shown but that he is amply able to pay a balance of the judgment, but it is not averred that any effort was being made to compel the plaintiff to pay the balance, a demurrer to the complaint was properly sustained.—*Aldridge v. Clark*, 15 Ind. 235.

**[c] (Sup. 1877)**

Only those interested through defendant can complain that in selling several parcels en masse, after having received no bids thereon separately, the sheriff sold more of the land than was required to satisfy the execution.—*Weaver v. Guyer*, 59 Ind. 195.

**[d] (Sup. 1877)**

One claiming under a judgment defendant by purchase from him after the levy of an execution cannot have the sheriff's sale set aside on the ground that the defendant at the time of the sale offered the sheriff personal property, which he owned, sufficient to satisfy the execution, where the sheriff's return recites that no personal property could be found to levy on.—*Stockton v. Stockton*, 59 Ind. 574.

**[e] (Sup. 1881)**

Where the lien of a judgment on which lands are sold under execution is senior to that of a mortgage on such lands, assignees of the mortgage holding it in trust have an interest entitling them to sue in their own names and as trustees of an express trust to set aside the execution sale for good cause.—*Stotsenburg v. Stotsenburg*, 75 Ind. 538.

**[f] (Sup. 1883)**

Where there is no adverse possession by the purchaser at sheriff's sale at the time of the subsequent conveyance by the execution debtor, the right of the last grantee to bring an action to avoid the sheriff's sale is expressly recognized by Rev. St. 1881, § 293, providing that actions for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him by title acquired after the date of the judgment, must be commenced within 10 years after the date of the sale.—*Stumph v. Reger*, 92 Ind. 286.

**[g] (Sup. 1887)**

One who claims in the character of a judgment creditor cannot avoid a consummated sheriff's sale on the ground that there were irregularities in the conduct of the sheriff or clerk.—*Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

**[h] (Sup. 1888)**

A judgment creditor cannot complain that, under another judgment against the debtor and a surety, property of the surety was levied on and sold before that of the principal debtor was exhausted, contrary to the order of court.—*Holcraft v. Douglass*, 115 Ind. 139, 17 N. E. 275.

A sheriff's sale will not be overthrown on account of irregularities in an action by a judgment creditor.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 673-680.

See, also, 17 Cyc. p. 1267.

**§ 245. — Waiver and estoppel.**

Estoppel by permitting mortgage of property, see ESTOPPEL, § 94.

Waiver of appraisement, see ante, § 141.

Waiver of objection to sale without appraisement as affecting title of purchaser, see post, § 275.

**[a] (Sup. 1839)**

Where, after sale under execution, the execution debtor, apprised of the sale, informed a third person of his inability to redeem, showed him the boundaries, and consented that such person should buy it, and he did buy it of the purchaser at the sheriff's sale, the execution debtor waived any right he might have to vacate the execution sale, on account of a mistake in the advertisement of sale.—*McClure v. McCormick*, 5 Blackf. 129.

**[b] (Sup. 1850)**

An execution, merely voidable, may be set aside on motion of the defendant, but, if not so set aside, all acts done under it are valid, as well in relation to the execution plaintiff as to strangers. The execution defendant may waive the errors, and, if he does not procure the process to be set aside, he will be presumed to have waived them; and, if he does waive them, the process should not be set aside, even on motion.—*Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510.

**[c] (Sup. 1862)**

Where a single town lot is sold, with no suggestion from the execution defendant nor any other interested party of the propriety of a division, the purchaser's title is valid, although the jury should find a division to have been proper.—*West v. Cooper*, 19 Ind. 1.

**[d] (Sup. 1878)**

Where an execution defendant waives, as he is entitled to do, the sale of his land in parcels, by requesting that it be sold as an entirety, he cannot, in an action to recover the land

by one holding a sheriff's deed, be heard to complain that it was thus sold.—*Joyce v. First Nat. Bank of Madison*, 62 Ind. 188.

[e] (Sup. 1881)

The fact that the execution debtor consented to a sale at another place than that named in the notice will not prevent him from avoiding it.—*Murphy v. Hill*, 77 Ind. 129.

[f] (Sup. 1881)

Rev. St. 1876, p. 217, § 466, provides that, if an estate consists of several lots, tracts, and parcels each shall be offered separately and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution unless the same is not susceptible of division. *Held*, that the sheriff's sale in mass, instead of in parcels, is voidable, and not void; and hence the right to have the sale set aside because of such sale in mass may be waived by parol.—*Nelson v. Bronnenburg*, 81 Ind. 193.

[g] (Sup. 1883)

Where the property of a gravel road company is sold on execution, its assignee for benefit of creditors, by accepting the surplus proceeds, ratifies the sale, and neither he nor his assignor can object to its validity.—*Rowe v. Major*, 92 Ind. 206.

[h] (Sup. 1886)

Where an execution defendant, entitled to have lands sold in a certain order, fails to take steps to have it so done, and fails to object to their sale in a different order, or where he fails to object to a sale as irregular because a former levy is undisposed of, until after the sale is consummated, he is, in the absence of any excuse for such a failure, estopped from complaining of such irregularities.—*Richey v. Merritt*, 108 Ind. 347, 9 N. E. 368.

An execution defendant by his acquiescence in irregularities in the proceedings on an execution, including the sale of property on it, may estop himself from obtaining an order setting aside such sale.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 681-686.

See, also, 17 Cyc. pp. 1269-1272.

§ 246. Opening or vacating.

Lien of purchaser for taxes paid when sale is set aside, see TAXATION, § 531.

Rights and remedies of purchasers on avoidance of sale, see post, §§ 284-287.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 687-722.

See, also, 17 Cyc. pp. 1267-1287.

§ 248. — Defects or irregularities in execution or levy.

[a] (Sup. 1836)

An execution plaintiff is chargeable with notice of all the irregularities which may have

occurred both in the issuance of an execution and in the sale of property on it, and hence, when an execution plaintiff becomes the purchaser, the sale will be set aside for irregularities, which could not be made effective against an innocent third person not chargeable with notice of mere irregularities.—*Richey v. Merritt*, 9 N. E. 368, 108 Ind. 347.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 696.

See, also, 17 Cyc. p. 1273.

§ 249. — Irregularities or misconduct affecting sale.

[a] (Sup. 1850)

To render a sheriff's sale void on account of the property being sold to a person who was not the highest bidder, it is necessary to prove that he acted fraudulently, and that the person offering to bid higher was responsible.—*Hobbs v. Beavers*, 2 Ind. 142, 52 Am. Dec. 500.

[b] (Sup. 1855)

When certain real estate was sold on execution the sheriff represented that the whole land was covered by a mortgage, when in fact the mortgage covered only part, and that an execution was a prior lien on the lands, which was in fact a subsequent one to that on which the levy was made. *Held* that, whether the sheriff knew the representations were false or not, they were sufficient ground for setting aside the sale.—*Reed v. Diven*, 7 Ind. 189.

[c] (Sup. 1859)

Though a sheriff's sale cannot be collaterally impeached, it may be set aside on the direct proceeding for an irregularity in offering the property for sale without appraisal.—*Davis v. Campbell*, 12 Ind. 192.

[d] (Sup. 1859)

Where an administrator purchased his decedent's real estate at an execution sale under an execution in favor of the administrator levied on before he assumed the trust, the cestui que trust may have the sale set aside without showing fraud, or without showing that the administrator made an advantageous bargain; the administrator being a trustee of the estate of his decedent and disqualified from purchasing the same.—*Martin v. Wyncoop*, 12 Ind. 286, 74 Am. Dec. 209.

[e] (Sup. 1883)

A sale cannot be declared void for misdescription of the land in the advertisement and sale, on the mere evidence of an error in some of the published notices, when the first levy is not shown to be incorrect, the second levy is correct, the land was sold and conveyed by a correct description, and the execution defendant

has acquiesced.—*Hollcraft v. Douglass*, 115 Ind. 139, 17 N. E. 275.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 697-702.  
See, also, 17 Cyc. pp. 1274-1276; note, 18 L. R. A. 88.

#### § 250. — Inadequacy of price.

As ground for collateral attack, see post, § 256.

[a] (Sup. 1826)

The real estate of B. was, in 1823, sold on execution, under a judgment recovered against him by A., in 1822, which judgment had not been replevied. A., the execution plaintiff, was the purchaser for \$365. The property sold had been appraised, under the statute of 1820, at \$4,640. In ejectment by A. for the premises it was held that no bid for the land could be made, under the statute of 1820, for less than one-half the appraised value, and that the sheriff's sale, therefore, for \$565, was void, and his deed conveyed no title to the purchaser.—*Harrison v. Doe ex dem. Rapp*, 2 Blackf. 1.

[b] (Sup. 1838)

St. 1820, prohibiting the sale of real estate on execution for less than two-thirds of its appraised value, applies only to sales on judgments rendered after the passage of the act.—*Hobson v. Doe ex dem. Harper*, 4 Blackf. 487.

[c] (Sup. 1849)

Where 1,280 acres of land, worth \$20,000, were sold on execution for \$75, the sale was held to be invalid; the sale not being compulsory on the day it was made, but open to adjournment.—*Sherry v. Nick of the Woods ex dem. Lockwood*, 1 Ind. 575, Smith, 289.

[d] (Sup. 1850)

Where a sheriff sells realty worth \$1,200 for \$111, such inadequacy of price is not in itself sufficient to avoid the sale.—*Roe ex dem. Weirick v. Ross*, 2 Ind. 99.

[e] (Sup. 1853)

Great inadequacy of price will not vitiate a sale of land upon execution, where the inadequacy has been occasioned by the improper conduct of the execution defendant.—*Law v. Smith*, 4 Ind. 56.

[f] (Sup. 1853)

The opinion of the Legislature repeatedly expressed through the appraisement laws, is not without its uses to our own courts in aiding them to come to correct conclusions as to what shall be deemed adequacy or inadequacy of price.—*Benton v. Shreeve*, 4 Ind. 66.

[g] (Sup. 1854)

A sheriff's sale of real estate upon execution may be void, for gross inadequacy of price.—*Swope v. Ardery*, 5 Ind. 213; (1857) *Reeves v. Clark*, 8 Ind. 409.

[h] (Sup. 1855)

In February, 1846, A. recovered a judgment against B. in the Franklin circuit court

for \$61. In May following, B., being the owner of two lots in Brookville, mortgaged them to C. to secure the payment of \$168. In August following, D. recovered a judgment in said court against B. and others for \$146. The lots, which were worth from \$350 to \$400, were sold at sheriff's sale on D.'s judgment for \$11, D. being the purchaser. Afterwards D. purchased A.'s judgment, exposed the lots for sale thereon, and bid them off himself for \$20. This bid D. transferred to J., receiving from J. \$305 for the substitution. Held, that neither sale was avoided by inadequacy of price.—*Bertenshaw v. Moffitt*, 6 Ind. 464.

[i] (Sup. 1857)

Under Rev. St. 1843, relating to execution sales, and requiring that property sold on execution should bring a certain proportion of its appraised value, a sale for less than the required price was void.—*Woodruff v. Hoard*, 9 Ind. 186.

[j] (Sup. 1881)

Inadequacy of price is not sufficient ground for setting aside a sheriff's sale.—*Nelson v. Bronnenburg*, 81 Ind. 193.

[k] (Sup. 1884)

A sheriff's sale of property worth \$6,400, subject to a mortgage of \$4,000, for \$5, will not be set aside simply for inadequacy of price.—*Kerr v. Haverstick*, 94 Ind. 178.

[l] (Sup. 1887)

While a sheriff's sale will not as a rule, be set aside for mere inadequacy of price, yet if the inadequacy be so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or if the owner of the property has been misled or surprised, the sale will be regarded as fraudulent, and the injured party permitted to redeem.—*Fletcher v. McGill*, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779.

[m] (Sup. 1892)

A sheriff's sale of land will not be set aside for mere inadequacy of price, unless the difference between the value of the property sold and the price paid is so great as to shock the sense of justice and right.—*Branch v. Foust*, 30 N. E. 631, 130 Ind. 538.

[n] (Sup. 1895)

Where execution is levied on two lots, one appraised at \$400 and the other at \$1,100, with a joint incumbrance of \$1,100, a sale of the latter lot for \$80 is for two-thirds of its appraised value, exclusive of incumbrances, as required by Rev. St. 1894, § 744 (Rev. St. 1881, § 732).—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 703-707.  
789.

See, also, 17 Cyc. pp. 1276-1278.

**§ 251. — Inadequacy of price in connection with other objections.**

[a] (Sup. 1855)

Certain lands levied on by execution lay in parcels, adjoining one another, though the division between them was distinctly marked. The parcels together, over and above incumbrances, were worth much more than the amount of the execution. They were sold by the sheriff in one lot, to the execution plaintiff, for a sum less than the execution. *Held*, that the sale ought to be set aside.—*Reed v. Diven*, 7 Ind. 189.

[b] (Sup. 1864)

Gross inadequacy of consideration, with any departure from duty on the part of the sheriff, which may prove injurious to the rights of the execution defendant, in the sale of property, will authorize the court to set aside the sale.—*Lashley v. Cassell*, 23 Ind. 600.

Where a sheriff, in order to realize his costs, sells land to a plaintiff's attorney for a grossly inadequate consideration, and the real estate thus sold terminates in the midst of rooms in each story of a building, when half of it would secure the debt, and a proper division of the property, the sale will be set aside.—*Id.*

[c] (Sup. 1867)

It is a departure from his official duty for a sheriff, knowingly, from an entire body of 240 acres of land, suitable for one farm, to select and sell on execution 80 acres out of the center, and thus separate the other two 80's, and destroy all communication between them for the purposes of a farm; and a complaint alleging such facts, together with averments that the property sold was worth \$2,500, and was sold for \$213 to the execution creditor, and that the sale of the central 80 acres had lessened the value of the remaining property to the extent of \$1,000, makes a case of gross inadequacy of consideration, and shows good cause for setting aside the sale.—*Hamilton v. Burch*, 28 Ind. 233.

[d] (Sup. 1881)

Inadequacy of price, in connection with other irregularities, may avoid a sheriff's sale.—*Nelson v. Bronnenburg*, 81 Ind. 193.

[e] (Sup. 1887)

Great inadequacy of price at a sheriff's sale requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.—*Fletcher v. McGill*, 10 N. E. 651, 11 N. E. 779, 110 Ind. 395.

Where a sheriff's sale is made for a grossly inadequate price, and there is included in the levy and sale a number of separate lots, two of which are not owned by the execution defendant, who has no actual knowledge of the sale until after the expiration of the time allowed to redeem, and it appears that the bidding was so arranged as to include all the property when

a separate parcel would have been sufficient, the sale is fraudulent, and will be set aside.—*Id.*

[f] (Sup. 1889)

An execution was issued, and returned unsatisfied only as to a small amount, and another was issued, and returned without any attempt to collect it. A third was issued, and, without any demand on the debtor, or attempt to satisfy it out of available personalty, as required by Rev. St. 1876, § 444, was levied on an 80-acre tract of land worth \$2,500, and the tract unnecessarily sold in solido, and bought in by the judgment creditor for \$36.44, the balance then due on the judgment, including costs. No demand was made for a sheriff's deed until long after the expiration of the period of redemption. *Held* sufficient to raise a presumption of unfairness and oppression, and to make the sale presumptively fraudulent; and the burden is on the purchaser to show that the debtor actually had notice of the sale, and that there was no concealment or misapprehension which induced him to omit to redeem.—*Wright v. Dick*, 116 Ind. 538, 19 N. E. 306.

Gross inadequacy of price, coupled with slight additional facts, showing fraud, irregularity, or any other circumstance, which may have operated to prevent the property from bringing something like its fair value, will avoid a sheriff's sale.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 708-716.

See, also, 17 Cyc. p. 1278.

**§ 253. — Application and proceedings thereon.**

Parol evidence to show invalidity of sale, see EVIDENCE, § 437.

[a] (Sup. 1881)

Where real estate which should have been sold in separate parcels at an execution sale was sold in one lot, proceedings to avoid the sale must be brought within a reasonable time.—*Nelson v. Bronnenburg*, 81 Ind. 193.

[b] (Sup. 1884)

A sheriff's sale, at which the purchaser secured the land at less than its value by preventing others from bidding, may be set aside even after the year allowed for redemption.—*Lynch v. Reese*, 97 Ind. 300.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 698, 717-721.

See, also, 17 Cyc. pp. 1280-1285.

**§ 254. — Hearing and determination.**

[a] (Sup. 1879)

The setting aside of a sheriff's sale is in the discretion of the court.—*Case v. Colter*, 60 Ind. 336.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 722.



**§ 256. Actions to set aside sale.**

Admissions in pleading, see **PLEADING**, § 69.  
 Amendment of pleading as to relief prayed, see **PLEADING**, § 250.

Jurisdiction of action as dependent on whether title to real property is involved, see **COURTS**, § 163.

Limitation of action by purchaser to set aside former sale, see **LIMITATION OF ACTIONS**, § 130.

**[a] (Sup. 1825)**

An execution debtor paid to the sheriff the amount due, except a small balance, which could not then be ascertained, and promised to pay that when called on. The sheriff afterwards, by virtue of the execution, on which \$15.25 were due without calling on the debtor, sold 100 acres of land, worth \$15 or \$20 an acre, for \$351.25. *Held*, that the sale was an abuse of the sheriff's powers, and would be set aside by a court of chancery, though a court of law could not interfere.—*Reed v. Carter*, 1 Blackf. 410.

**[b] (Sup. 1830)**

A purchaser of land at a sheriff's sale, to support his title in an action to set the sale aside, has only to show the judgment of a competent court and an execution authorizing the sale of land, and need not show that the defendant in the execution had not personal property out of which the debt might have been made.—*Frakes v. Brown*, 2 Blackf. 295.

**[c] (Sup. 1852)**

An execution defendant, whose land has been sold at sheriff's sale, cannot, in ejectment to recover possession of the premises, show that his own title was defective, as against a purchaser at the sale; but third persons in possession may.—*Harris v. Doe ex dem. Spencer*, 3 Ind. 494.

**[d] (Sup. 1854)**

A judgment creditor of the defendant cannot disturb a sheriff's sale of land, made in gross, because it contained a greater number of acres than it was supposed to contain when it was levied upon, appraised, and sold.—*Russell v. Houston*, 5 Ind. 180.

**[e] (Sup. 1860)**

A sheriff is not a proper party defendant in an action to set aside a sale made by him on execution.—*Draper v. Vanhorn*, 15 Ind. 155.

**[f] (Sup. 1861)**

A tender of the price paid by the purchaser of land at a sheriff's sale is not requisite in a suit to set aside the sale and annul the sheriff's deed.—*Banks v. Bales*, 16 Ind. 423.

**[g] (Sup. 1862)**

In an action to set aside a sale on execution issued on a judgment in an action on a contract, instituted before the delivery of a deed by the sheriff to the purchaser, and before the payment of the purchase money, it is competent to show by testimony where such con-

tract was executed and payable.—*Hutchins v. Barnett's Ex'r*, 19 Ind. 15.

**[h] (Sup. 1864)**

A mortgagee, where the mortgaged property has been sold at sheriff's sale upon a judgment fraudulently procured in favor of another person, may institute his action to set aside the sheriff's sale without at the same time suing for the foreclosure of his mortgage; and his mortgage, or a copy of it, need not in such case be filed with the complaint.—*Potter v. Sumner*, 22 Ind. 442.

**[i] (Sup. 1865)**

A judgment defendant, in order to set aside a sale of land on execution under the judgment, on the ground that such representations were made by the sheriff at the sale in the presence of the purchaser, that persons were prevented from bidding, and that the land was sold for about one-third its value, need not offer to repay the money bid upon the sale.—*Seller v. Lingerhman*, 24 Ind. 264.

In an action to set aside an execution sale, representations by the sheriff before and at the time of the sale are admissible in evidence, in connection with the inadequacy of price, on the issue whether the sale was fair and valid.—*Id.*

**[j] (Sup. 1867)**

The first paragraph of a complaint to set aside a sheriff's sale of real estate alleged that the plaintiff derived title to the premises by deed from the execution defendant, and sought to avoid the sale on the ground that the judgment was void. The second paragraph admitted the lien of the judgment, and sought to avoid the sale on the ground that the property was susceptible of division and had been sold in solido. The third paragraph was in the usual form of a complaint for recovery of the possession of land. To the second and third paragraphs the defendant answered that the conveyance of the property by the execution defendant to the plaintiff was without consideration, and made to defraud creditors. *Held*, that the answer was bad,—as to the second paragraph, because that paragraph admitted the lien of the judgment, and did not assert any right under the deed against the judgment plaintiff, and the deed as between the parties was good; and, as to the third paragraph, because that paragraph did not disclose the plaintiff's title, and the answer did not aver that the plaintiff had no other title than that derived from the deed.—*Taylor v. McClure*, 28 Ind. 39.

**[k] (Sup. 1867)**

If property of an execution defendant has been improperly sold, it is no bar to his action to set aside the sale that the purchaser, being the execution plaintiff, and hence chargeable with notice of irregularities, offered to reconvey to him on payment of the debt. He can insist that the execution shall be legally levied upon his property, the sale fairly conducted, and the money collected in the manner provided by law.—*Hamilton v. Burch*, 28 Ind. 233.

In an action to set aside a sheriff's sale, an offer to prove that at the sale there were ten or more persons present competent to bid, and that three or more did bid, and that defendants had offered the land soon after the sale to an agent of plaintiffs for the amount of the judgment, interest, and costs, is immaterial, and properly rejected.—*Id.*

[I] (Sup. 1872)

A complaint to set aside an execution sale made to the execution plaintiff alleged that the real estate consisted of two 40-acre lots, and the sheriff so treated it by offering one 40-acre lot separately, and then offering both lots together. *Held* sufficient on demurrer.—*Voss v. Johnson*, 41 Ind. 19.

[m] (Sup. 1876)

In an action for the recovery of the possession of real estate, an answer by way of counterclaim seeking to have set aside a sale thereof, made to plaintiff by the sheriff under an execution issued on a judgment in favor of plaintiff and against defendant, it being alleged that, before the sale, defendant pointed out and surrendered to the officer holding the execution personal property to be levied on and sold by him in value sufficient to satisfy the execution, but that the officer, confederating with plaintiff, refused to accept such personal property, and without defendant's knowledge or consent levied on the real estate in question, and that such officer also confederating with plaintiff, advertised the real estate and sold it as a whole without offering it in the subdivisions into which it was divisible, each of said subdivisions being worth more than the sum paid by plaintiff and more than sufficient to satisfy the execution, and further alleging that defendant offered to pay the purchase money together with 10 per cent. interest and all costs or such sum as the court might find due plaintiff, was good on demurrer.—*Gilpin v. Wilson*, 53 Ind. 443.

[n] (Sup. 1879)

The complaint in a suit to have a sheriff's sale set aside and a receipt in an execution canceled and declared void, and satisfaction of a certain judgment vacated and set aside and the judgment in favor of plaintiffs and against defendants declared in full force from the rendition thereof, alleged that plaintiffs recovered a judgment against defendants; that execution was levied, or attempted to be levied, by the sheriff, upon certain land of one of the defendants; that the land was advertised for sale and on a certain date was sold and bought in by plaintiffs for the amount of the balance due on their judgment and costs; that plaintiffs received the sheriff's certificate of purchase and then the sheriff's deed, and that the execution was returned satisfied; that in the levy, the advertisement of sale, the certificate of sale, and the deed the land was described as "a part of sections five (5) and eight (8) in township seven (7) south of range five (5) west, 14 acres"; that the pretended sheriff's sale and the sheriff's deed constituted the sole and only considera-

tion for the receipt upon the execution, and for the apparent satisfaction of the judgment. *Held*, that the description in the levy, certificate, and deed was so utterly defective as to convey absolutely nothing, so that a demurrer to such complaint for want of sufficient facts should have been overruled.—*Kercheval v. Lamar*, 68 Ind. 442.

[o] (Sup. 1881)

In an action to set aside an execution sale, an alleged copy of the proceedings leading up to the execution filed with the complaint constituted no part of the pleading, and neither added to nor detracted from the force of its averments.—*Stotsenburg v. Stotsenburg*, 75 Ind. 538.

[p] (Sup. 1881)

In an action by a grantee of a judgment debtor to set aside a sheriff's sale on execution issued on the judgment, the matter in issue is whether the execution purchaser has a valid title to the land by virtue of the sheriff's deed, and defendants cannot attack the sufficiency of plaintiff's title to maintain the action, since, if plaintiff has no title, a judgment in his favor cannot operate in favor of his grantor, who is not a party to the action.—*Fechheimer v. Washington*, 77 Ind. 366.

[q] (Sup. 1881)

Where a complaint by a man and woman to set aside a sheriff's sale and quiet title alleged joint ownership in land, and that their title was clouded, and the only issue tendered was the validity of a sheriff's sale, the plaintiffs could not complain that the court limited its judgment to a proviso that the judgment should not affect whatever rights the woman had as the wife of the other plaintiff; it not appearing from the complaint that plaintiffs were husband and wife.—*Mugge v. Helgemeier*, 81 Ind. 120.

[r] (Sup. 1881)

Rev. St. 1876, p. 217, § 466, provides that if an estate consists of several lots, tracts, and parcels, each shall be offered separately, and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division. *Held*, that where the execution debtor waited until the purchaser at the execution sale had obtained his deed and transferred the property, and his suit to set aside the sheriff's deed because of a sale in mass was not commenced until after the year for redemption had expired, the suit was barred by delay.—*Nelson v. Bronnenburg*, 81 Ind. 193.

Where a complaint to set aside a sheriff's deed and quiet title to real estate sold under execution alleged that the execution debtor had personal property subject to execution which ought to have been, but was not, exhausted before any sale of his real estate, but it was not alleged that the sheriff had knowledge of such personal property or by reasonable diligence could have discovered it, and it was not averred that it was in the county or that it might have

been taken under the execution or that it was unincumbered, the complaint was insufficient, since there is no cause of action in such a case without an allegation that the sheriff had knowledge of the personal property, or by reasonable diligence might have discovered it, and that the same might have been taken under the execution.—*Id.*

[s] (Sup. 1882)

In a suit to set aside a sheriff's sale of land, it was averred that a judgment was recovered against a principal and other parties as sureties, and that the land sold by the sheriff, after the rendition of the judgment, was owned by one of the sureties, and that he conveyed it by deed to a third person who devised it to the plaintiffs, that thereafter a judgment creditor issued an execution on the judgment, and the sheriff sold it to the judgment creditor and issued to him a certificate of the purchase without having demanded property of the principal debtor, and without having exhausted the residue of the property of the surety, though he was the owner of a large amount of real and personal property subject to execution of sufficient value to satisfy the judgment. *Held*, that as it was not averred that the deed to such third person had been recorded, or that the judgment creditor had any notice that such surety had sold the land, and as he purchased for value and without notice he must be regarded as a bona fide purchaser, and the deed of conveyance made by such surety in the judgment to such third person must as to him be regarded as fraudulent and void.—*Sansberry v. Lord*, 82 Ind. 521.

[t] (Sup. 1884)

In a suit to set aside a sheriff's sale of certain real estate, the execution, the advertisement of the sheriff's sale, and the schedule and appraisal referred to in the complaint were properly admitted in evidence for the purpose of proving the material facts averred therein.—*Barkley v. Mahon*, 95 Ind. 101.

[u] (Sup. 1884)

The failure of a company to bring a suit to set aside a sheriff's sale of its property for four years after the sale was made was not such an acquiescence in it as precludes a court of equity from disturbing it, where it appears that it did not know the property had been sold for any length of time before the suit was commenced.—*Fountain Coal Co. v. Phelps*, 95 Ind. 271.

[v] (Sup. 1884)

In an action to set aside a sheriff's sale of land, the complaint was insufficient where it averred that the plaintiff turned out a certain part of the land which was of sufficient value to satisfy the writs, but it was not averred that the sheriff did not first offer the tract so designated.—*Lynch v. Reese*, 97 Ind. 360.

[w] (Sup. 1884)

Where, in a suit to set aside a sale of real estate, plaintiff did not aver that, when the levy

was made, she was ready to pay the judgment or that she had property other than that levied on which she would have designated and which she was still ready to turn out on the execution, she was not harmed by the levy not having been preceded by the service of execution.—*Guerin v. Kraner*, 97 Ind. 533.

[x] (Sup. 1833)

The burden does not rest on a landowner whose land has been sacrificed at a sheriff's sale to show, in an action to set aside the sale, than any person would have bid more than the purchaser if the latter had not falsely represented that he was bidding for the use of the execution defendant.—*Stuart v. Brown*, 34 N. E. 976, 135 Ind. 232.

[y] (Sup. 1894)

Where, on execution sale of land, the sheriff issued a certificate properly describing the whole tract, and the purchaser entered after the expiration of redemption, and remained in possession for 10 years, the fact that, by mistake, part of the tract was omitted from the granting clause in the sheriff's deed, does not extend the execution debtor's right of action, if not enforced within 10 years after the sale, as provided in Rev. St. 1894, § 294 (Rev. St. 1881, § 293).—*Moore v. Ross*, 130 Ind. 200, 38 N. E. 817.

[yy] (Sup. 1900)

Under Burns' Rev. St. 1894, § 744, providing, "No property shall be sold on any execution or order of sale issued out of any court for less than two-thirds of the appraisal cash value thereof, exclusive of liens and incumbrances, except where otherwise provided by law;" and section 585, that, "when a judgment is to be executed without relief from appraisal laws, it shall be so ordered in the judgment,"—a complaint which alleged that property of the plaintiff was sold for a price greatly below its value, at a sheriff's sale under a judgment for costs, without any appraisal, and that a sale without appraisal was not ordered in the judgment, and prayed that such sale be set aside, was sufficient.—*Bollman v. Gemmill*, 57 N. E. 542, 155 Ind. 33.

[z] (Sup. 1900)

Burns' Rev. St. 1894, § 3350, declares that every conveyance of lands shall be recorded in the recorder's office of the county where such lands are situated, and every conveyance not so recorded in 45 days from its execution shall be void as against any subsequent purchaser in good faith and for a valuable consideration. Defendant, who was a judgment creditor of plaintiff's husband, bought land at a sheriff's sale as the land of such husband, without notice that the land had been conveyed to plaintiff, the conveyance not being recorded. *Held*, that he took good title to the land, and hence a complaint, in an action to set aside the sheriff's sale and quiet title to the land, which fails to allege that plaintiff's deed to the land was recorded 45 days before the levy and sale, or that

defendant had notice, actual or constructive, before purchasing the land, was demurrable.—*Union Cent. Life Ins. Co. v. Dodds*, 58 N. E. 258, 155 Ind. 365.

[zz] (App. 1906)

In an action to set aside an execution sale of property, plaintiff cannot object that the amount for which the property was sold was inadequate or less than its actual value. in the absence of an averment of such fact in the complaint.—*Fuller v. Exchange Bank*, 78 N. E. 206, 38 Ind. App. 570.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 723-733.

See, also, 17 Cyc. pp. 1282-1285.

### § 258. Collateral attack on sale.

[a] (Sup. 1836)

After a town lot had been sold on execution, the execution debtor brought ejectment for the lot against the purchaser at the sheriff's sale. *Held*, that the validity of the sheriff's acts in selling the whole, instead of part, of the lots, was a proper subject of inquiry.—*Doe ex dem. Maguire v. Smith*, 4 Blackf. 228.

[b] A sale on execution issued more than a year after judgment, without revival, cannot, upon that ground alone, be avoided in a collateral suit by one who was not a party to the execution.—(Sup. 1849) *Doe ex dem. Cooper v. Harter*, 1 Ind. 427; (1850) *Doe ex dem. Cooper v. Harter*, 2 Ind. 252.

[c] (Sup. 1849)

The sale on execution of the whole of a tract of land of great value, and capable of division, for a nominal sum, in unfavorable weather, very few persons being present, will be *held* invalid upon an action of ejectment between the parties.—*Sherry v. Nick of the Woods ex dem. Lockwood*, 1 Ind. 575, *Smith*, 289.

[d] (Sup. 1850)

A sale under process, absolutely void from defects apparent upon the face of the writ, can convey no title to any purchaser. Where it is merely erroneous and voidable, the defects which render it so can only be taken advantage of in direct proceedings, for the purpose of having the errors corrected; and, unless reversed or set aside by the court from which it issued, such process will be deemed valid for all purposes, as regards strangers, and in collateral actions.—*Doe ex dem. Cooper v. Harter*, 2 Ind. 252.

A sale under a dormant judgment is voidable, and will not be declared void in collateral proceedings, and it is immaterial in such case that the purchasers were the execution plaintiffs, and were, therefore, to be charged with notice.—*Id.*

[e] (Super. 1871)

An execution, at most only voidable, cannot be avoided in a collateral suit by one who is not a party to it. It must be by direct pro-

ceedings by a person in position to impeach its validity.—*Woodburn Sarven Wheel Co. v. McKernan*, Wils. 48.

[f] (Sup. 1875)

Where a sale of land under execution was illegal, because there was no appraisement, but no direct proceeding to avoid it was brought within 10 years thereafter, the sale cannot be attacked in a collateral proceeding to recover possession of the land.—*Hatfield v. Jackson*, 50 Ind. 507.

[g] (Sup. 1882)

A sheriff's sale of land under an execution issued upon a transcript of a justice's judgment, filed more than 10 years after its rendition, is not void for want of revival and leave of court, but voidable only in a direct proceeding instituted by the execution defendant before the sale.—*Martin v. Prather*, 82 Ind. 535.

[h] (Sup. 1885)

A sale on execution of land worth \$8,780 for \$1,125, but subject to judgments of equal date for \$13,000, will not be treated as void for inadequacy of price in a collateral proceeding by the holder of one of the judgments.—*Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754.

[i] (Sup. 1890)

The title of a purchaser at a sale of land under an execution issued by an assignee of a judgment rendered in favor of a county cannot be collaterally attacked by strangers to that judgment and to its assignment because the county board sold and assigned the judgment without publicly advertising it for sale for 60 days, as required by Rev. St. 1881, § 4248.—*Wells v. Bower*, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570.

[j] (Sup. 1890)

An execution sale will not be set aside for a mere irregularity, on a collateral attack by a creditor under a second execution.—*Ribelin v. Peugh*, 126 Ind. 216, 25 N. E. 1103.

[k] (Sup. 1892)

A merely irregular sale on execution cannot be collaterally attacked.—*Boos v. Morgan*, 30 N. E. 141, 130 Ind. 305, 30 Am. St. Rep. 237.

[l] (Sup. 1892)

In an action to recover the possession of land by the grantee under a sheriff's deed, where the validity of the sale is attacked by a cross complaint, the attack is direct, rather than collateral.—*Branch v. Foust*, 130 Ind. 538, 30 N. E. 631.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 736-739, 789.

See, also, 17 Cyc. pp. 1285, 1286.

### § 259. Presumption of validity.

[a] (Sup. 1853)

Where it does not appear that the rents and profits of land were not first offered upon

a sale on execution, it will be presumed that they were first offered.—*Law v. Smith*, 4 Ind. 56.

[b] The presumption is in favor of the regularity of a sheriff's sale.—(Sup. 1854) *Mercer v. Doe ex dem. Nutting*, 6 Ind. 80; (1882) *Ferrier v. Deutchman*, 81 Ind. 390.

[c] (Sup. 1857)

A promissory note was levied upon and sold by virtue of an execution. The defense in a suit upon it was no title, because sold without appraisalment. *Held*, that the court would presume, on appeal, either that the contract upon which the judgment was rendered, on which the note was sold, was anterior in date to the passage of an appraisalment law, or a waiver of such law, as it did not otherwise appear on the record.—*Small v. Eby*, 9 Ind. 177.

[d] (Sup. 1861)

In absence of proof to the contrary, a sheriff, at a sale of land under an execution, will be presumed to have complied with the requirements of the law in not selling more than was necessary to satisfy the execution, if the land was divisible.—*Banks v. Bales*, 16 Ind. 423.

[e] (Sup. 1864)

Where the law requires a sheriff to appraise property taken on execution, it will be presumed, in the absence of proof, that he performed his duty in that respect.—*Evans v. Ashby*, 22 Ind. 15.

[f] (Sup. 1868)

The rule that the sheriff is presumed to have done his duty in making the sale does not apply where the fact that the sale was in violation of the statute is apparent on the face of the record through which the title is claimed.—*Piel v. Brayer*, 30 Ind. 332, 95 Am. Dec. 699.

[g] (Sup. 1880)

Plaintiff claimed that a sheriff's sale made under an execution based upon a judgment (both with relief from valuation and appraisalment laws) was invalid because it did not appear that the lands had been appraised as required by law. The sheriff's return did not state whether or not such appraisalment was made, and there was no evidence upon the point introduced at the trial. *Held* that, in making up the special finding of facts, the presumption that the sheriff did his duty ought to prevail.—*Talbott v. Hale*, 72 Ind. 1.

[h] (Sup. 1882)

Where a sheriff in his return of a sale of several tracts of land for a gross sum says nothing about the manner in which they were offered, it will be presumed that he conducted the sale in the proper manner by offering them separately.—*Ferrier v. Deutchman*, 81 Ind. 390.

[i] (Sup. 1889)

Where a sheriff has executed a deed for property sold on execution, it will be presumed, in the absence of proof to the contrary, that he did his duty, and collected from the purchaser

the amount of his bid.—*Meikel v. Meikel*, 119 Ind. 421, 20 N. E. 720.

[j] (Sup. 1886)

It cannot be presumed that the sheriff ex parte in the sale of lands under execution offered and sold more than the interest of the execution debtor.—*Currier v. Elliott*, 39 N. E. 554, 141 Ind. 394.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 740-742.

See, also, 17 Cyc. p. 1287.

## (B) TITLE AND RIGHTS OF PURCHASER.

Adverse possession by execution defendant as against purchaser, see ADVERSE POSSESSION, § 60.

As affected by return or defects therein, see post, § 345.

Color of title, see ADVERSE POSSESSION, § 74.

Liability of sheriff for representations of deputy as to title, see SHERIFFS AND CONSTABLES, § 100.

Lien of purchaser for taxes paid, see TAXATION, § 531.

Priorities between purchasers under different executions, see ante, § 112.

Restraining sale under prior execution of property purchased, see ante, § 171.

Right of dower, see DOWER, § 14.

Right of purchaser to attack fraudulent transfer by debtor, see FRAUDULENT CONVEYANCES, § 223.

Right of purchaser to charge debtor for use and occupation during time allowed for redemption, see USE AND OCCUPATION, § 4.

Right of purchaser to reform deed, see REFORMATION OF INSTRUMENTS, § 26.

Rights as to fixtures, see FIXTURES, § 28.

Sheriff's deed as equitable mortgage, see MORTGAGES, § 27.

Warranty by sheriff or constable, see SHERIFFS AND CONSTABLES, § 120.

## § 260. Nature and effect of transfer in general.

Estoppel by position in judicial proceeding, see ESTOPPEL, § 68.

[a] (Sup. 1864)

A person executed a mortgage of land, the equity of redemption in which was afterwards sold on execution against him. Subsequently the mortgage was foreclosed, and the mortgagee and another person became the purchasers at the sale on foreclosure. The premises were then conveyed to the mortgagor in pursuance of a parol agreement between him and the mortgagee that such conveyance should be made upon his payment of the mortgage debt. More than 10 years after the sheriff's deed was executed, the purchaser at the execution sale was sued by the mortgagor to recover possession of the land. *Held*, that said parol agreement did not operate so as to make the retransfer to him in-

ure to the benefit of the purchaser under execution.—Wood v. Sandford, 23 Ind. 96.

[b] (Sup. 1880)

In an action by a purchaser against a third person for the possession of property sold under execution, the purchaser must not only show the judgment, execution, sale, and sheriff's deed, but must show, in addition, that the execution defendant had title.—Shipley v. Shook, 72 Ind. 511.

[c] (Sup. 1883)

To support title under a sheriff's sale, a judgment, execution, sale, and deed must be shown.—Leary v. New, 90 Ind. 502.

[d] (Sup. 1884)

One who claims title to land under a sheriff's sale must produce the sheriff's deed, as such deed is the completion of the title.—Wilhite v. Hamrick, 92 Ind. 594.

[e] (Sup. 1888)

A sale on a judgment against an owner does not make the purchaser the owner of the land, but the judgment debtor has a right to bring his action to quiet title, although the claim of the purchaser at the sheriff's sale cannot be cut off, for during the year allowed for redemption the purchaser at the sheriff's sale has no claim or right except to be repaid the amount of his bid, with the rate of interest prescribed in the statute.—Brown v. Cody, 18 N. E. 9, 115 Ind. 484.

[f] (Sup. 1895)

A purchaser at an execution sale stands in no sort of legal privity with the creditor upon whose claim the judgment was obtained.—Currier v. Elliott, 39 N. E. 554, 141 Ind. 394.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 743-746.  
See, also, 17 Cyc. p. 1342.

§ 262. Property passing by sale.

[a] (Sup. 1882)

Where an execution defendant sows a crop which he knows cannot mature until after the year allowed for redemption has expired, he cannot, after a failure to redeem, remove such crop.—Thomas v. Noel, 81 Ind. 382.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 747-760;  
48 CENT. DIG. Waters, § 173.  
See, also, 17 Cyc. pp. 1288-1290, 1348;  
note, 19 Am. Dec. 752.

§ 263. Estate or interest acquired.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 747-760.  
See, also, 17 Cyc. pp. 1288-1294; note,  
15 L. R. A. 68; note, 89 Am. Dec. 370.

§ 264. — In general.

[a] (Sup. 1822)

A purchaser of real estate at sheriff's sale obtains all the interest that the execution debt-

or had in the property.—Way v. Lyon, 3 Blackf. 76.

[b] The purchaser at an execution sale acquires the right, title, and interest of the debtor.—(Sup. 1881) Sharpe v. Davis, 76 Ind. 17; (1885) Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853.

[c] (Sup. 1881)

The purchaser at a sheriff's sale of the interest of one of two joint tenants cannot secure a title superior to that of the other.—Wilson v. Peelle, 78 Ind. 384.

[d] At a sale on execution the purchaser takes only the interest of the defendant in execution.—(Sup. 1882) Miller v. Noble, 86 Ind. 527; (1889) Lewark v. Carter, 20 N. E. 119, 117 Ind. 206, 3 L. R. A. 440, 10 Am. St. Rep. 40.

[e] (Sup. 1884)

No warranty of title is implied on a sale by a sheriff of property under execution.—Short v. Sears, 93 Ind. 505.

[f] A judgment creditor who buys at his own sale obtains only the interest which the judgment debtor had in the property at the time the judgment was entered.—(Sup. 1889) Shirk v. Thomas, 22 N. E. 976, 121 Ind. 147, 16 Am. St. Rep. 381; (1895) Currier v. Elliott, 39 N. E. 554, 141 Ind. 394.

[g] (App. 1908)

A purchaser at a sale under a judgment creditor's execution will acquire the title of the mortgagor and his wife, not under the certificate of sale on foreclosure, but under his deed received pursuant to the execution sale, under Burns' Ann. St. 1901, § 785, providing that such deed shall convey to the purchaser all the title and interest of the owners sold under the original execution.—Luken v. Fickle, 42 Ind. App. 445, 84 N. E. 561.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 747-758.  
See, also, 17 Cyc. p. 1288.

§ 265. — Particular estates or interests of debtor.

[a] (Sup. 1869)

The death of a husband leaving a wife surviving would, it seems, terminate an estate conveyed by a sheriff conveying the wife's real estate under an execution against the husband.—Montgomery v. Tate, 12 Ind. 615.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 759; 33 CENT. DIG. Life Est. § 53.  
See, also, 17 Cyc. pp. 1291-1293; note, 28 L. R. A. 161.

§ 266. — Time as of which title vests in purchaser.

[a] The title of a purchaser at a sheriff's sale takes effect from the date of the judgment.—(Sup. 1818) Smith v. Allen, ex dem. Bigger, 1

Blackf. 22; (1849) *Doe ex dem. Hutchinson v. Horn*, 1 Ind. 363, Smith, 242, 50 Am. Dec. 470.

[b] (Sup. 1889)

Where land is conveyed by a sheriff under execution sale, the title does not pass until the year for redemption expires and a deed is executed by the sheriff.—*Shirk v. Thomas*, 22 N. E. 976, 121 Ind. 147, 16 Am. St. Rep. 381.

[c] (Sup. 1891)

The title of the purchaser of land at a sheriff's sale relates back to the time the judgment lien became effective, and such rule carries back the title so as to vest in the purchaser all the right and interest the judgment debtor possessed in the land at the time the judgment fastened on it.—*Paxton v. Sterne*, 26 N. E. 557, 127 Ind. 289.

[d] (App. 1908)

Where property sold under mortgage foreclosure was redeemed by a judgment creditor of the mortgagor, a sale by such redemptioner under a venditioni exponas is to be regarded as having been made under the original foreclosure decree, and the title of the purchaser at such sale relates back to the date of the execution of the mortgage on which the redemption was based.—*Luken v. Fickle*, 42 Ind. App. 445, 84 N. E. 561.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 760.

See, also, 17 Cyc. p. 1294; note, 15 Am. Dec. 249.

§ 268. Liens or incumbrances on property.

Compliance with conditions of mortgage as condition precedent to right to possession, see post, § 278.

Right of execution creditor as to excess proceeds after satisfaction of mortgage, see CHATTEL MORTGAGES, § 265.

Right of purchaser to subrogation, see SUBROGATION, § 16.

[a] (Sup. 1849)

A. mortgaged land to B., and a judgment was afterwards recovered against A. A. then mortgaged the land to C. The land was sold, and execution issued upon the judgment. D. became the purchaser, with notice of the first mortgage, which had never been recorded, and then procured an assignment of the second mortgage. *Held*, that D. held the land subject to the first mortgage, and that he could not set up the second mortgage to defeat it; that having been extinguished by the execution sale.—*Board of Com'r's of Sinking Fund v. Wilson*, 1 Ind. 356, Smith, 221.

[b] (Sup. 1868)

A complaint alleged that R., as assignee of the plaintiff, recovered a judgment against B. in a certain court, and afterwards S. recovered a judgment against B., not stating in what court; that both executions were placed in the hands of the same officer, who levied the R.

execution on lands of B., sold them at public auction to S., the highest bidder, executed to S. a deed therefor, applied the proceeds in payment of the R. execution, and credited the overplus on the S. execution; that afterwards the plaintiff recovered a judgment against B. on a note given by B. as a part of the purchase money of the same lands, and caused the execution to be levied thereon, and at the sheriff's sale became the purchaser; that at the previous sale the sheriff gave notice of such note; and that he intended to enforce a vendor's lien thereon. *Held*, that the facts alleged were insufficient to impeach S.'s title to the lands.—*Robertson v. Smith*, 29 Ind. 313.

[c] (Sup. 1881)

A purchaser at an execution sale, based on a judgment rendered subsequent to the execution and recording of a mortgage on the land sold, takes title to the land conveyed subject to such mortgage.—*Smith v. Moore*, 73 Ind. 388.

[d] (Sup. 1881)

In a suit on notes secured by mortgages of personalty, it was not error to refuse to permit a defendant to prove his purchase of the property under an execution issued after the mortgages were created, as the purchaser at such a sale of mortgaged personalty buys subject to the mortgage, and hence proof of such purchase would have been immaterial.—*Richardson v. Seybold*, 76 Ind. 58.

[e] (App. 1892)

An officer who levies on mortgaged chattels under the authority of Rev. St. 1881, § 722, and sells it on an execution, the lien of which is junior to that of the mortgage, must hold it until the terms of the mortgage have been complied with by the purchaser.—*Collins v. State ex rel. Hutchinson*, 30 N. E. 12, 3 Ind. App. 542, 50 Am. St. Rep. 298.

[f] (Sup. 1895)

On the sale under execution of land subject to an incumbrance jointly with other land, the incumbrance cannot be apportioned between the parcels, so as to fix absolutely the amount for which each shall be liable.—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

[g] (App. 1895)

The purchaser at an execution sale of mortgaged chattels has a lien thereon for the excess remaining after satisfaction of the mortgage.—*McFadden v. Ross*, 14 Ind. App. 312, 41 N. E. 607.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 762-767.

See, also, 17 Cyc. pp. 1294-1297.

§ 269. Equities against debtor.

[a] (Sup. 1881)

A trust in favor of a wife in respect to land conveyed to the husband, no mention of which appears on the face of the deed, will not prevail against a purchaser at an execution sale on a judgment against the husband, unless no-

tice to such purchase of such trust is fairly and clearly established by the evidence.—*Turner v. First Nat. Bank of Madison*, 78 Ind. 19.

[b] (Sup. 1882)

A purchaser of land at a sheriff's sale takes subject to outstanding equities of which he has notice before the completion of his purchase.—*Heck v. Fink*, 85 Ind. 6.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 768.

See, also, 17 Cyc. p. 1297.

§ 270. *Bona fide purchasers.*

Sufficiency of findings by court, see TRIAL, § 395.

Under satisfied judgment, see ante, § 12.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 769-790.

See, also, 17 Cyc. pp. 1298-1305; note, 21 L. R. A. 33.

§ 271. — *In general.*

[a] (Sup. 1822)

The title of a bona fide purchaser of real estate at sheriff's sale cannot be impeached for any error in the judgment, nor on account of the execution's having issued out of season, nor for any fault of the sheriff in not pursuing the directions of the statute as respects the inquest, advertisement of sale, etc. To support his title, however, the purchaser must show the sale to have been authorized by the judgment of a court of competent jurisdiction, and by the kind of execution which the statute prescribes.—*Armstrong v. Jackson ex dem. Elliott*, 1 Blackf. 210, 12 Am. Dec. 225.

[b] (Sup. 1848)

Under Act Feb. 11, 1843, providing that no property shall be sold on execution for less than its fair value, to be ascertained by an appraisement, a sale made in violation thereof is void, though the purchaser had no actual notice of the irregularity.—*Doe ex dem. Holman v. Collins*, 1 Ind. 24, Smith, 58.

[c] (Sup. 1849)

By a sale, on execution, of land subject to a mortgage, the claim of a mortgagee whose lien is subsequent to that of the judgment is extinguished in the hands of a purchaser without notice.—*Board of Com'rs of Sinking Fund v. Wilson*, 1 Ind. 356.

[d] (Sup. 1851)

A bona fide purchaser at sheriff's sale of land, which the judgment debtor had conveyed away before judgment, but the deed for which had not been recorded within 90 days of its execution, nor prior to the recording of the sheriff's deed, will hold the land.—*Doe ex dem. Hosier v. Hall*, 2 Ind. 556, 54 Am. Dec. 460.

[e] (Sup. 1863)

Where, after adjournment of court, the clerk issued an order of sale without direction from plaintiff, and the sheriff sold the property

to one who bought in good faith, and without notice that the writ had issued without authority, or that the plaintiff had no notice of the time of sale, the rights of the bona fide purchaser were not affected thereby.—*Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315.

[f] (Sup. 1854)

When a purchaser at execution sale is the attorney of the execution plaintiff, he is not entitled to the consideration which in a case of less hardship might be accorded to a purchaser without notice of all the facts.—*Lashley v. Cassell*, 23 Ind. 600.

[g] (Super. 1872)

An irregularity in issuing the execution will not affect an innocent purchaser of property sold at a sheriff's sale.—*Gillespie v. Splahn*, Wils. 228.

[h] (Sup. 1877)

The rule of caveat emptor applies to purchasers at sheriffs' sales on execution.—*Neal v. Gillaspy*, 56 Ind. 451, 26 Am. Rep. 37.

[i] (Sup. 1878)

Mere inadequacy of price is not a ground for setting aside a sheriff's sale after the property has come into the hands of an innocent purchaser without notice.—*Dawson v. Jackson*, 62 Ind. 171.

[j] (Sup. 1878)

Irregularities in the proceedings prior to an execution sale cannot affect the title acquired by a bona fide purchaser at such sale without notice of such irregularities.—*Joyce v. First Nat. Bank of Madison*, 62 Ind. 188.

[k] (Sup. 1881)

A purchaser of real estate at a sheriff's sale, in good faith and without notice, or his assignee, will be protected from secret trusts and unrecorded liens.—*Rooker v. Rooker*, 75 Ind. 571.

[l] (Sup. 1881)

The original vendor of goods obtained from him on false pretenses cannot maintain replevin against a bona fide purchaser at a sale on execution against the fraudulent vendee.—*Clafin v. Cottman*, 77 Ind. 58.

[m] (Sup. 1881)

Where A. purchased at a sheriff's sale, for a valuable consideration and without notice, land in fact subject to a secret trust, held, that he took the land discharged of the trust by virtue of 1 Rev. St. 1876, p. 915, which provides that no such trust "shall defeat the title of a purchaser for a valuable consideration and without notice," and that the principle that a purchaser at a sheriff's sale takes only the debtor's interest did not apply.—*Milner v. Hyland*, 77 Ind. 458.

[n] (Sup. 1881)

Under an ordinary conveyance to two parties, which by Rev. St. 1881, § 2922, creates a tenancy in common, they in fact being partners



and the property firm property, a bona fide purchaser at a sheriff's sale on execution against one partner, without notice of the partnership, would hold that portion against firm creditors.—*McMillan v. Hadley*, 78 Ind. 590.

[o] (Sup. 1888)

A sale to an innocent purchaser will not be set aside for irregularities in the notice, at the suit of a judgment creditor of defendant in execution, in the absence of a showing that plaintiff's judgment cannot be satisfied by an ordinary execution.—*Hollcraft v. Douglass*, 115 Ind. 139, 17 N. E. 275.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 769-780, 782.

See, also, 17 Cyc. p. 1298.

### § 272. — Notice.

[a] (Sup. 1850)

The distinction between a purchaser with and without notice cannot be applied to all cases of sales under executions called irregular.—*Doe ex dem. Cooper v. Harter*, 2 Ind. 252.

[b] (Sup. 1851)

A purchaser at sheriff's sale stands, in relation to the registration law, as though he were purchaser at the same date from the execution defendant himself.—*Doe ex dem. Hosier v. Hall*, 2 Ind. 556, 54 Am. Dec. 460.

[c] (Sup. 1866)

Where lands are sold upon a judgment against a party who has only a naked legal title, and the person holding the equitable title is in possession at the time, such possession is constructive notice to the purchaser.—*Glide-well v. Spough*, 26 Ind. 319.

[d] (Sup. 1868)

A purchaser at a sheriff's sale of land, who, on being notified that the judgment had been paid without the sheriff's knowledge, refuses the sheriff's retender of the purchase money and afterwards takes a sheriff's deed, cannot hold as innocent purchaser. The payment of the judgment terminated the sheriff's power to sell.—*Myers v. Cochran*, 29 Ind. 256.

[e] (Super. 1871)

A sale under a voidable execution is valid, even to a purchaser, with notice of the facts, where there is no fraud shown.—*Woodburn Sarven Wheel Co. v. McKernan*, Wils. 48.

[f] (Sup. 1874)

Where land is purchased at sheriff's sale by one who has actual notice of a mortgage thereon, wherein the county and state where the land is situated are not named, though the section, township, and range are specified, and the vendee knows what land was intended to be mortgaged and the county where the land lies, he cannot be regarded as a purchaser for a valuable consideration without notice.—*Betson v. State ex rel. Torrence*, 47 Ind. 54.

[g] (Sup. 1874)

If the purchaser of real estate at a sheriff's sale on an execution issued on a judgment rendered for a debt secured by a mortgage on the real estate knows that the lands sold were mortgaged to secure the debt for which the judgment was rendered, he cannot claim, in answer to a complaint to set aside such sale and to foreclose the mortgage, that he suffered harm from a failure to indorse on the execution a description of the mortgaged premises.—*Linville v. Bell*, 47 Ind. 547.

[h] (Sup. 1876)

A purchaser at a sheriff's sale is bound to know whether or not the latter had authority to make such sale.—*State ex rel. Sage v. Prime*, 54 Ind. 450.

[i] (Sup. 1879)

A., the owner of mortgaged land, verbally agreed with B. to exchange it for land owned by B., who assumed payment of the mortgage. Possession was given. B. improved the land taken in exchange and paid the mortgage. Subsequently judgment was given against A. as principal and defendant as surety, and made a lien on B.'s land. B. then conveyed to A., and A., at B.'s request, conveyed to plaintiff, who purchased from B. The land was sold to defendant on an execution against A. and defendant; the latter knowing plaintiff's title and that B. was in possession. In an action by plaintiff against defendant, to set aside the sale, held, that plaintiff was entitled to judgment.—*Armstrong v. Fearnaw*, 67 Ind. 429.

[j] (Sup. 1882)

A purchaser at execution sale takes subject to all claims legal or equitable which third parties may have on it, of which such purchaser had notice before the completion of his contract.—*Heck v. Fink*, 85 Ind. 6.

The doctrine as to notice, or the want of notice, of claims of third persons, is applicable as well to purchasers of real estate upon execution as to persons purchasing at a private sale.—*Id.*

[k] (Sup. 1883)

Whether certain facts in evidence were sufficient to charge a purchaser of land at a sheriff's sale with notice of the existence of a vendor's lien thereon, is for the jury.—*Boling v. Howell*, 93 Ind. 329.

[l] (Sup. 1888)

One against whom judgment has been rendered as surety is not bound to take notice of the irregularities in the notices of execution sale against his principal, and, in the absence of actual notice, may become a bona fide purchaser.—*Hollcraft v. Douglass*, 115 Ind. 139, 17 N. E. 275.

[m] (Sup. 1889)

Where, after a conveyance by the debtor of land set apart as exempt, and after the recording of such conveyance, the creditor levies on and sells the land, the records of such con-

veyance, and of the proceedings setting apart the land, are full notice to the purchaser at the sheriff's sale.—*Ray v. Yarnell*, 118 Ind. 112, 20 N. E. 705.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 771, 781-788.

See, also, 17 Cyc. pp. 1301-1303.

### § 273. — Judgment creditor as purchaser.

As affecting right to vacate sale, see ante, § 248.

Effect on right to attack collaterally, see ante, § 258.

[a] A judgment creditor who, purchasing land at an execution sale under his judgment, does not pay the price, but merely credits the amount of his bid on the judgment, is not a bona fide purchaser.—(Sup. 1826) *Harrison v. Doe ex dem. Rapp*, 2 Blackf. 1; (1877) *Meredith v. Chancey*, 59 Ind. 466; (1881) *Neff v. Hagaman*, 78 Ind. 57; (1881) *Bole v. Newberger*, 81 Ind. 274; (1882) *Vitito v. Hamilton*, 86 Ind. 137; (1882) *Carnahan v. Yerkes*, 87 Ind. 62; (1892) *Boos v. Morgan*, 30 N. E. 141, 130 Ind. 305, 30 Am. St. Rep. 237; (1892) *Branch v. Foust*, 30 N. E. 631, 130 Ind. 538; (1892) *Old Nat. Bank of Evansville v. Findley*, 31 N. E. 62, 131 Ind. 225. CONTRA, see (Sup. 1899) *Pugh v. Highley*, 53 N. E. 171, 152 Ind. 252, 44 L. R. A. 392, 71 Am. St. Rep. 327; (App. 1905) *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

#### [b] (Sup. 1877)

In the absence of any showing of fraud on the part of the defendant, or those claiming through him, the execution plaintiff, becoming the purchaser of all the parcels upon such entire bid, is not entitled to have the sale and entry of satisfaction set aside because the defendant's title to some of the parcels fails, and the residue is incumbered by mortgages duly recorded. (Distinguishing some cases of total failure of the defendant's title, and others under particular statutes).—*Weaver v. Guyer*, 59 Ind. 195.

#### [c] (Sup. 1882)

Continued possession by a judgment defendant of lands sold on execution to the judgment plaintiff is not notice to the judgment plaintiff or his assignees that the right to possession is claimed or held in any other character than that existing at the time of sale.—*Hays v. Wilstach*, 82 Ind. 13.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 772, 789, 790.

See, also, 17 Cyc. pp. 1304, 1305.

### § 275. Effect of defects or irregularities in execution, levy, or sale.

Defects in return, see post, § 345.

Failure to make return, see post, § 347.

#### [a] (Sup. 1829)

A sale of land on a void execution is a nullity, and passes no interest to the purchaser.—*Elliott v. Armstrong*, 2 Blackf. 198.

#### [b] (Sup. 1841)

The title of a purchaser of land sold on execution is not affected by the fact that the sheriff did not sell the land given up by the defendant in execution to be levied on, but other land of the defendant.—*Tillotson v. Doe ex dem. Gregory*, 5 Blackf. 590.

#### [c] (Sup. 1856)

In ejectment defendant offered in evidence a conveyance of the land to him by sheriff's deed. The sheriff's authority was derived from a judgment rendered on default in a suit; the declaration containing two several counts on two several notes, one of which was given before, and the other after, the enactment of the law requiring land to be appraised before being sold on execution. The land was not appraised. Defendant contended that judgment was rendered on the first note alone; but, on inspecting the record, the court decided that the judgment was rendered on both notes. *Held*, that the sheriff's deed was no evidence of title.—*Babcock v. Doe ex dem. Bowman*, 8 Ind. 110.

#### [d] (Sup. 1864)

Where part of a judgment is directed to be collected without appraisal, and execution is issued, and the defendant consents to the sale without appraisal, the purchaser, in the absence of actual fraud, acquires a good title to the property.—*Stockwell v. Byrne*, 22 Ind. 6.

#### [e] (Sup. 1871)

Under 2 Gav. & H. St. p. 252, § 474, providing that any sheriff who shall sell land without giving the proper notice or in the manner prescribed, shall pay a certain amount as damages, the title of a purchaser at a sheriff's sale is not affected by the fact that the sheriff omitted to post the statutory notices, the defendant in execution having sufficient remedy under the statute.—*White v. Cronkhite*, 35 Ind. 483.

#### [f] (Sup. 1876)

Where a sheriff by mistake sold property under an execution that had been satisfied, the purchaser acquired no title.—*State ex rel. Sage v. Prime*, 54 Ind. 430.

#### [g] (Sup. 1879)

An execution issued by the clerk of the circuit court on the transcript of a judgment of a justice of the peace, without an affidavit by the judgment plaintiff that the judgment was unpaid, is voidable only, and a sale thereunder is valid.—*Mavity v. Eastridge*, 67 Ind. 211.

Under 2 Rev. St. 1876, p. 236, § 541, declaring that, upon the plaintiff or his agent filing with the clerk of the court of common pleas his affidavit that a judgment rendered by

a justice of the peace is unpaid, the clerk shall issue execution, etc., the issuance of execution without the filing of the affidavit required renders the proceeding voidable only, and not void, and the purchaser of property sold under the execution acquires a good title.—Id.

[h] (Sup. 1881)

Though land purchased at an execution sale was misdescribed in the levy, return, and advertisement, a purchaser who gets a deed nevertheless takes color of title, whether the sheriff is authorized to sell or not, and the rights of the purchaser pass to his assigns. 2 Rev. St. 1876, p. 257, § 621.—Ray v. Detchon, 79 Ind. 58.

[i] (Sup. 1888)

The question of the right of a party to have execution on the judgment cannot be raised on a merely voidable execution after the sale has been regularly made on it.—Caley v. Morgan, 16 N. E. 790, 114 Ind. 350.

[j] (Sup. 1889)

A merely irregular use of the process, such as the failure to levy upon and exhaust the debtor's personal property, before resorting to his real estate, or the sale of his real estate in a body, when it should have been subdivided and sold in parcels, does not necessarily render the sale void as against a good-faith purchaser. Such irregularities as a general rule can only be taken advantage of by the execution defendant. These may be waived by the debtor, and will be deemed waived if he acquiesces during the statutory period of redemption.—Wright v. Dick, 19 N. E. 306, 116 Ind. 538.

[k] (Sup. 1889)

In an action for an injunction to restrain a trespass on plaintiff's land, the answer alleged that E. obtained a judgment against C., who was then owner of the land; that execution was issued on such judgment, and, by mistake, was levied on a different tract, which was sold thereunder, and a deed executed to E., who conveyed to defendant, who entered into possession of the land in controversy; that, while such judgment was a lien on the land in controversy, C. conveyed the same to his wife, and she to plaintiff without consideration, and for the purpose of defrauding creditors, and that plaintiff had full notice of the nature of defendant's claim; and that plaintiff's only interest in the land, if he has any, is by virtue of such fraudulent conveyance. *Held*, that the answer was wholly insufficient. The purchase of a different tract could give defendant neither title nor right of possession of the land in controversy.—Clen-deney v. Ohl, 118 Ind. 46, 20 N. E. 639.

[l] (Sup. 1897)

Rev. St. 1894, § 294 (Rev. St. 1881, § 293), prohibiting an action by the execution debtor or any one claiming under him, for recovery of real estate sold on execution, to be brought more than 10 years after the sale, gives good

title to the purchaser at execution sale of lands which the debtor submitted to sale by the sheriff to satisfy the execution, and surrendered after the sale to the purchaser, and which the purchaser for 10 years occupied and claimed title to under the sale, though the levy and other steps under the execution and the sheriff's deed gave a description not embracing the land.—Marley v. State ex rel. Chenoweth, 46 N. E. 466, 147 Ind. 145.

[m] (App. 1901)

Where the evidence showed a judgment against defendant, and an execution, and a sale and deed under it to plaintiff of defendant's undivided interest in certain realty, a judgment for defendant in partition by the purchaser must be reversed, though the sheriff did not make demand on the defendant for property before the execution sale, and there was no evidence of a levy by the sheriff.—Lahr v. Ulmer, 60 N. E. 1009, 27 Ind. App. 107.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 16, 148, 345, 791-796.

See, also, 17 Cyc. pp. 1306-1308.

#### § 276. Effect of modification, vacation, or reversal of judgment.

Effect of payment or satisfaction of judgment, see ante, § 14.

[a] (Sup. 1830)

The reversal of a judgment on error, after a sale of land under it on execution, does not affect the purchaser's title.—Frakes v. Brown, 2 Blackf. 295.

[b] (Sup. 1852)

A sale to an execution plaintiff will be rendered invalid by the reversal of the judgment, as respects the costs of the suit.—Hutchens v. Doe ex dem. Smith, 3 Ind. 528.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 797-799.

See, also, 17 Cyc. pp. 1309, 1310.

#### § 277. Possession.

Possession by defendant after execution sale as constituting him a tenant, see LANDLORD AND TENANT, § 7.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 800-814.

See, also, 17 Cyc. pp. 1310-1317; notes, 15 Am. Dec. 671, 84 Am. Dec. 570.

#### § 278. — In general.

Redemption from mortgage as condition precedent to action, see post, § 280.

[a] Under the express provisions of 2 Rev. St. p. 135, § 436, a purchaser at sheriff's sale of mortgaged property is not entitled to the possession of the property until he complies with the condition of the mortgage.—(Sup. 1862)

Heimberger v. Boyd, 18 Ind. 420; (1864) Coe v. McBrown, 22 Ind. 252.

[b] (Sup. 1874)

A sale of goods on execution, under 2 Gav. & H. St. p. 240, § 436, providing that the interest of a mortgagor of goods may be sold on execution, does not entitle the purchaser to possession, except on his compliance with the conditions of the mortgage.—Broadhead v. McKay, 46 Ind. 595.

[c] (Sup. 1881)

The purchaser of land at an execution sale, who redeems a mortgage, is not entitled in ejectment to possession of the land.—Rice v. Puett, 81 Ind. 230.

[d] (Sup. 1886)

Where ice in icehouses is sold at sheriff's sale, the purchaser has a reasonable time in which to make suitable arrangements, and to remove the ice from the houses.—Geisendorff v. Eagles, 5 N. E. 743, 106 Ind. 38.

[e] (Sup. 1886)

Though a constable may levy on mortgaged goods, and take possession, yet, if he sell them, he has no authority to deliver the possession without first requiring the purchaser to comply with the conditions of the mortgage.—State ex rel. Jessup v. Milligan, 106 Ind. 109, 5 N. E. 871.

[f] (Sup. 1887)

Under Rev. St. § 722, providing that mortgaged goods and chattels may be levied on and sold subject to the mortgage, and the purchaser shall be entitled to possession upon complying with the conditions of the mortgage, a constable has a right to levy on and sell mortgaged property, but a delivery is unlawful, until the purchasers satisfy the mortgage; and the delivery only confers on the purchasers a title conditioned on satisfaction of the mortgage.—Slifer v. State ex rel. Syfers, 114 Ind. 291, 14 N. E. 595, 16 N. E. 623.

[g] (Sup. 1890)

Under Rev. St. 1881, § 767, providing that the owner of real estate sold by the sheriff shall be entitled to possession for one year, the holder of a sheriff's certificate entitling him to a deed after a year cannot enjoin the execution of a writ of possession in favor of the holder of the legal title.—Ross v. Donaldson, 123 Ind. 238, 24 N. E. 109.

[h] (Sup. 1891)

A sheriff's deed of land sold under execution was executed to the assignee of the judgment, and the debtor sold the property during the year for redemption to defendant, who took and kept possession for five years. Held, that the assignee could recover possession and the rental value after the expiration of the year for redemption.—Merritt v. Richey, 127 Ind. 400, 27 N. E. 131.

[i] (App. 1885)

The sheriff is bound to take notice of recorded mortgages, and it is his duty to require the purchaser to comply with the conditions of the mortgage before placing him in possession.—Adams v. Hessian, 39 N. E. 530, 11 Ind. App. 598.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 800, 802–805.

See, also, 17 Cyc. p. 1310.

§ 279. — During period for redemption.

[a] (Sup. 1848)

The statute which gave to an execution defendant the privilege, for a certain time, of redeeming his land sold on execution, did not give him the right of possession of the land during that time. The legal title and right of possession were in the purchaser, subject to the defendant's right to redeem.—Raub v. Heath, 8 Blackf. 575.

[b] Where the rents and profits of real estate after a term of years, not exceeding seven, are sold by the sheriff on execution, the purchaser at the sale is not entitled to possession during the year of redemption, under Act June 4, 1861 (2 Gav. & H. St. p. 251), providing that whenever any real property, "or any interest therein," is sold on execution, the judgment debtor shall be entitled to possession for one year.—(Sup. 1876) Ragsdale v. Mathes, 52 Ind. 495; (1883) Johnson v. Briscoe, 92 Ind. 367; (1894) Jewett v. Tomlinson, 36 N. E. 1106, 137 Ind. 326.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 801.

See, also, 17 Cyc. p. 1311.

§ 280. — Remedies for recovery.

Right to possession as dependent on redemption from mortgage, see ante, § 278.

Suits for possession and to quiet title, see post, § 283.

Title in third person as defense in action of ejectment, see EJECTMENT, § 25.

[a] (Sup. 1818)

A judgment debtor in possession, or his vendee subsequent to the judgment is not entitled to notice to quit previous to an action of ejectment against him by the purchaser at a sheriff's sale under the judgment.—Smith v. Allen ex dem. Bigger, 1 Blackf. 22.

[b] (Sup. 1825)

Where the purchaser of real estate at a sheriff's sale brings ejectment to recover possession, and defendant is a person other than the judgment debtor, plaintiff must prove the debtor's title to the premises.—Calloway v. Doe ex dem. Joyes, 1 Blackf. 372.

[c] (Sup. 1853)

To entitle a person to a specific performance of a sheriff's sale—if the sale can be at all enforced in equity—he must have filed his bill within a reasonable time, paid, or offered to pay, the purchase money, and, in case of an offer, have followed up the tender by bringing the money into court.—*Benton v. Shreeve*, 4 Ind. 68.

[d] (Sup. 1866)

The introduction in evidence of the record of the judgment only, without a transcript of the record of the proceedings in the case, showing jurisdiction in the court rendering the judgment and that the judgment itself was within the relief sought, is not a sufficient showing of title in the purchaser at a sheriff's sale under the judgment.—*Glidewell v. Spaugh*, 26 Ind. 319.

[e] (Sup. 1869)

In an action by a judgment creditor who had purchased land at a sheriff's sale on an execution against the judgment debtor, it was alleged that the legal title at the time of sale was standing in the name of C., who was also made a party to the suit, to whom it had been conveyed by D. Plaintiff also alleged that B. had paid the purchase money, and had procured the conveyance to be made by D. to C. to defraud his creditors, and particularly plaintiff, to whom he was greatly indebted. B. alleged that in making the purchase he acted as C.'s agent, who was not present, and advanced the purchase money in pursuance of an agreement with C. by which he was to advance it as a short loan, and that C. thereafter repaid the money. *Held*, that on the issue of the bona fides of the transaction it was error for the court to refuse to allow C. to testify that he borrowed the money with which to pay for the property from D.—*Hubble v. Osborn*, 31 Ind. 249.

[f] (Sup. 1871)

Where, in an action for a recovery of real estate and damages for its detention, the right to recover depended on whether a sheriff's sale and conveyance under which plaintiff claimed was valid, it was proper to instruct the jury to find for plaintiff if they found that the judgments and executions and therefore deeds were valid, and that they were, if nothing to the contrary appeared.—*White v. Cronkhite*, 35 Ind. 483.

[g] (Sup. 1877)

An execution plaintiff, who purchases the property at a sale thereunder held without sufficient notice, cannot, on a sheriff's deed acquired under such sale, eject the owner of the property.—*Meredith v. Chancey*, 59 Ind. 406.

[h] (Sup. 1878)

An execution defendant cannot set up his own want of title to defeat an action by the holder of the sheriff's deed to recover possession; nor can he object that the sheriff sold the land in solido, if he waived his right to

have it sold in parcels.—*Joyce v. First Nat. Bank of Madison*, 62 Ind. 188.

[i] (Sup. 1880)

It is sufficient, to authorize a recovery by a purchaser at a sheriff's sale against the execution defendant, to show the judgment, execution, sale, and sheriff's deed.—*Shipleigh v. Shook*, 72 Ind. 511.

[j] (Sup. 1881)

Where the title of plaintiff in ejectment is based on a sheriff's sale, he need only prove a valid judgment and sale and the execution of the proper deed.—*Rucker v. Steelman*, 73 Ind. 396.

[k] (Sup. 1882)

An agreement between an execution debtor and a third person, of which the plaintiff, who has bought the land at sheriff's sale, has no notice, cannot change the nature of the debtor's possession in such manner as to impose upon the plaintiff the necessity of making a demand before bringing suit for the possession.—*Hays v. Wilstach*, 82 Ind. 13.

[l] (Sup. 1882)

In ejectment by the purchaser at a sheriff's sale against defendant in execution, the latter cannot attack the sale except for reasons rendering it absolutely void.—*Lovely v. Speisshoffer*, 85 Ind. 454.

[m] (Sup. 1884)

A purchaser at an execution sale may maintain ejectment for the land without making a demand for the possession.—*Elston v. Piggott*, 94 Ind. 14.

[n] (Sup. 1890)

One claiming title through a sale of land on a judgment cannot sue in ejectment, and to quiet title, as against the person holding the title through a sale on a decree foreclosing a tax lien, without first redeeming from such sale.—*Jenkins v. Newman*, 122 Ind. 99, 23 N. E. 683.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 806-814.

See, also, 17 Cyc. pp. 1312-1317.

## § 281. Rents and profits.

Recovery from assignee for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 337.

Right to possession of land on sale of rents and profits, see ante, § 279.

[a] (Sup. 1879)

Under 2 Rev. St. 1876, p. 220, § 2, allowing the judgment debtor, and not the purchaser at the execution sale, the possession of the premises for the year succeeding the sale, neither the judgment debtor nor his grantee is liable to the purchaser for the rents thereof in that time.—*Wilson v. Powers*, 66 Ind. 75.

[b] (Sup. 1891)

Rev. St. 1881, § 767, provides that the owner of land sold on execution may redeem, and

"shall be entitled to the possession of the same for one year from the date of sale." Section 1222 provides that a receiver may be appointed to protect or preserve during the time allowed for redemption any land sold on execution, and to secure to the person entitled thereto, the rents and profits, and in such other cases as may be provided by law, or when it may be necessary to secure ample justice to the parties. *Held*, that a receiver will not be appointed at the instance of a mere purchaser at execution sale, and for the sole purpose of the collection and preservation of the rents and profits.—*Merritt v. Gibson*, 27 N. E. 136, 129 Ind. 155, 15 L. R. A. 277.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 815-817.  
See, also, 17 Cyc. pp. 1317, 1318.

**§ 282. Waste.**

[a] (Sup. 1891)

Where a house on land sold under execution was accidentally burned, without the negligence of the debtor's grantee, who remained in possession after such sale and during his wrongful occupancy, the grantee was not liable.—*Merritt v. Richey*, 127 Ind. 400, 27 N. E. 131.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 818.  
See, also, 17 Cyc. p. 1319.

**§ 283. Actions to confirm or try title.**

[a] (Super. 1871)

An affidavit and execution issued upon it are admissible in evidence, the former to show authority for the issuance of the execution, and the latter for the sale under which the purchaser acquires title, as well as to show justification for the party acting under it.—*Woodburn Sarven Wheel Co. v. McKernan*, Wils. 48.

[b] (Sup. 1881)

An execution debtor cannot defeat the title of the grantee in the sheriff's deed in a suit for possession by showing that such grantee took an assignment of the certificate of sale as collateral security merely, since, if he did so, he could properly receive the deed, and would hold as trustee for the equitable owner of the certificate.—*Turner v. First Nat. Bank of Madison*, 78 Ind. 19.

In a suit to recover land purchased under execution and to quiet title thereto, an instruction that the judgment, execution, amended return, and sheriff's deed were, taken in connection with other matters referred to, sufficient to make out a prima facie case in favor of the execution purchaser, *held* to give the proper construction to those instruments.—*Id.*

In a suit by an execution purchaser for possession and to quiet title to land, a receipt given by the sheriff to the purchaser at the execution sale for the amount bid for the land

was admissible in evidence as a part of the *res gestae*.—*Id.*

[c] (Sup. 1890)

When two judgments are liens on real estate and separate sales are made on each of the judgments, and different individuals purchase the lands at such sales, the purchaser at the junior sale cannot maintain an action of ejectment or to quiet title against the purchaser of the real estate at the sale of the prior judgment without having redeemed from such sale.—*Jenkins v. Newman*, 23 N. E. 683, 122 Ind. 99.

[d] (Sup. 1890)

A cross-complaint in an action for the recovery of real property alleged that defendant was owner of the land in controversy, and had been in possession thereof for 15 years; that he had made valuable improvements thereon, and had paid the taxes and other assessments against the property; that plaintiff was setting up a title and had instituted an action to recover possession; that, after defendant had purchased the real estate, his grantor became insolvent; that plaintiff recovered a judgment against the grantor; that defendant was about to institute proceedings to enjoin a sale under the judgment, when plaintiff in person and by his attorney informed defendant that he need not pay any attention to the sale; that it was not the intention of plaintiff to purchase or disturb defendant's title; that plaintiff would bid it off at a nominal sum merely to get it out of the way, inasmuch as he had to have the real estate levied on sold in the inverse order from that in which the debtor had conveyed it, and for this reason only had defendant's property been levied on and advertised for sale; that defendant relied on the promise and permitted the estate to be sold, and did not redeem from the sale; that the premises were purchased for the nominal sum of \$1, and that plaintiff knew that defendant was relying on the promise; that at the time of the sale the real estate was of the value of \$6,000. *Held*, that the cross-complaint was not an action to redeem, but to quiet title; and hence the law relating to time for redemption had no application.—*Detwiler v. Schultheis*, 23 N. E. 700, 122 Ind. 155.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 744.

**§ 284. Rights and remedies on avoidance of sale or failure of title.**

Value of improvements as claim against estate of deceased execution debtor, see EXECUTORS AND ADMINISTRATORS, § 202.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 819-822.  
See, also, 17 Cyc. pp. 1319-1322; note, 14 Am. Dec. 131.

**§ 285. — In general.****[a]** (Sup. 1877)

In the absence of any showing of fraud on the part of the defendant or those claiming through him, the execution plaintiff, becoming the purchaser of all the parcels upon an entire bid, is not entitled to prevail in an action to have the sale and entry of satisfaction set aside because the defendant's title to some of the parcels fails, and the residue is incumbered by mortgages duly recorded.—*Weaver v. Guyer*, 59 Ind. 195.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 819.

See, also, 17 Cyc. p. 1319.

**§ 286. — Reimbursement.**

Amendment as to relief prayed of complaint in action to recover price paid, see PLEADING, § 250.

Reimbursement from estate of deceased execution debtor, see EXECUTORS AND ADMINISTRATORS, § 202.

**[a]** Where land to which the judgment debtor has no title is sold under a judgment, and the purchase money has been paid, the purchaser can recover it back from the judgment defendant.—(Sup. 1833) *Muir v. Craig*, 3 Blackf. 293, 25 Am. Dec. 111; (1866) *Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460.

**[b]** (Sup. 1847)

If land be sold on execution, and the creditor receive the purchase money, the purchaser cannot, either at law or in equity, recover back the money from the creditor merely because the debtor had no title to the land; but the debtor is liable.—*Dunn v. Frazier*, 8 Blackf. 432.

**[c]** A purchaser at sheriff's sale on execution of land to which the debtor had no title may maintain an action against the debtor to recover the purchase money as for money paid to defendant's use, though no fraud in relation to the sale be imputed to the debtor.—(Sup. 1857) *Preston v. Harrison*, 9 Ind. 1; (1858) *Pennington v. Clifton*, 10 Ind. 172.

**[d]** (Sup. 1858)

A purchaser at a sheriff's sale of land to which the execution debtor has no title can sue the debtor for the amount of the purchase money, without previous demand.—*Pennington v. Clifton*, 10 Ind. 172.

**[e]** (Sup. 1865)

In an action by a judgment debtor to set aside a sale because of representations by the sheriff, whereby persons were prevented from bidding and the land was sold for one-third of its value, the purchaser was entitled to recover the purchase money paid by him at the sale and to have his lien declared on the land sold without bringing a separate action.—*Seller v. Lingerman*, 24 Ind. 264.

**[f]** (Sup. 1866)

Where the title to land sold at sheriff's sale was adjudged bad for defects in the pro-

ceedings, the purchaser may recover in equity from the judgment debtor the money paid for the extinguishment of his debt.—*Hawkins v. Miller*, 26 Ind. 173.

A purchaser of real estate at a sheriff's sale, whose title is adjudged bad for defects in the proceedings, cannot maintain an action at law against the judgment defendant for the price paid to the sheriff.—*Id.*

**[g]** (Sup. 1878)

To an action by a purchaser of land at an execution sale against the judgment debtor, the complaint alleging that by reason of a misdescription of the land in the sheriff's levy and advertisement of sale the sale was void, the sheriff is not a necessary party defendant.—*Coan v. Grimes*, 63 Ind. 21.

A sheriff who levies on and sells property under execution is neither a necessary nor proper party defendant to a suit by an execution purchaser who bought the property at the request of the execution defendant to recover the purchase price.—*Id.*

**[h]** (Sup. 1882)

Where several tracts of land are sold at sheriff's sale as an entirety for an aggregate sum of money, and the purchaser fails to get title to a part only of such tracts, he cannot recover a part of the amount of his bid from the judgment defendant or his legal representatives; the rule of caveat emptor being applicable to him.—*Parker v. Rodman*, 84 Ind. 256.

**[i]** (Sup. 1883)

The rule that there is no warranty in judicial sales does not apply where the purchaser seeks to assert his rights against the execution debtor or his property.—*Short v. Sears*, 93 Ind. 505.

**[j]** (Sup. 1889)

The purchaser of property at sheriff's sale cannot, on the failure of title thereto, recover of the execution plaintiffs, for whose debt the sale was made, the price paid, though the deputy sheriff making the sale, without their knowledge or authority, declared publicly that the title to the property was clear and all right, relying on which the purchaser made his bid.—*Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 820, 821.

See, also, 17 Cyc. pp. 1320, 1321.

**§ 287. — Recourse to parties or officer.****[a]** (Sup. 1876)

A sheriff, holding several executions against the same person, levied on his land at the same time, and sold a portion of the land for a sum sufficient to satisfy the executions first and second in priority; but, after satisfying the execution first in priority, he applied the surplus on an execution subsequent in priority to the second, and afterwards sold another portion of the land to satisfy the execution next in

priority. The latter sale, upon suit by the execution defendant against the purchaser was declared vacated, and the purchaser then brought suit on the sheriff's bond to recover the purchase money of the second sale. *Held*, that neither the sheriff nor his sureties were liable for the return of the purchase money.—*State ex rel. Sage v. Prime*, 54 Ind. 450.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 822.

See, also, 17 Cyc. p. 1321.

### § 289. Assignees of certificates of sale.

[a] (Sup. 1872)

A sheriff's certificate of a sale of real estate on an execution is assignable, and authorizes the sheriff to make a deed to the assignee.—*Gillespie v. Splahn*, Wils. 228.

[b] (Sup. 1874)

A certificate of purchase made by a sheriff on the sale of real estate on execution may be assigned, and the deed of the sheriff may be made to the assignee.—*Splahn v. Gillespie*, 48 Ind. 397.

[c] (Sup. 1880)

In an action by an assignee of a sheriff's certificate of land sold on execution against a grantee of the defendant in execution, it was error to instruct the jury to find for plaintiff, if he purchased the certificate in good faith, as such certificate conveys no title, but is only an obligation on which title may be obtained if the land is not redeemed, and the assignee has no greater rights than the assignor.—*Hasselman v. Lowe*, 70 Ind. 414.

[d] (Sup. 1881)

As the purchaser at a sheriff's sale is required to show a valid judgment and execution, it follows that he must take notice of the character and contents of the same, and of the discrepancies between such judgment and execution, if any; and an assignee of the certificate of sale is affected with like notice.—*Stotsenburg v. Stotsenburg*, 75 Ind. 535.

[e] (Sup. 1881)

A certificate of sale given by a sheriff to a purchaser at an execution sale is assignable, and the assignee stands in the place of, and becomes, in legal effect, the purchaser at the sheriff's sale.—*Turner v. First Nat. Bank of Madison*, 78 Ind. 19.

[f] (Sup. 1882)

The rule that, where there has been an acceptance of redemption money, the holder of the certificate of sale loses his character as purchaser, does not extend to cases where a third person pays money not for the purpose of redeeming, but for the purpose of becoming the owner of the certificate or of acquiring the title to the land.—*Hays v. Wilstach*, 82 Ind. 13.

[g] (Sup. 1882)

Under 2 Rev. St. 1876, p. 220, providing that on the sale of lands under an execution the

sheriff shall deliver to the purchaser a certificate of sale, which entitles the holder thereof to a deed to be executed by the sheriff at the expiration of one year from the date of the sale if the property was not previously redeemed, an assignee of the certificate is not required to demand a deed at the expiration of the year, but may do so at any time thereafter.—*Madux v. Watkins*, 88 Ind. 74.

[h] (Sup. 1890)

Where the purchaser at a sheriff's sale assigned his certificate of purchase to another to secure a loan, and the assignee, after procuring a deed, sold the land, the assignor could maintain an action to compel the assignee to account for the consideration received from the purchaser in excess of the debt secured and proper outlays.—*Wagner v. Winter*, 122 Ind. 57, 23 N. E. 754.

[i] (Sup. 1903)

A complaint alleged that plaintiffs transferred realty to defendant's husband, he agreeing to pay certain taxes thereon, and that on his failure so to do plaintiffs paid the taxes; that execution issued against defendant's husband; that after his death the realty in question was sold by the sheriff to the execution plaintiff, who transferred his certificate of sale to defendant, who afterwards obtained a sheriff's deed for the realty, and "still holds the same by virtue thereof, and not otherwise." The complaint prayed that plaintiffs be subrogated to the former lien for taxes, and that the same be foreclosed against the property in the hands of defendant. There was no allegation that defendant had any notice of the alleged lien of plaintiffs at the time she purchased the certificate of sale, and took deed for the property. *Held*, that it would be presumed that defendant acquired title without notice and free from any prior secret equity, so that the complaint was demurrable.—*Blumenthal v. Tibbits*, 66 N. E. 159, 160 Ind. 70.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 667, 828.

See, also, 17 Cyc. p. 1324.

### § 290. Purchasers from execution purchasers.

[a] (Sup. 1853)

Where land is sold by a sheriff at an execution sale under a judgment, the record of the proceedings under the judgment is constructive notice to a purchaser from the purchaser at the sheriff's sale.—*Neal v. Pressell*, 4 Ind. 594.

[b] (Sup. 1861)

A deputy clerk issued an execution without authority from the judgment plaintiff, and without any direction from his principal so to do, and became a purchaser of the lands at the sale. The land was subsequently sold to a third person, who, before he made actual payment of all the purchase money, had notice of the invalidity of the execution. *Held*, that such



subsequent purchaser cannot claim the rights of an innocent purchaser without notice, even though the deferred payments of purchase money have been secured, and the conveyance actually executed.—*Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

A deputy clerk without authority from the judgment plaintiff, and without any direction from his principal so to do, issued an execution, and became a purchaser at the sale. *Held* that, though the sale was invalid, a subsequent purchaser in good faith without notice, who has actually paid his purchase money, and taken his deed, will not be disturbed in his title.—*Id.*

[c] (Sup. 1871)

A purchaser in good faith of real estate from one who has bought it at an execution sale cannot be bound or affected by any agreement or trust of which he had no notice or knowledge, which may have existed between his vendor and the judgment debtor.—*Parmlee v. Sloan*, 37 Ind. 469.

[d] (Sup. 1876)

The purchaser of land at sheriff's sale lost his certificate of purchase, and afterwards sold the land and gave a title bond to the vendee conditional to execute a proper conveyance; his wife not joining him in the execution of the bond. The vendee's assignee paid the purchase money to such purchaser, who died after occupying the land four years, but without obtaining a sheriff's deed. *Held*, that such purchaser's widow and heirs had no interest in the land, and that the holder of such title bond was entitled to specific performance as against them.—*Butler v. Holtzman*, 55 Ind. 125.

[e] (Sup. 1880)

Where a purchaser at sheriff's sale obtains a deed on the strength of his certificate, and then conveys the land to a bona fide purchaser for a valuable consideration, the latter may take a better title than the purchaser obtained by his purchase and certificate.—*Hasselman v. Lowe*, 70 Ind. 414.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 827; 48 CENT. DIG. Ven. & Pur. § 487.

See, also, 17 Cyc. p. 1323.

(C) REDEMPTION.

Deed as documentary evidence, see EVIDENCE, § 366.

Laws relating to as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 180.

Possession of purchaser during period for redemption, see ante, § 279.

Redemption from prior sale as prerequisite to action for possession or to quiet title by purchaser at subsequent sale, see ante, § 283.

§ 292. Statutory provisions.

[a] (Sup. 1876)

The provision of the first clause of section 452, 2 Gav. & H. Rev. St. 244, that "when any property shall be sold subject to liens and incumbrances, the purchaser may pay the liens and incumbrances, and hold the property discharged from all claims of the execution defendant," is not repealed by the redemption law of 1861, 2 Gav. & H. Rev. St. 251, so far as it affects the right of redemption existing by the general principles of law and held by one not a party to the judgment on which the sale was made.—*Gatling v. Dunn*, 52 Ind. 408.

[b] (Sup. 1882)

Since Act March 31, 1879, relating to redemption from sheriffs' sales, contains no repeal clause and no provision in conflict with the second section of the act of 1861, providing for redeeming land in twelve months from the date of sale, the latter section is not repealed.—*Mitchell v. Hodges*, 87 Ind. 491.

[c] (Sup. 1897)

The redemption law of 1881 repeals, as to all sales made subsequent to its enactment, the former law of 1879.—*Warford v. Sullivan*, 147 Ind. 14, (Sup.) 46 N. E. 27.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 830.

See, also, 17 Cyc. pp. 1324, 1325.

§ 293. Persons entitled to redeem and priority of right.

Redemption by one not entitled as affecting sale under order of court in proceedings to settle estate of deceased debtor, see EXECUTORS AND ADMINISTRATORS, § 329.

[a]. (Sup. 1847)

A junior judgment creditor, whose judgment was rendered after the repeal of Act 1841 relative to the redeeming of land, could not redeem under that act.—*State Bank v. Nutt*, 8 Blackf. 450.

[b] (Sup. 1882)

Persons who are neither owners, nor mortgagees of land, nor judgment creditors having a lien thereon, are not entitled to redeem from an execution sale of it.—*Stout v. Duncan*, 87 Ind. 383.

2 Rev. St. 1876, p. 279, § 676, provides that, when any defendant surety in replevin bail is compelled to pay the judgment against his principal, the judgment shall not be discharged, but shall remain in force for the use of the bail. *Held* that, where a surety in replevin bail was required to pay a judgment against his principal within the redemption year after an execution sale, such surety was entitled to redeem the sale.—*Id.*

[c] (Sup. 1882)

A surety who by payment of a judgment against his principal became subrogated to the rights of the judgment creditor is entitled to

redeem from a foreclosure sale of the debtor's property.—*Nesbit v. Hanway*, 87 Ind. 400.

[d] (*Sup.* 1888)

Under Rev. St. 1881, § 771, providing that, in the absence of redemption from execution sale by the owner, or those claiming under him, the land sold may be redeemed within one year by any creditor whose judgment, at the time he offers to redeem, shall be a lien upon the interest of the debtor sold, and which shall be junior to the judgment under which the property was sold, the creditor, under whose judgment the land was sold, cannot redeem from his own sale and restore the lien of his judgment.—*Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125.

A mortgagee, whose mortgage was executed and recorded after a sale on execution, is entitled to redeem from such sale, under Rev. St. 1881, § 774, providing that any person having a lien otherwise than by judgment on the land may redeem at any time within one year.—*Id.*

[e] (*Sup.* 1890)

A judgment creditor cannot redeem from his own sale.—*Horn v. Indianapolis Nat. Bank*, 25 N. E. 558, 125 Ind. 381, 9 L. R. A. 676, 21 Am. St. Rep. 231.

[f] (*Sup.* 1897)

The fact that the holder of a junior judgment has a lien thereby on other lands of the judgment debtor does not affect his right to redeem.—*Warford v. Sullivan*, 147 Ind. 14, 46 N. E. 27.

[g] (*Sup.* 1898)

Under Burns' Rev. St. 1894, § 783, any judgment creditor, his executors or administrators or assigns, whose judgment or decree, at the time he offers to redeem, shall be a lien on the property sold junior to that upon which the sale was made, is entitled to redeem real estate sold by a sheriff on execution at any time within one year from the date of sale.—*Jarrell v. Brubaker*, 49 N. E. 1050, 150 Ind. 260.

Though under Burns' Rev. St. 1894, § 783 (*Horner's Rev. St. 1897*, § 771), any creditor whose judgment, at the time he offers to redeem, shall be a lien on the property sold, junior to that on which the sale was made, has the right to redeem within one year, one who had a mortgage on 80 acres, a part of a 320-acre tract on which there was a judgment lien, which was junior to the mortgage lien by virtue of the date of such mortgage, and who afterwards bid in the 80 acres at a foreclosure sale of his mortgage, for a sum sufficient to satisfy the debt, cannot redeem the 320 acres on a subsequent execution sale under the junior lien.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 835-844.

See, also, 17 Cyc. pp. 1326-1329; note, 21 Am. St. Rep. 243.

## § 295. Time of redemption.

Computation of time, see TIME, §§ 4, 9, 10.

[a] (*Sup.* 1876)

Where the rents and profits of real estate for a term of years not exceeding seven are sold on execution, the interest so sold may be redeemed within one year under the provisions of Act June 4, 1861.—*Ragsdale v. Mathes*, 52 Ind. 495.

[b] (*Sup.* 1876)

The holder of a judgment for \$722, purchased a farm worth \$10,000 at sheriff's sale under execution issued on the judgment, for the amount of his judgment, and assigned the certificate of purchase to the holders of a prior judgment for \$500. Within the year allowed for redemption, the assignees of the certificate accepted from the debtor \$400 of the redemption money, and agreed that such debtor might pay the balance and the amount of the prior judgment at a specified time after the expiration of the time for redemption. *Held* that, even if time was made the essence of such contract by the parties, it would be unconscionable to so construe it, and such debtor might redeem after the time fixed thereby.—*Spath v. Hankins*, 55 Ind. 155.

[c] (*Sup.* 1882)

A junior judgment creditor, who has had a prior sale of his debtor's land upon the execution, and has bid the land in at the sale, cannot, after the expiration of the year allowed for redemption, redeem from a sale of the same land made jointly under an execution issued upon a senior judgment and a decree of foreclosure under a mortgage older than the junior judgment creditor's lien, the latter not having been made a party to the foreclosure suit, although he might redeem after the expiration of the year had the sale been made by virtue of the decree of foreclosure alone.—*Cummings v. Pottinger*, 83 Ind. 204.

[d] (*Sup.* 1882)

The purchaser of real estate at sheriff's sale may, after the year allowed for redemption and before the execution of the sheriff's deed, consent to a redemption, accept the money, and thereby estop himself from denying the redemptioner's right to redeem. Until the execution of the deed, the title is defeasible, notwithstanding the expiration of the year.—*Taggart v. McKinsey*, 85 Ind. 392.

[e] (*Sup.* 1883)

The time for redeeming the levy of an execution on real estate may be extended by parol.—*Butt v. Butt*, 91 Ind. 305.

[ee] (*Sup.* 1884)

The year allowed by Rev. St. 1881, § 768, to redeem from sheriff's sale, begins to run from the day the sale is completed by the payment of the purchase-money bid.—*Liggett v. Firestone*, 96 Ind. 260.

[f] (*Sup.* 1884)

If one whose land has been sold under an execution pays money in consideration of an oral promise that the time for redemption shall

be extended, such agreement may be enforced by him whose land has thus been sold.—*McMakin v. Schenck*, 98 Ind. 264.

[g] (Sup. 1886)

It is settled that an agreement made during the year for redemption by which the time for redemption is extended is valid, and will prevent the purchaser at sheriff's sale from acquiring title under such sale.—*Cox v. Ratcliffe*, 5 N. E. 5, 105 Ind. 374.

[h] (Sup. 1892)

In an action for the possession of land it appeared that plaintiff claimed under a sheriff's deed on a sale in execution of a judgment in favor of plaintiff against defendants; that the land was sold for \$167.03, the amount of the judgment, with interest and costs of sale; that the land was worth \$3,200; that one of defendants had personal property, subject to levy of the execution, worth more than \$600; that defendants had no actual knowledge of the levy or sale until after the year for redemption had expired. Defendants, by cross complaint, tendered the amount plaintiff paid for the land, with interest, and prayed for leave to redeem. *Held*, that defendants were entitled to judgment.—*Branch v. Foust*, 130 Ind. 538, 30 N. E. 631.

[i] (Sup. 1902)

In an action to redeem from an execution sale of real estate, plaintiff alleged that the purchaser agreed to extend the time allowed by law for the redemption of the lands in consideration of the payment of the amount bid with interest thereon and to assign the certificate to defendant, and he held it as security for the repayment of the sum advanced by him; that immediately after obtaining the certificate defendant, without the consent of the plaintiffs, surrendered it to the sheriff and procured a deed for the lands which he placed on record; that thereafter he denied that plaintiffs had any right to the land. Neither of the plaintiffs asserted that the defendant was not to have a deed in case they failed to pay the amount coming to him within the time agreed for redemption, nor that defendant was to hold the certificate as a mere security for a loan as evidence of a lien on the land. No note or other evidence of indebtedness was executed by plaintiffs to defendant. Plaintiffs failed to redeem the land from defendant within the time they alleged he allowed them by his agreement, and no attempt to assert and enforce such supposed right was made until after the lapse of 14 years from the date of the transaction. *Held*, that defendant was the owner of the land in fee simple, and his title should be quieted against the claim of plaintiffs, and they were not entitled to the relief they demanded.—*Turpie v. Lowe*, 62 N. E. 484, 158 Ind. 314, 92 Am. St. Rep. 310.

The statutory period within which lands sold on execution may be redeemed may be extended by contract without otherwise affecting

or impairing the rights of the holder of the certificate of purchase.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 846-850.  
See, also, 17 Cyc. p. 1329.

§ 296. Amount required to redeem.

Liability of debtor for use and occupation during time allowed for redemption, see USE AND OCCUPATION, § 4.

[a] (Sup. 1888)

Plaintiffs, as judgment creditors, purchased land at an execution sale, and credited the amount upon the judgment, but paid in cash the costs. Before the expiration of the period for redemption, the judgment debtors made an assignment, with the assent of all their creditors, the proceeds to be applied by the assignee to redeem all lands sold on execution, then to pay liens in the order of priority, and then all other claims. The assignee defendant sold the land purchased by plaintiffs, and paid them \$59.60, and refused to pay more. To a complaint alleging these facts, an answer, stating that as the judgment under which plaintiffs purchased was valueless owing to prior judgments, and plaintiffs, wishing to get back the amount they had paid as costs, accepted \$59.60 in full satisfaction of their claim, was *held* good; the case not being within the rule that a partial payment will not discharge a debt.—*Pfaffenberger v. Platter*, 114 Ind. 473, 16 N. E. 835.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 851-856.  
See, also, 17 Cyc. pp. 1331, 1332.

§ 297. Tender and payment into court.

[a] (Sup. 1878)

The fact that the clerk of the court, on receiving and collecting a check on a bank for the amount necessary to redeem, places the same to his own credit in a bank as such clerk, does not render the redemption invalid.—*Jessup v. Carey*, 61 Ind. 584.

[b] (Sup. 1893)

Where a clerk of the circuit court accepts a check as money paid on a judgment in redemption, the redemption, so far as such payment is concerned, is complete.—*Bowen v. Vangundy*, 133 Ind. 670, 33 N. E. 687.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 857-864.  
See, also, 17 Cyc. pp. 1332, 1333.

§ 298. Proceedings on redemption.

[a] (Sup. 1847)

Plaintiff purchased land at an execution sale. The debtor sold his right to redeem to the defendant, who executed a receipt for the same as purchaser under the plaintiff. A proper record of the redemption was made on the order book of the court and on the record of deeds.

*Held*, that the facts did not show that the land had been redeemed, but that the right to redeem had been released.—*Nichols v. Woodruff*, 8 Blackf. 493.

[b] (*Sup.* 1881)

After a purchaser of land under a judgment constituting an inferior lien has received from the defendants in a suit pending to foreclose a mortgage on the land the amount sufficient to redeem from the sale but retains the certificate in trust for them, and such defendants are barred of all right in the land by a subsequent decree in the foreclosure suit, the taking of a deed by such purchaser in his own name from the sheriff confers on him no title which he can convey to such defendants, since the payment by the defendants amounted to a redemption from the sheriff's sale.—*Shanklin v. Franklin Life Ins. Co.*, 77 Ind. 268.

[c] (*Sup.* 1881)

Payment of the redemption money, by one holding the equity of redemption, to a purchaser of the land at a sheriff's sale, is sufficient notice to the latter of the facts upon which the right of the former to redeem is based.—*Rice v. Puett*, 81 Ind. 230.

[d] (*Sup.* 1882)

Act March 31, 1879, § 7, requiring a statement of the facts authorizing a redemption from an execution sale to be filed with the clerk, applies only where a mortgagee or judgment creditor attempts to redeem, and not where the owner redeems.—*Mitchell v. Hodges*, 87 Ind. 491.

[e] (*Sup.* 1886)

A purchaser of real estate at sheriff's sale, who receives part of the redemption money from the execution debtor, is entitled to a lien for the unpaid balance thereof, notwithstanding the fact that he has obtained no sheriff's deed therefor, but simply holds by certificate of purchase.—*Ringle v. First Nat. Bank*, 107 Ind. 425, 8 N. E. 236.

The 10-year statute of limitation of suits by the execution debtor, for the recovery of real property sold on execution, does not apply to an action brought by a purchaser at sheriff's sale to enforce a lien for an unpaid balance of redemption money.—*Id.*

[f] (*Sup.* 1897)

Where the owner of a certificate of purchase at a judgment sale accepts the redemption money, he waives any objections to the sufficiency of the affidavit of the redemptioner.—*Warford v. Sullivan*, 147 Ind. 14, 46 N. E. 27.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 865-873.

See, also, 17 Cyc. p. 1333.

#### § 300. Defects, objections, and waiver.

[a] (*Sup.* 1874)

A purchaser of lands at execution sale, who within the year allowed by statute for

redemption accepts a part of the redemption money on the execution debtor's promise to pay the residue within the year, thereby waives his right to hold the land as a purchaser, and the debtor may complete the redemption after the expiration of the year.—*Hughart v. Lenburg*, 45 Ind. 498.

[b] (*Sup.* 1876)

Where a purchaser at sheriff's sale, within the time allowed for redemption, accepts part of the redemption money on the promise of the debtor to pay the balance on a specified day after the expiration of such time, and agrees that such debtor may pay the balance and redeem at the time agreed upon, the purchaser holds the certificate of purchase or the sheriff's deed, if he obtain one, merely as security for the remainder of the redemption money, and the debtor may redeem after the expiration of the time for redemption on tender of the proper amount.—*Spath v. Hankins*, 55 Ind. 155.

[c] (*Sup.* 1877)

Where a purchaser of partnership real estate, sold by the sheriff under an execution issued on a judgment against the firm, receives from one to whom a member of the firm has conveyed such real estate the redemption money therefor, his certificate of sale from the sheriff is thereby annulled, and he is estopped from afterwards denying the grantee's right to redeem.—*Goddard v. Renner*, 57 Ind. 532.

[d] (*Sup.* 1882)

A purchaser at a sheriff's sale accepted part payment of the debt during the year for redemption, and agreed not to take a deed; accepting notes for the remainder of the debt, payable after the expiration of the year. *Held*, that he waived his right to the deed, and could not acquire any title by afterwards accepting it.—*Felton v. Smith*, 84 Ind. 485.

[e] (*Sup.* 1883)

A., B. and C. having consecutively obtained judgments against D., A. sold at sheriff's sale, and B. redeemed therefrom on his judgment, which was afterwards reversed, but on second trial was reaffirmed. B. thereupon brought suit against A., C., and D. to be subrogated to A.'s rights and to obtain a deed of the land, alleging that D. still owned the land and was otherwise insolvent. *Held*, that C. and D. could not question the regularity of the redemption, and that A. had waived his right to do so by accepting the redemption money.—*Carver v. Howard*, 92 Ind. 173.

[f] (*Sup.* 1888)

Where the purchaser has permitted a redemption by a junior mortgagee, and accepted payment, the mortgagee's right to redeem cannot be questioned by others.—*Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 878-882.

See, also, 17 Cyc. p. 1334.

### § 301. Actions to redeem and for accounting.

[a] (Sup. 1884)

The lien of a judgment on the debtor's right to redeem on paying a certain sum does not entitle the judgment plaintiff to demand an accounting for rents and profits.—*Wilhelm v. Humphries*, 97 Ind. 520.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 883-880.

See, also, 17 Cyc. pp. 1335-1337.

### § 302. Operation and effect.

Subrogation of persons making redemption to rights of creditors, see SUBROGATION, § 26.

[a] (Sup. 1875)

Where mortgaged land is sold under execution against the mortgagor, a redemption by the mortgagee prior to the maturity of the mortgage debt does not vest in him the title or give him the right of possession.—*Reed v. Ward*, 51 Ind. 215.

[b] (Sup. 1877)

Where co-partnership real estate, which has been sold on an execution issued on a judgment against the firm, is conveyed by a member of the firm to a grantee who redeems the same from such sale, it may then be sold on execution for any unsatisfied balance of such judgment.—*Goddard v. Renner*, 57 Ind. 532.

[c] (Sup. 1877)

Real estate sold at sheriff's sale in part satisfaction of a personal judgment and decree foreclosing a prior mortgage lien may, upon being redeemed from such sale by a purchaser thereof at a sheriff's sale of the same on a subsequent judgment lien, be sold to satisfy the residue of such mortgage judgment, notwithstanding the fact that at the time of such latter sale the debtor has other property subject to execution.—*Cauthorn v. Indianapolis & V. R. Co.*, 58 Ind. 14.

[d] (Sup. 1884)

The holder of the sheriff's certificate of sale of real estate, and not the assignee of the judgment, is entitled to the redemption money.—*Brown v. Harrison*, 93 Ind. 142.

[e] (Sup. 1884)

Act March 31, 1879 (Acts 1879, p. 176), providing for redemption from execution sales, does not entitle the redemptioner to a lien for redemption money paid.—*Groves v. Barber*, 98 Ind. 309.

[f] (Sup. 1888)

Redemption by a mortgagee, whose mortgage was subsequent to the execution sale, does not restore the lien of the judgment under which the land was sold, and subject it to a resale, under Rev. St. 1881, § 770, enacting that whenever the owner, or persons claiming under him, redeem, the sale shall be wholly vacated, and the land be subject to sale, as if

such sale had not been made.—*Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125.

Rev. St. 1881, § 770, enacting that whenever any real estate shall be redeemed by the owner or any part owner, or persons claiming under them, the sale by the sheriff shall be wholly vacated and the real estate shall be subject to sale on execution, as if such sale had not been made, refers to redemptions made by the owner or by his executor or administrator, or any one holding either the legal or equitable title under him in pursuance of sections 768 and 769.—Id.

[g] (Sup. 1897)

Rev. St. 1894, § 782 (Rev. St. 1881, § 770), providing that, when the owner redeems from a sheriff's sale, the same shall be wholly vacated, does not apply to a redemption by a junior lienholder, so as to render the real estate subject to sale on execution again.—*Warford v. Sullivan*, 46 N. E. 27, 147 Ind. 14.

Under Rev. St. 1894, §§ 783, 784 (Rev. St. 1881, §§ 771, 772), where a junior judgment lienholder redeems, a senior judgment lienholder, if he do not redeem within a year, loses his lien on the land.—Id.

[h] (Sup. 1898)

The acceptance of redemption money from a junior incumbrancer by a purchaser of the land at an execution sale under a senior judgment does not estop the judgment debtor from questioning the validity of such redemption.—*Jarrell v. Brubaker*, 49 N. E. 1050, 150 Ind. 260.

[i] (Sup. 1899)

The word "owner," as used in Burns' Rev. St. 1894, § 782 (*Hornor's Rev. St. 1897*, § 770), which provides that lands sold under a judgment, when redeemed by the owner, shall be subject to resale to pay an amount remaining unpaid on such judgment, means any owner of the real estate whose interest is subject to payment of the judgment, without regard to whether or not he is the judgment debtor, or claims under him.—*Lemmon v. Osborn*, 54 N. E. 1058, 153 Ind. 172.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 890-900.

See, also, 17 Cyc. pp. 1337-1339; note, 67 Am. St. Rep. 510.

### (D) CONVEYANCE TO PURCHASER.

Execution of deed as taking contract out of statute of frauds, see FRAUDS, STATUTE OF, § 139.

Mandamus to compel, see MANDAMUS, § 73.

Reformation of sheriff's deed, see REFORMATION OF INSTRUMENTS, § 6.

Right of purchaser to reform deed, see REFORMATION OF INSTRUMENTS, § 23.

Sheriff's deed as equitable mortgage, see MORTGAGES, § 27.

**§ 303. Necessity and nature in general.**

[a] (Sup. 1881)

The title of a purchaser of lands sold at a sheriff's sale is not defeated by the omission of the sheriff to execute a deed until four months after the expiration of the time allowed for redemption.—*Jones v. Kokomo Bldg. Ass'n*, 77 Ind. 340.

[b] (Sup. 1881)

A conveyance from the sheriff is necessary to perfect the title of a purchaser of real estate at an execution sale.—*Goss v. Meadors*, 78 Ind. 528.

[c] (Sup. 1897)

A sheriff's certificate of purchase of land at a sheriff's sale does not pass title to the purchaser, in the absence of the execution of a sheriff's deed thereon, after the expiration of the year allowed by statute for redemption.—*Hill v. Swihart*, 47 N. E. 705, 148 Ind. 319.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 901, 902.

See, also, 17 Cyc. p. 1340.

**§ 306. Right to conveyance.**

[a] (Sup. 1853)

It is the duty of a sheriff on a sale of land upon execution to make and tender a deed to the purchaser, and the latter is not bound to part with his money until the deed is tendered.—*State ex rel. Chapman v. Lines*, 4 Ind. 351.

[b] (Sup. 1855)

A purchaser at a sheriff's sale, to be entitled to relief in equity, must have paid or tendered the purchase money within a reasonable time.—*Conklin v. Smith*, 7 Ind. 107, 63 Am. Dec. 416.

[c] (Sup. 1882)

Payment of the purchase price of land sold under execution is essential to entitle the purchaser to a deed.—*Carnahan v. Yerkes*, 87 Ind. 62.

[d] (Sup. 1882)

The holder of a sheriff's certificate of the sale of real estate may assign the same, in the event of nonredemption, as well before as after the expiration of the year allowed for redemption; and therefore the assignment of such a certificate by the administrator of the purchaser before the time for redemption has expired, made in pursuance of an order of court, cannot be collaterally attacked.—*Conger v. Babcock*, 87 Ind. 497.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 607, 912, 913, 915, 916.

See, also, 17 Cyc. pp. 1342, 1343.

**§ 307. Time for making.**

[a] (Sup. 1882)

2 Rev. St. 1876, p. 220, providing that the certificate purchased at an execution sale shall

entitle the holder thereof to a deed of conveyance to be executed by the officer making the sale at the expiration of one year from the date of such sale, if the property shall not have been previously redeemed, did not require the holders of such certificate to demand of the sheriff the execution of the deed either immediately upon the expiration of the year or within any specified time thereafter.—*Maddux v. Watkins*, 88 Ind. 74.

[b] (Sup. 1889)

The mere omission of the purchaser to demand a deed from the sheriff at the expiration of the period for redemption, will not ordinarily defeat his absolute and continuous right to a conveyance after that time, where the sale has been properly made and the writ duly returned, and a proper record thereof made.—*Wright v. Dick*, 19 N. E. 306, 116 Ind. 538.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 909, 914.

See, also, 17 Cyc. p. 1343.

**§ 308. Restraining making or delivery.**

Restraining sale, see ante, §§ 169–172.

[a] (Sup. 1852)

A sheriff who held a first and third execution against certain land sold it to A., who held the third judgment, and who paid enough of his bid to satisfy the first judgment, and directed that the residue be credited on his own execution, which was done; the sheriff returning the execution unsatisfied, stating that A. had failed to pay the balance of his bid, wherefore the sale was void. *Held*, on a bill by the holder of the second judgment, who had purchased under the execution thereon, to enjoin a conveyance to the first purchaser, that he was entitled to an injunction without first tendering the amount paid in satisfaction of the first judgment.—*Carnahan v. Yerkes*, 87 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 910.

See, also, 17 Cyc. p. 1342; note, 62 Am. Dec. 523.

**§ 309. Form and contents.**

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 917–924.

See, also, 17 Cyc. pp. 1344–1346.

**§ 310. — In general.**

[a] (Sup. 1884)

Where title is claimed to lands through a sheriff's deed, the deed is admissible in evidence, though there are discrepancies in the dates of the deed, the execution, and the return.—*Camp v. Smith*, 98 Ind. 409.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 917.

**§ 311. — Recitals.**

Conclusiveness of recitals, see post, § 320.

## [a] (Sup. 1836)

Th recital in a sheriff's deed is not a necessary part of it, and if the deed misrecites the execution under which the sheriff sells, or recites no execution, the sale is nevertheless good, if at the time it is made the sheriff has in his hands a valid execution.—*Doe ex dem. Wilkins v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368.

A sheriff's deed is admissible as evidence of the title of the grantee therein, or persons claiming under him, though its recitation of the amount of the execution under which the sale was made is incorrect; such recital in the deed not being necessary to its validity.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 918-920.  
See, also, 17 Cyc. p. 1344.

## § 315. Recording and registration.

## [a] (Sup. 1839)

A sheriff's deed is good against the execution defendant and his heirs or devisees, though it be not acknowledged or recorded.—*Dixon v. Doe ex dem. Lasselle*, 5 Blackf. 106.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 928-931.  
See, also, 17 Cyc. pp. 1347, 1348.

## § 316. Amendment or reformation.

## [a] (Sup. 1878)

A deed which is void for uncertainty of description cannot be reformed.—*Lewis v. Owen*, 64 Ind. 446.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 932, 933.  
See, also, note, 109 Am. St. Rep. 33.

## § 318. Construction and operation.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 935-948.  
See, also, 17 Cyc. pp. 1348-1351.

## § 319. — In general.

## [a] (Sup. 1851)

It is a general rule that a purchaser at a sheriff's sale is bound only to show the judgment of a competent court, an execution warranted by the judgment, and a sale and deed under it.—*Carpenter v. Doe ex dem. Schaffner*, 2 Ind. 465.

## [b] (Sup. 1876)

A conveyance of the land of a judgment debtor by virtue of a sale thereof upon an execution or decree does not create the relation of landlord and tenant between the person receiving such conveyance and such debtor.—*Powell v. De Hart*, 55 Ind. 94.

## [c] (Sup. 1882)

A sheriff's deed, based on a valid return, is competent, but not generally material, evidence in support of the purchaser's title.—*Ferrier v. Deutchman*, 81 Ind. 390.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 935-939.

## § 320. — Conclusiveness of recitals.

## [a] (Sup. 1874)

A sheriff's deed of conveyance is not, of itself, evidence of the authority of the sheriff to sell, or of a judgment or execution.—*Huddleston v. Ingels*, 47 Ind. 498.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 940-945.  
See, also, 17 Cyc. pp. 1349, 1350.

## § 321. — Relation back.

## [a] (Sup. 1881)

A sheriff's deed made in pursuance of a sale on execution takes effect by relation from the date of the judgment, and passes to the purchaser all the title and interest which the judgment debtor then had.—*Shanklin v. Franklin Life Ins. Co.*, 77 Ind. 268.

## [b] (Sup. 1884)

A sheriff's deed, made after the expiration of the year allowed for redemption, relates back to the date of the sale, so as to give a good title as against any intervening judgment.—*Wilhelm v. Humphries*, 97 Ind. 520.

## [c] (Sup. 1891)

The title of the purchaser of land acquired by virtue of a sheriff's sale and deed relates back to the rendition of the judgment.—*Merritt v. Richey*, 27 N. E. 131, 127 Ind. 400.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 946-948.  
See, also, 17 Cyc. pp. 1350, 1351.

## (E) PROCEEDS.

## § 322. Disposition in general.

## [a] (Sup. 1897)

Rev. St. 1894, § 785 (Rev. St. 1881, § 773), provides for a sale by the last redemptioner on an execution in the nature of a venditioni exponas, and for a distribution of the proceeds of the sale. *Held*, that the manner of distribution set out in such section, after satisfying the execution, applies to cases where the redemptioner's judgment is not stayed, and is not payable in instalments, as well as where it is.—*Warford v. Sullivan*, 46 N. E. 27, 147 Ind. 14.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 949-955.  
See, also, 17 Cyc. p. 1351.

## § 323. Mortgages and other liens.

## [a] (App. 1908)

Where a judgment creditor redeemed certain land from mortgage foreclosure, and caused the land to be sold under his venditioni exponas, which sale resulted in a surplus, the time within which a junior judgment creditor could pursue the land having expired, the latter could only look to such surplus and to a personal judgment

against the mortgagor for the payment of his debt.—*Luken v. Fickle*, 42 Ind. App. 445, 84 N. E. 561.

Where mortgaged land was redeemed from a foreclosure sale by a judgment creditor of the mortgagor and resold, such resale discharged the lien of the judgment on which the original sale was made and the liens of all intervening judgments and decrees; the surplus arising from the sale, if any, being distributed among the judgment creditors whose liens were junior to that under which the original sale was made according to the original priorities and equities, as expressly provided by Burns' Ann. St. § 785.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 956-959.  
See, also, 17 Cyc. p. 1353.

### § 326. Distribution among different judgments or executions.

[a] (Sup. 1847)

A sheriff, by virtue of a *fi. fa.*, sold certain real estate of the debtor for more than sufficient to satisfy the execution. At the time of the sale the sheriff had in his hands other executions against the same debtor on judgments younger than that under which the sale was made. These younger judgments were for a larger amount in the aggregate than the balance of the purchase money after payment of the execution on which the sale was made. *Held*, that the whole of the purchase money should be paid to the sheriff, and that he should satisfy the judgments according to the order of time in which they were rendered.—*Steele v. Hanna*, 8 Blackf. 326.

[b] (Sup. 1850)

The sheriff is only authorized to sell the interest of execution defendants subject to execution in lands levied on, and, having made the sale, he must apply the proceeds to the satisfaction of the several executions according to the priority of the liens of the judgment.—*McMahon v. Thompson*, 2 Ind. 114.

[c] (Sup. 1853)

A sheriff, who having several executions in his hands upon decrees of foreclosure against the same land, sells the land upon the execution having the preference for a sum more than sufficient to satisfy it, should apply the surplus upon the other executions, according to the order of their preference.—*Benton v. Shreeve*, 4 Ind. 66.

[d] (Sup. 1862)

Where the sheriff holds several executions against one defendant at the time of the sale of the defendant's real property, it is wholly immaterial on whose execution the sales are made, and the proceeds of them must be applied on the several judgments, in the order of their seniority, until the moneys are exhausted.—*State ex rel. Wilber v. Salyers*, 19 Ind. 432.

[e] (Sup. 1882)

The fund derived from a sale under a third judgment should be applied to the payment of other judgments in the order of their dates.—*Carnahan v. Yerkes*, 87 Ind. 62.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 960-973.  
See, also, 17 Cyc. pp. 1357-1359.

### § 327. Rights to surplus.

[a] (Sup. 1864)

A replevin bail for the stay of execution, who has paid a part of the judgment, and afterwards, at a sale of the property of his principal by the sheriff on an execution issued thereon, becomes the purchaser thereof, for a sum greater than the balance due, has the right, against junior creditors, in whose favor executions are at the time in the hands of such sheriff, to retain the overplus, to an amount sufficient to satisfy the sum paid by him as such bail.—*Colgrove v. Cox*, 22 Ind. 43.

[b] (Sup. 1876)

Where the proceeds of land sold upon execution by the sheriff are more than sufficient to satisfy the execution and the costs legally taxed, and he proposes to retain the surplus to pay for costs incurred by him in advertising the sale without legal authority, he is liable to the execution defendant for such surplus, upon demand.—*Martin v. Reissner*, 54 Ind. 217.

[c] (Sup. 1897)

Under Burns' Rev. St. 1894, § 786 (Rev. St. 1881, § 774), providing that any person having a lien otherwise than by judgment on real estate may at any time from one year of the sale and after he shall have had his lien duly recorded redeem it from the purchaser at the sale or from any prior redemptioner, and redemption thereof may be made from him on the same terms and conditions as required in cases of redemption by judgment creditors, a mortgagee may redeem at any time within one year from the original sale, and redemption may be made from him on the same terms and conditions as required in cases of redemption by judgment creditors, and such redeeming mortgagee, being placed on the same terms and conditions as junior judgment creditors, is entitled to share with them in the distribution of any surplus that may arise from the last sale, according to their original priorities and equities.—*Warford v. Sullivan*, 46 N. E. 27, 147 Ind. 14.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 974-980.  
See, also, 17 Cyc. pp. 1359, 1360.

### VIII. RETURN.

As prerequisite to creditors' suit, see CREDITORS' SUIT, § 16.

As sufficient memoranda within statute of frauds, see FRAUDS, STATUTE OF, § 103.



Conditions precedent to setting aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES**, § 241.

Execution against the person, see post, § 444.

In justice's court, see **JUSTICES OF THE PEACE**, § 135.

Liability of sheriff or constable for failure to make return, see **SHERIFFS AND CONSTABLES**, § 123.

Liability of sheriff or constable for making false return, see **SHERIFFS AND CONSTABLES**, § 124.

Necessity of return of execution against property to authorize execution against the person, see post, § 426.

Return of execution unsatisfied as condition precedent to supplementary proceedings, see post, § 376.

Secondary evidence of, see **EVIDENCE**, § 162.

### § 333. Time for making.

Computation of time, see **TIME**, § 10.

#### [a] (Sup. 1841)

Where an execution was issued on the 3d of March, returnable within 30 days, and the constable, after making a full examination for goods without success, returned it nulla bona on March 13th, the objection that the return was void because returned before the expiration of the 30 days was without merit, since, after full examination for goods without success, the officer was at liberty to return it nulla bona.—*Wilcox v. Ratliff*, 5 Blackf. 561.

When a constable having in his hands a fi. fa. has made one full examination for goods without effect, he may return the execution nulla bona.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1002-1004.

See, also, 17 Cyc. pp. 1368, 1369.

### § 334. Form and requisites.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1006-1014.

See, also, 17 Cyc. pp. 1366-1373.

### § 335. — In general.

#### [a] (Sup. 1849)

An officer who has been prevented from selling property taken on execution should set forth in his return the cause by which he was so prevented.—*State ex rel. Bennet v. Nelson*, 1 Ind. 522, *Smith*, 401.

#### [b] (Sup. 1880)

Though a return on the back of a writ of execution is made partly in one column and partly in another, with the indorsements on the writ between the two, the subscription to the left-hand column is a proper authentication of the whole return.—*Stott v. Harrison*, 73 Ind. 17.

#### [c] (Sup. 1881)

It is not material on what part of a writ the constable's return is written; it being sufficient if written on a separate sheet of paper properly identified and attached to the writ.—*Waymire v. State ex rel. Nichol*, 80 Ind. 67.

#### [d] (Sup. 1885)

Where the sheriff sells land on execution, the appraisalment thereof is no part of his return.—*Coan v. Elliott*, 101 Ind. 275.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1006-1012, 1014.

See, also, 17 Cyc. p. 1366.

### § 336. — Description of property.

#### [a] (Sup. 1853)

The return upon a fi. fa. that it was levied "upon the property of" the execution defendant, without designating the kind, quantity, or value, and accompanied by no other paper or memorandum to remove the uncertainty, is void for uncertainty.—*Law v. Smith*, 4 Ind. 56.

#### [b] (Sup. 1882)

A description in the return of an execution, "twenty-eight feet off the west side of lot number five, in block L," in a certain city, held sufficient.—*Bond v. Heuser*, 86 Ind. 398.

#### [c] (Sup. 1889)

A description of land as "the fractional east half of the southeast quarter of section 22, township 23, range 10 east, containing sixty-one acres, more or less," when the section in question is not fractional, is insufficient.—*Peck v. Sims*, 120 Ind. 345, 22 N. E. 313.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1013.

See, also, 17 Cyc. p. 1372.

### § 337. Record.

#### [a] (Sup. 1879)

A motion to correct the record upon an execution docket is not a common-law civil action, requiring adversary pleadings. It is merely a motion auxiliary to the record which precedes it, so that, though a party demurs and pleads to a motion, forming issues of law and fact, his act in so doing is harmless.—*Newhouse v. Martin*, 68 Ind. 224.

The making of the record upon an execution docket is a ministerial act, and its correction affects no judicial act in the case.—*Id.*

Where the clerk's record of the return of an execution was erroneous and the execution and return were lost, the court properly permitted their contents to be proved and from such contents correct the record; and such correction was not objectionable on the ground that it was by parol.—*Id.*

The circuit court has power to order the correction of the clerk's record of the return on an execution, and, where the execution is

lost, to allow its contents and the return to be proved by parol.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1005.

See, also, 17 Cyc. p. 1373.

### § 338. Amendment.

Amendment of record, see ante, § 337.

Change of venue on motion to permit, see VENU-  
UE, § 36.

#### [a] (Sup. 1862)

Generally a sheriff may be allowed to amend his return to an execution where it defectively describes the lands levied on; but the court cannot compel him to do so, or make an order directing such amendment to be made.—*Walter v. Palmer*, 18 Ind. 279.

To any motion or complaint to effect an amendment to a sheriff's return on an execution the sheriff should be made a party.—*Id.*

#### [b] (Sup. 1881)

A sheriff may, by leave of the court, amend his return on an execution after his term of office has expired, so as to make it conform to the facts as they occurred.—*Turner v. First Nat. Bank of Madison*, 78 Ind. 19.

#### [c] (Sup. 1881)

A constable under the sanction of the court may amend his return to correctly exhibit the proceedings taken by him.—*Waymire v. State ex rel. Nichol*, 80 Ind. 67.

#### [d] (Sup. 1883)

A motion to permit a sheriff to amend his return after it has become a matter of record, so that it might speak the whole truth, is not a civil action, and the forming of issues of law and fact and the trial thereof as in a civil action were irregular.—*Wilcox v. Moudy*, 80 Ind. 232.

Where the evidence, on a motion to correct a sheriff's return showed that within the knowledge of the sheriff, the real estate in question was offered in fee simple in parcels, and that such fact was not stated in the return, there was no abuse of discretion in permitting an amendment of the return no reason against the allowance of the amendment having been shown.—*Id.*

On a motion to correct a sheriff's return, the court may exercise a sound discretion, and hence may be enlightened by any material and competent evidence, including oral evidence.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1015-1023.

See, also, 17 Cyc. pp. 1373-1375.

### § 341. Construction.

#### [a] (Sup. 1858)

The fact that a sheriff's return to an execution levied on real estate states that the property was sold to the highest bidder does

not admit the inference that there was no appraisal.—*Thurston v. Barnes*, 10 Ind. 289.

#### [b] (Sup. 1860)

A return, "Not satisfied for want of buyers," does not show a levy on property.—*Bowman v. Mallory*, 14 Ind. 424.

#### [c] (Sup. 1878)

A return: "The real estate levied upon sold to S. for \$130. Purchase money not paid,"—shows that at the date of the return the land was merely bid off and remained unsold.—*Dawson v. Jackson*, 62 Ind. 171.

#### [d] (Sup. 1882)

If land sold on execution should have been appraised, and the return is silent on the subject, in the absence of evidence to the contrary, appraisal will be presumed.—*Hale v. Talbott*, 86 Ind. 447.

#### [e] (Sup. 1884)

Where an execution was directed to and returned by the sheriff of a county named, it will be presumed that the land levied upon is in that county, notwithstanding the return to the execution does not expressly state in what county it is situated.—*Camp v. Smith*, 98 Ind. 409.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1024, 1025.

See, also, 17 Cyc. pp. 1375, 1376.

### § 342. Operation and effect.

Return as evidence of appraisal improperly recited therein, see ante, § 141.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1030-1048; 43 CENT. DIG. Sheriffs, §§ 296, 408.

See, also, 17 Cyc. pp. 1377-1382.

### § 343. — In general.

#### [a] (Sup. 1843)

In a scire facias against a constable for a false return of an execution, the return being that the execution was returned by order of plaintiff, the return is no evidence that plaintiff gave such order.—*Andrew v. Parker*, 6 Blackf. 461.

#### [b] (Sup. 1882)

The return of an officer on execution is sufficient evidence of seizure to make at least a prima facie case.—*Boesker v. Pickett*, 81 Ind. 554.

#### [c] (Sup. 1884)

Where title to property is claimed through a sheriff's sale, the return to the execution is admissible in an action, though it shows a levy on personalty undisposed of at the time of the sale.—*Camp v. Smith*, 98 Ind. 400.

Where title is claimed through a sheriff's sale, the return to the execution is admissible,

though it does not state in what county the land levied on is situated.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1030–1032, 1041–1043.

See, also, 17 Cyc. p. 1377.

**§ 344. — Conclusiveness.**

[a] (Sup. 1844)

In scire facias to have execution in the circuit court on a justice's transcript, the writ alleged the recovery of a judgment by the plaintiff against the defendant before a justice of the peace for a certain sum, the issuing of a fieri facias on the judgment, and a return of the execution nulla bona. It stated, also, that the justice afterwards filed in the circuit court a certified transcript of the judgment and proceedings, and that the transcript was recorded and filed in that court. *Held* that the defendant cannot in such case deny the truth of the constable's return of nulla bona.—Bennett v. Jones, 7 Blackf. 110.

[b] (Sup. 1846)

The part of a sheriff's return to an execution of his having sold certain land, which names the day of sale, is not material, and may be contradicted by parol evidence.—Goodtitle ex dem. Cook v. Cummins, 8 Blackf. 179.

[c] (Sup. 1852)

A sheriff's return that he has executed a deed of land to a bidder does not preclude the bidder from showing that he had received no deed.—Gregg v. Strange, 3 Ind. 366.

[d] (Sup. 1863)

A return of an officer on final process is generally conclusive against him.—Butler v. State ex rel. McFatridge, 20 Ind. 169.

A return to an execution is generally, as against other parties than the officer making it, mere prima facie evidence of the facts which it recites.—Id.

[e] (Sup. 1870)

A sheriff's return to an execution, showing the collection of the money thereon, is conclusive upon the sureties on his official bond in a suit on such bond on the relation of the execution plaintiff for the failure of the officer to pay over such money.—Bagot v. State ex rel. Dennison, 33 Ind. 262.

[f] (Super. 1872)

The return of a sheriff on an execution, as to matters required to be returned in the discharge of his official duties, cannot be contradicted by the sheriff, nor by the parties to the execution, by parol evidence, except in a direct proceeding.—Gillespie v. Splahn, Wils. 228.

[g] (Sup. 1873)

Where an execution defendant sought to set aside the levy of an execution on personal property on the ground that the execution had

been satisfied by a prior levy on a sufficient amount of real estate to satisfy the debt, a recital in the sheriff's return that he had levied on the personal property, because he regarded the real estate previously levied on insufficient, was no evidence of that fact, since the facts stated in an officer's return can only be evidence between the parties when they are official. Mere statements of opinion cannot have such an effect.—Lindley v. Kelley, 42 Ind. 294.

[h] (Sup. 1874)

A sheriff's return on execution is conclusive against him, but only prima facie evidence in his favor.—Splahn v. Gillespie, 48 Ind. 397.

A party or privy may not aver the falsity of a return of a proper officer upon an execution or order of sale, except in a direct proceeding against such officer for a false return.—Id.

[i] (Sup. 1876)

In an action for the recovery of real estate, and to set aside an execution sale thereof, evidence that on the day on which the execution was levied upon the land, and before the levy was made, the execution defendant pointed out and gave up to the officer who held the execution unincumbered personal property of a certain value, consisting of certain chattels, sufficient to satisfy the execution, which the officer refused to receive, was not evidence tending to contradict a statement in the officer's return that at a certain date the officer demanded payment of the execution defendant, and he directed the officer to levy on real estate, and in pursuance of said direction, on a certain date, nearly two months after the former date, he levied on certain real estate described.—Gilpin v. Wilson, 53 Ind. 443.

[j] (Sup. 1877)

Parol evidence of the dates of a sheriff's publications of a sale is not excluded by his return that he had given notice of sale by "three successive publications" in a certain newspaper.—Meredith v. Chancey, 59 Ind. 466.

[k] (Sup. 1877)

A sheriff's return on an execution "shall be taken and deemed to be a record," and cannot be contradicted by parol evidence.—Stockton v. Stockton, 59 Ind. 574.

[l] (Sup. 1878)

A return upon an execution or decree whereunder real estate has been sold cannot be impeached in an action to set aside the sale, brought by the defendant against the plaintiff, who had become the purchaser, and the clerk of the court.—Fry v. Gallaspie, 61 Ind. 478.

[m] (Sup. 1881)

In an action to enforce an execution sale against a judgment plaintiff, who was alleged to have purchased thereat, the return of the sheriff cannot be contradicted by parol testimony that the sale was made to defendant.—Clark v. Shaw, 79 Ind. 164.

[n] (Sup. 1881)

In an action on a constable's bond for breach of duty in disposing of property levied on, his return on the writ is not conclusive.—*Waymire v. State ex rel. Nichol*, 80 Ind. 67.

[o] (Sup. 1881)

Where receipts were indorsed on a writ by the sheriff, parol evidence that no money was paid on a bid made at a sale under the writ, except enough to pay costs and that the amount of the bid less the costs was credited on the execution, was admissible to explain the receipt.—*Johnson v. State ex rel. Slinkard*, 80 Ind. 220.

A sheriff's return on an execution may be explained by parol.—*Id.*

[p] (Sup. 1882)

Statements in the return of an officer on an execution as to the reasons for his failure to levy are not conclusive.—*Hessong v. Pressley*, 86 Ind. 555.

[q] (Sup. 1884)

Where a sheriff's return showed that certain executions came to his hand at a certain time, he could not allege, and he could not be permitted to prove, that they did not all come to his hand at the same time, so as to give either one of them a preference over either one or all of the others.—*State ex rel. Clark v. Cisney*, 95 Ind. 265.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1033-1040; 43 CENT. DIG. Sheriffs, §§ 296, 408. See, also, 17 Cyc. pp. 1379-1382.

#### § 345. Effect of return or defects therein on title of purchaser.

[a] (Sup. 1844)

The title of a purchaser of real estate at a sheriff's sale, who pays the purchase money and receives the sheriff's deed, cannot be affected by the circumstance that the return of the execution is imperfect.—*Doe ex dem. Wolf v. Heath*, 7 Blackf. 154.

[b] (Sup. 1858)

The title of a purchaser at a sheriff's sale cannot be invalidated by the fact that the return shows no appraisal, which may be proved aliunde.—*Thurston v. Barnes*, 10 Ind. 289.

[c] (Sup. 1862)

The purchaser of land at a sheriff's sale on execution is not bound to see that the sheriff makes a proper return to the execution.—*State ex rel. Wilber v. Salyers*, 19 Ind. 432.

[d] (Sup. 1875)

The title of a purchaser of land at an execution sale is not affected by failure of the sheriff to show in his return that he made demand for personal property before levying on

the realty, where such purchaser is not a judgment plaintiff.—*Reed v. Ward*, 51 Ind. 215.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1044, 1045.

See, also, 17 Cyc. p. 1382.

#### § 347. Failure to make.

[a] (Sup. 1844)

The making of a return is not essential to the purchaser's title.—*Doe ex dem. Wolf v. Heath*, 7 Blackf. 154.

[b] (Sup. 1862)

The purchaser of land at a sheriff's sale on execution is not bound to see that the sheriff makes a return to the execution.—*State ex rel. Wilber v. Salyers*, 19 Ind. 432.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1046-1048, 1062.

See, also, 17 Cyc. pp. 1365, 1366.

### IX. PAYMENT, SATISFACTION, AND DISCHARGE.

Execution against the person, see post, §§ 446, 448-450.

Issuance of alias writ against joint defendant pending levy on property of codefendant, see ante, § 99.

Payment by replevin bail and recovery over, see ante, § 177.

#### § 351. Levy on personal property.

Levy on personalty under same writ after levy on realty, see ante, § 136.

Right to successive executions, see ante, § 19.

[a] A levy on goods must be considered as a satisfaction until the insufficiency is made manifest by a sale and return.—(Sup. 1843) *Miller v. Ashton*, 7 Blackf. 29; (1854) *Barret v. Thompson*, 5 Ind. 457.

[b] (Sup. 1850)

A levy upon goods sufficient to pay the debt does not necessarily amount to satisfaction.—*Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510.

[c] (Sup. 1882)

Where a sheriff levied on sufficient personal property to satisfy the writ, but allowed it to go to waste, a sale thereafter of realty under such writ was void.—*Harmon v. State ex rel. Pelton*, 82 Ind. 197.

[d] (Sup. 1888)

A levy upon goods of sufficient value to pay a judgment raises a presumption that the execution is satisfied. This presumption may be overcome by a return of the officer showing that the property had been duly and lawfully sold, and that a sale regularly made had not

been productive of sufficient to pay the debt.—*Dehority v. Paxon*, 17 N. E. 259, 115 Ind. 124

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1074½, 1075, 1079.

See, also, 17 Cyc. p. 1394.

**§ 352. Levy on real property.**

Issuance of alias writ against joint defendant pending levy on bond of codefendant, see ante, § 90.

Levy on personalty under same writ after levy on realty, see ante, § 136.

Right to successive executions, see ante, § 19.

[a] (Sup. 1843)

Lands levied on will be considered as a satisfaction until the contrary is shown by sale.—*Miller v. Ashton*, 7 Blackf. 29.

[b] (Sup. 1850)

A mere levy upon lands never amounts to satisfaction.—*Doe ex dem. Mace v. Dutton*, 2 Ind. 309, 52 Am. Dec. 510.

[c] (Sup. 1853)

A levy is prima facie a satisfaction of the execution, but it may be shown to have proved to be not an actual one.—*Law v. Smith*, 4 Ind. 56.

[d] (Sup. 1873)

There is no distinction in this state as to the effect of a levy as satisfaction between a levy on personalty and on realty, and a levy on realty of sufficient value to pay the execution creates a presumption of satisfaction.—*Lindley v. Kelley*, 42 Ind. 294.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1074½, 1076, 1079.

See, also, 17 Cyc. p. 1397.

**§ 353. Sale.**

[a] (Sup. 1816)

Where land is struck off at an execution sale, but no conveyance was made by the officer, or purchase money paid, the execution was unsatisfied, since, to make such sale valid, a memorandum in writing must be made at the time the land was struck off.—*Chapman v. Harwood*, 8 Blackf. 82, 44 Am. Dec. 736.

[b] (App. 1906)

The receipt of the money from the execution debtor, or the sale of the debtor's property and receipt of the money therefor, by the sheriff, is a satisfaction of such execution and releases the debtor, regardless of what the sheriff does with the money.—*Fuller v. Exchange Bank*, 38 Ind. App. 570, 78 N. E. 206.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1074½, 1076, 1079.

See, also, 17 Cyc. p. 1394.

**§ 355. Release or discharge without satisfaction.**

Release of levy in general, see ante, § 146.

Right to issue alias writ against joint defendant, see ante, § 99.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1074½, 1078–1080.

See, also, 17 Cyc. p. 1400.

**§ 356. Indorsement or entry of satisfaction.**

[a] (Sup. 1879)

Where a judgment debtor paid the amount due on the judgment to the sheriff, holding an execution for its collection, but the judgment creditor never received the money, the debtor was entitled, in proceedings for that purpose, to have the judgment satisfied of record.—*Beard v. Millikan*, 68 Ind. 231.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1081.

**§ 357. Vacating entry of satisfaction.**

Setting aside sale and satisfaction on failure of title, see ante, § 285.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1089, 1090.

See, also, 17 Cyc. pp. 1401, 1402.

**X. SUPPLEMENTARY PROCEEDINGS.**

Against corporations, see CORPORATIONS, § 523.

Appellate jurisdiction of supplementary proceedings as dependent on whether title to real property is involved, see COURTS, § 220 (13).

Arrest of judgment, see JUDGMENT, § 263.

Assignment for benefit of creditors as affecting lien of pending proceedings, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 334.

Change of venue, see VENUE, § 36.

Conclusiveness of judgment therein, see JUDGMENT, § 646.

Decisions reviewable, see APPEAL AND ERROR, §§ 73, 78.

For collection of taxes, see TAXATION, § 600.

Garnishment against county in supplementary proceedings against debtor, see COUNTIES, § 221.

Judgment in as bar, see JUDGMENT, § 552.

Remedy by supplementary proceedings as bar to creditors' suit, see CREDITORS' SUIT, § 6.

Review of decisions, see APPEAL AND ERROR, § 116.

Right to trial by jury of issues of fact, see JURY, § 16.

Supplementary proceedings to enforce judgment as collateral attack, see JUDGMENT, § 519.

Waiver of lien by proof of claim in bankruptcy, see BANKRUPTCY, § 364.

**§ 358. Nature and purpose of remedy.**

As action so as to authorize plea of judgment as an estoppel, see JUDGMENT, § 646.

Mode of procedure, see post, § 304.

Scope of inquiry, see post, § 307.

Substitute for creditor's bill, see post, § 377.

[a] Proceedings supplemental to execution are a "civil action," within the meaning of the Code.—(Sup. 1885) *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; (1887) *Baker v. State ex rel. Mills*, 109 Ind. 47, 9 N. E. 711.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1091.

See, also, 17 Cyc. p. 1402.

### § 359. Statutory provisions.

[a] (Sup. 1907)

A proceeding supplementary to execution (*Burns' Ann. St. 1901*, § 827) being a summary proceeding created by statute and in derogation of the common law, the statute must be strictly construed.—*West v. State ex rel. Benedict*, 168 Ind. 77, 79 N. E. 361.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1092.

See, also, 17 Cyc. p. 1404.

### § 360. Judgments and executions on which proceedings are authorized.

[a] (App. 1906)

The transcript of a justice's docket, showing a judgment against defendant for commutation for failure to work the road, together with evidence that such judgment is in force and uncollectible by execution, sustains a judgment in supplemental proceedings against defendant's debtor and in denial of defendant's alleged exemption.—*Hobbs v. Town of Eaton*, 38 Ind. App. 628, 78 N. E. 333.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1093.

See, also, 17 Cyc. pp. 1405-1407.

### § 362. Persons against whom proceedings may be maintained.

[a] (Sup. 1862)

Persons holding assets of a corporation, which is a judgment debtor and defendant, may be compelled to answer as to such assets in a proceeding supplementary to execution.—*Tompkins v. Floud County Agricultural & Mechanical Ass'n*, 19 Ind. 197.

Since the statute provides the mode in which a corporation may answer where it is disclosed that assets are held by it belonging to a judgment debtor, it may itself be required to answer as a judgment debtor in supplementary proceedings.—*Id.*

[b] (Sup. 1876)

2 Rev. St. 1876, p. 231, § 522, authorizing supplementary proceedings to be extended to any "person or corporation," means only ordinary private corporations, not municipal cor-

porations.—*Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

A body politic and corporate cannot be made a defendant in proceedings supplementary to execution to answer as to its indebtedness to an execution debtor.—*Id.*

[c] (Sup. 1884)

A proceeding supplementary to execution can only be maintained against one having monies claimed to belong to the execution debtor, in connection with the proceedings against the judgment debtor, who must be made a party defendant.—*Earl v. Skiles*, 93 Ind. 178.

[d] (App. 1899)

Supplementary proceedings may be had against an executor having in his possession a legacy belonging to the judgment debtor.—*Murphy v. Busick*, 53 N. E. 475, 22 Ind. App. 247, 72 Am. St. Rep. 304.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1095, 1129.

See, also, 17 Cyc. p. 1411.

### § 363. Property or rights which may be reached.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1100-1105, 1131.

See, also, 17 Cyc. pp. 1412-1417; note, 41 Am. Rep. 23.

### § 364. — In general.

[a] In proceedings supplementary to execution, money and choses in action of the judgment debtor in the hands of third persons can be reached, as well as property.—(Sup. 1859) *Butler v. Jaffray*, 12 Ind. 504; (1882) *Fowler v. Griffin*, 83 Ind. 297.

[b] (Sup. 1861)

In proceedings in aid of execution against A., B., and C., the issue of execution on a judgment against A. was alleged, and that B. and C. had in their hands personal property of A. *Held*, that a valid assignment by A. to B. and C. of said property in favor of certain of his creditors was a sufficient defense.—*Chandler v. Caldwell*, 17 Ind. 256; *Same v. Davis*, *Id.* 262.

[c] (Sup. 1868)

In supplementary proceedings a third person testified that a judgment recovered by the judgment debtor had been assigned to him in consideration of his agreement to board, lodge, and care for the judgment debtor for several years and to pay another judgment against him; that before service of process in the supplementary proceeding witness had sold the judgment, which was assigned by him to another for a valuable consideration, and had boarded the judgment debtor for a year and eight months, and paid the judgment as agreed; that witness

had no other property belonging to the judgment debtor, and was not indebted to him, except on his obligation to board him under the contract. *Held*, that such contract was valid and binding between the parties, and, though open to suspicion because of the judgment rendered against the judgment debtor shortly after the assignment, yet that fact alone did not render the contract fraudulent, so as to entitle the judgment creditor to have the proceeds of the judgment applied in satisfaction of his judgment.—*Mahony v. Hunter's Ex'r*, 30 Ind. 246.

[d] A sum advanced by one person to another to be used in the redemption of land from a prior execution sale thereof, it being expressly agreed that the ownership of the money should remain in the former unless received by the purchaser at the execution sale in redemption of the land, there being some dispute as to the right of redemption, and the money being placed in the hands of the clerk of the court which rendered the judgment, under an agreement that, if it was used in making redemption, the borrower, if he should sell the land, would repay the lender, but otherwise would secure payment by giving the lender a mortgage on the land redeemed, and the money to be withdrawn if not so used, remains the property of the lender, and cannot be taken from the clerk by an execution creditor of the borrower, in supplementary proceedings against him, to be applied on such creditor's execution.—(Sup. 1874) *Terry v. Deitz*, 49 Ind. 293; (1875) *Brookville Nat. Bank v. Same*, Id. 598.

[e] (Sup. 1876)

Section 524 of the practice act of this state, relating to proceedings supplementary to execution, reaches only the "property of the judgment debtor, not exempt from execution," and not his moneys, claims, and choses in action.—*Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

[f] (Sup. 1879)

An indebtedness on a note is "property," within the meaning of Code, § 519, so that it may be subjected to the payment of a judgment on supplementary proceedings.—*Dunning v. Rogers*, 69 Ind. 272.

[g] (Sup. 1880)

A judgment creditor may, by proceedings supplementary to execution, reach the net proceeds of a partition sale belonging to the debtor or in the hands of the commissioner appointed to make the sale.—*Sherman v. Carvill*, 73 Ind. 126.

[h] (Sup. 1887)

Money fraudulently withheld by a judgment debtor is property, and may be reached in his hands by a proceeding supplemental to execution.—*Baker v. State ex rel. Mills*, 109 Ind. 47, 9 N. E. 711.

[i] (Sup. 1899)

Where an insurance policy was sold and assigned by the insured before an action against

him, and it is not alleged that such assignment was fraudulent or void for any reason, the policy is not subject to supplementary proceedings on a judgment obtained in such action.—*Rodwell v. Johnson*, 52 N. E. 798, 152 Ind. 525.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1100, 1101.

See, also, 17 Cyc. p. 1412.

### § 365. — Property exempt from execution.

Pleading as to exemptions, see post, §§ 377, 387.

[a] (Sup. 1882)

In proceedings supplementary to execution, the execution defendant has a right to plead in bar his exemption as a householder.—*Lowry v. McAlister*, 86 Ind. 543.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1102.

See, also, 17 Cyc. pp. 1414-1417.

### § 366. — Property held in trust.

[a] (Sup. 1874)

A. delivered to B. money to be placed by B. in the hands of the clerk as a special deposit for the use of a purchaser of land under mortgage foreclosure and to redeem the land from the decree against B. The agreement also provided that the ownership of the money should not pass from A. unless it was used in such redemption, in which case A. was to have a mortgage on the land. The money was tendered to the purchaser, who refused to accept it, and it was placed in the hands of the clerk for that purpose. *Held* that, in the absence of evidence that B. was entitled to redemption from the sale, and until such right was determined, the money was held in trust by him, and was not liable to be taken in supplementary proceedings by an execution creditor of B.—*Terry v. Deitz*, 49 Ind. 293.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1103.

See, also, 17 Cyc. p. 1416.

### § 368. — Salaries of public officers or employes.

[a] (Sup. 1876)

Proceedings supplementary to execution cannot be extended to reach an indebtedness of a public corporation to the execution debtor for a salary for his services as an officer.—*Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

The wages, fees, or salary of a county auditor due to him from his county cannot be subjected to the payment of his debts by proceedings supplementary to execution.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1105.

See, also, 17 Cyc. p. 1416.

**§ 369. Existence of other remedy.**

Exhaustion of remedy by execution, see post, § 376.

[a] The proceedings supplementary to execution authorized by statute supersede the bill for a discovery in cases where creditors seek to reach a judgment debtor's property and have it applied to the satisfaction of the judgments.—(Sup. 1857) *Figg v. Snook*, 9 Ind. 202; (1868) *Mason v. Weston*, 29 Ind. 561.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1091.

See, also, 17 Cyc. p. 1432.

**§ 371. Jurisdiction and authority of court or judge.**

Concurrent and conflicting jurisdiction of state and United States courts, see COURTS, § 489. Jurisdiction as dependent on whether title to real property is involved, see COURTS, § 163.

**[a] (Sup. 1863)**

Acts 1859, p. 94, § 1, providing that, when it appears that title to real estate is in issue in the common pleas court, the cause shall be transferred to the circuit court of the same county, does not deprive the court of common pleas of jurisdiction in proceedings supplementary to execution, where title to real estate is incidentally involved, for the purpose of discovery, as such act applies only where the title of land is the sole or principal thing to be determined.—*Carpenter v. Vanscoten*, 20 Ind. 50.

**[b] (Sup. 1864)**

Under 2 Gav. & H. St. p. 261, § 519, providing that if, after issuing an execution against property, the execution plaintiff shall file an affidavit "with the clerk of any court of record of any county" that the debtor has property therein, proceedings may be had for the application of such property as provided on the return of an execution, supplementary proceedings may be instituted in a court different from that in which the original judgment was rendered and out of which the execution was issued.—*Cooke v. Ross*, 22 Ind. 157.

**[c] (Sup. 1873)**

Where, in a proceeding supplementary to execution, the defendant resided in the county where the judgment was obtained and the supplementary proceeding was had, a national bank situated in another county might be made a party and required to answer as to funds of the defendant held by it, under Code, § 33.—*O'Brien v. Flanders*, 41 Ind. 486.

**[d] (Sup. 1874)**

Under 2 Gav. & H. St. p. 260, § 518, providing that proceedings supplementary to execution may be maintained against a judgment defendant in case he is a nonresident in the county where the judgment was rendered, where judgment was obtained in V. county against a nonresident, a resident of the state, but of an-

other county, who had funds of the judgment debtor in his hands, was properly made to answer in proceedings supplementary to execution in V. county, since the proceedings could not be instituted against the judgment debtor, who was a necessary party, in any other county.—*Folsom v. Clark*, 48 Ind. 414.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1097, 1098, 1134.

See, also, 17 Cyc. pp. 1406, 1437.

**§ 372. Time for taking proceedings.****[a] (Sup. 1862)**

In proceedings supplementary to execution the time for defendants to answer is fixed by law on the first day of the ensuing term, if no other be designated; but a different day, even in term, may be fixed.—*Tompkins v. Floyd County Agricultural & Mechanical Ass'n*, 19 Ind. 197.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1099.

See, also, 17 Cyc. pp. 1417, 1418.

**§ 373. Proceedings for examination of debtor.**

Proceedings for examination of third persons, see post, §§ 385-387.

Proceedings on examination, see post, § 397

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1106-1117.

See, also, 17 Cyc. pp. 1419-1429.

**§ 376. — After return of execution.**

Proof of issuance of execution, see post, § 398.

**[a] (Sup. 1872)**

Under Code, § 518, providing that, if an execution against the property of a judgment debtor or any of several debtors in the same judgment is returned unsatisfied in whole or in part, the judgment creditor shall be entitled to an order for the examination of such debtor concerning his property, where there was replevin bail on a judgment entered in the district court before the transcript was filed in the circuit court, and an execution was issued by the justice against the plaintiff alone, and not against her and the bail jointly, the return of such execution unsatisfied is not sufficient to support proceedings supplementary to execution against her, since the execution must issue against the parties who are the judgment defendants, and not against a part of them.—*Dandistel v. Knonenberger*, 39 Ind. 405.

**[b] (Sup. 1880)**

A return of an execution "nulla bona" is by Code, §§ 518, 522, sufficient to entitle the judgment plaintiff to prosecute proceedings supplementary to an execution.—*Sherman v. Carvill*, 73 Ind. 126.



[c] (Sup. 1884)

To maintain proceedings supplementary to execution, it must be shown, either that the execution has been returned *nulla bona*, or, if not returned, that defendant did not have within the county other property subject to execution sufficient to satisfy it.—*Cushman v. Gephart*, 97 Ind. 46.

[d] (Sup. 1888)

Before a judgment creditor is entitled to resort to the extraordinary remedy of a proceeding supplemental to execution, he must first have procured an execution against the property of the judgment debtor to issue to the sheriff of the county in which the debtor resides, or, if he do not reside in the state, to the sheriff of the county in which the judgment was rendered. When an execution so issued has been returned unsatisfied in whole or in part, the creditor shall be entitled to an order requiring the judgment debtor to appear forthwith, and answer concerning his property.—*McKinney v. Snider*, 18 N. E. 526, 116 Ind. 160.

[e] (Sup. 1907)

A proceeding supplementary to execution under Burns' Ann. St. 1901, § 827, cannot be maintained without first having judgment against defendant and a return of the execution thereon unsatisfied.—*West v. State ex rel. Benedict*, 168 Ind. 77, 79 N. E. 361.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1108, 1131.

See, also, 17 Cyc. p. 1421.

### § 377. — Pleadings and affidavits.

Dismissal for want of affidavit, see post, § 392.  
Execution defendant as necessary party to proceedings against third persons, see post, § 387.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Pleadings of judgment debtor in proceedings against third persons, see post, § 387.

[a] (Sup. 1860)

Though a complaint in proceedings supplementary to execution is not sworn to, nor sufficiently certain in its averments as to what articles the defendant has subject to execution and where they are, yet these defects are waived by an answer to the merits.—*Fillson v. Scott*, 15 Ind. 187.

[b] (Sup. 1863)

Under Rev. St. p. 152, § 518, providing that, when an execution on property of a judgment debtor is returned unsatisfied, the judgment creditor shall be entitled to an order requiring the judgment debtor to appear and answer concerning his property within the county in which the execution issued, a judgment creditor, on filing a complaint in which he alleged that the debtor had an equitable interest in real estate in that county which he refused to apply to the judgment, was entitled to an order re-

quiring defendant to appear and be examined concerning his property within such county.—*Carpenter v. Vanscoten*, 20 Ind. 50.

Under Rev. St. p. 152, § 518, providing that, when an execution against the property of a judgment debtor is returned unsatisfied in whole or in part, the judgment creditor shall be entitled to an order requiring the judgment debtor to appear and answer concerning his property within the county in which the execution issued, where a judgment creditor filed a complaint to secure the examination of the judgment debtor, and alleged that the debtor owned an equitable interest in real estate in that county which he refused to apply to the judgment, an answer which alleged that real estate was situated in another county was properly rejected, since no answer either making or tendering issues is necessary in such case.—*Id.*

[c] (Sup. 1864)

Where plaintiff in supplementary proceedings has waived the answer of the debtor, the court can refuse the debtor leave to file an answer and make new parties.—*Cooke v. Ross*, 22 Ind. 157.

[d] (Sup. 1864)

Proceedings supplementary to execution being summary proceedings, designed to accomplish without delay the purposes of a creditor's bill, pleadings are not contemplated or required, but the answer is to be regarded as evidence on the hearing; hence it was not error for the court, on motion, to strike out that portion of an answer not under oath, as required by 2 Gav. & H. St. p. 262, § 523, without requiring its sufficiency to be tested by demurrer.—*Coffin v. McClure*, 23 Ind. 356.

An exception to one paragraph of an answer in proceedings supplementary to execution, that it does not fully answer as to the matters averred in the plaintiff's affidavit, may be overruled without error, as it is too indefinite, and treats the paragraph as an entire answer.—*Id.*

[e] (Sup. 1867)

In a proceeding supplementary to execution, based upon an affidavit that the judgment defendant owned real estate which he unjustly refused to apply in satisfaction of the judgment, third persons cannot be made defendants for any other purpose than to answer as to any property held by them belonging to the judgment defendant, or as to their indebtedness to him.—*Burt v. Höttinger*, 28 Ind. 214.

[f] (Sup. 1868)

It is sufficient ground for rejecting a cross complaint or an answer, interposed in a proceeding supplementary to execution under the Code, that it is not verified.—*Routh v. Spencer*, 30 Ind. 348.

[g] (Sup. 1872)

The complaint in a proceeding supplementary to execution, under Code, § 519, must state that the execution debtor has property which

he unjustly refuses to apply towards the satisfaction of the judgment.—*Dandistel v. Kronenberger*, 39 Ind. 405.

[h] (Sup. 1879)

In proceedings supplementary to execution, the judgment plaintiff may compel the defendant to answer fully under oath, and from the information thus obtained frame his complaint; but, if he seeks to subject a particular claim to the payment of his judgment, he should file a verified complaint at first.—*Banty v. Buckles*, 68 Ind. 49.

[i] (Sup. 1881)

Where, in instituting supplementary proceedings, two separate affidavits are filed in which causes therefor are stated, and each of which closes with a separate prayer for relief, the sufficiency of such affidavits is to be considered separately.—*Abell v. Riddle*, 75 Ind. 345.

In supplementary proceedings under Code, § 522, an averment in the affidavit that the property "is not exempt from execution" is insufficient; it being necessary for the affidavit to show that the property sought to be reached, together with the other property claimed by the judgment debtor as exempt from execution, exceeds the amount exempt by law.—*Id.*

[j] The complaint in proceedings supplementary to execution must show that the execution issued in the right county.—(Sup. 1882) *Fowler v. Griffin*, 83 Ind. 297; (1888) *McKinney v. Snider*, 116 Ind. 160, 18 N. E. 526.

[k] (Sup. 1883)

In proceedings supplementary to execution, formal pleadings are not essential.—*Wallace v. Lawyer*, 91 Ind. 128.

Proof that an execution defendant has real estate within reach of execution, and that debts are due him, is not sufficient to sustain proceedings supplementary to execution based on the allegation that the defendant has concealed his property.—*Id.*

[l] (Sup. 1884)

The remedy of proceedings supplementary to execution given by statute is in many respects a substitute for the creditor's bill, and a complaint, in order to be sufficient, ought to state some facts showing the necessity for resorting to such extraordinary proceedings.—*Cushman v. Gephart*, 97 Ind. 46.

[m] (Sup. 1886)

As against the judgment debtor, the creditor, in a proceeding supplementary to execution, under Rev. St. 1881, §§ 816, 819, must aver in his verified complaint or affidavit that the debtor unjustly refuses to apply the money sought to be reached to the satisfaction of his debt.—*Mitchell v. Bray*, 106 Ind. 265, 6 N. E. 617.

[n] (Sup. 1887)

A verified complaint in a proceeding supplementary to execution, which fails to state that the judgment debtor resides in the county,

or that an execution has been issued to the sheriff of the county in which he resides, is bad on general demurrer for want of sufficient facts, under Rev. St. 1881, §§ 815, 816.—*Pouder v. Tate*, 111 Ind. 148, 12 N. E. 291.

[o] (Sup. 1887)

A proceeding supplementary to execution is a civil action, and, the statute governing such proceedings being silent on the subject, the affidavit or verified complaint may be amended as in ordinary cases.—*Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412.

It is not error for the court, after sustaining a demurrer to the affidavit in a proceeding supplementary to execution, to overrule a motion for final judgment thereon. He may permit the affidavit to be amended.—*Id.*

[p] (Sup. 1888)

An allegation that the amount due the debtor from a garnishee, together with the other property of the debtor, exceeds the amount exempted by law, is insufficient as a statement that the debtor had property not exempt.—*McKinney v. Snider*, 116 Ind. 160, 18 N. E. 526.

[q] (Sup. 1889)

Rev. St. 1881, § 822, provides that all supplementary proceedings, after the order requiring the parties to appear and answer, shall be summary, without further pleadings; but the sufficiency of the order and affidavit may be first tested by motion to dismiss or strike out. *Held*, that this does not take away the right to amend the affidavit after a demurrer to it had been sustained.—*Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38; *Same v. Holeman*, 119 Ind. 141, 21 N. E. 470.

[r] (App. 1892)

Under Rev. St. 1881, § 816, providing for supplementary proceedings, where an execution remains in the sheriff's hands unsatisfied, the affidavit must show that the judgment debtor has no other property subject to execution.—*Balz v. Benninhof*, 5 Ind. App. 522, 32 N. E. 595.

In supplementary proceedings, as the facts must be established as in other civil actions, the affidavit cannot be used at the trial for the purpose of supplying a deficiency in the proof that an execution has been issued on the judgment.—*Id.*

[s] (App. 1896)

A complaint in supplementary proceedings, alleging the issuance of an execution and its return unsatisfied, must allege that it was issued to a sheriff of the county of the debtor's residence, or that he was a nonresident of the state.—*Harper v. Behagg*, 14 Ind. App. 427, 42 N. E. 1115.

[t] (Sup. 1897)

An allegation that the execution defendant "has property and money that should be applied or paid to the satisfaction of said judgment, and that he fraudulently conceals and

withholds the same from payment thereof," does not sufficiently show that the creditor could not satisfy his demand out of the property of such execution defendant without resorting to the property claimed.—*Vordermark v. Wilkinson*, 46 N. E. 336, 147 Ind. 56.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1109–1113, 1132–1135.

See, also, 17 Cyc. pp. 1419–1425.

**§ 378. — Order for examination.**

Modification or vacation, see post, § 391.

**[a] (Sup. 1863)**

Where process supplementary to execution under 2 Rev. St. p. 152, § 518, is issued in vacation, a summons issued by the clerk is sufficient as an order.—*Carpenter v. Vanscoten*, 20 Ind. 50.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1114–1116.

See, also, 17 Cyc. pp. 1425–1429.

**§ 385. Proceedings for examination of third persons.**

Proceedings on examination, see post, § 397.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1123–1130.

See, also, 17 Cyc. pp. 1430, 1431.

**§ 387. — Pleadings or affidavits and parties.**

Making claimant party and litigating title, see post, § 414.

**[a] (In proceedings supplementary to execution.** both the person indebted to the execution defendant and the execution defendant himself are necessary parties, in order to reach the debt due from such debtor to such defendant.—(Sup. 1860) *Wall v. Whisler*, 14 Ind. 228; (1861) *Chandler v. Caldwell*, 17 Ind. 256; (1861) *Same v. Davis*, Id. 262; (1872) *Hoadley v. Caywood*, 40 Ind. 239.

**[b] (Sup. 1864)**

Where supplementary proceedings are instituted against a judgment debtor and a third person who is indebted to him, for the purpose of reaching such indebtedness, the question as to the liability of the third person cannot properly be raised by the judgment debtor in his pleadings.—*Cooke v. Ross*, 22 Ind. 157.

**[c] (Sup. 1864)**

In supplementary proceedings, a written answer may be waived, but defendant may be examined as a witness whether the answer is waived or not.—*Coffin v. McClure*, 23 Ind. 356.

Demurrers are not required to test the sufficiency of the answer in proceedings supplementary to execution. If the answer is not full, the court has ample power, on motion, to

require a more complete disclosure. If the answer does not constitute any defense to the claim made in the affidavit of the plaintiff, or admits it, the latter is entitled, without further delay, to such order as the court has power, under the statute, to make.—Id.

Where the answer in supplementary proceedings is not full, a mere motion to require the party to answer more fully as to the matter specified is the proper practice, though the filing of proper exceptions would be regarded as sufficient.—Id.

**[d] (Sup. 1877)**

On examination of a judgment debtor in supplementary proceedings, the answer of a bank, which plaintiff alleged had funds of the judgment debtor on deposit, under the oath of its president, filed as part of such proceedings, is not evidence against the debtor.—*O'Brien v. Flanders*, 58 Ind. 22.

**[e] (Sup. 1878)**

In a proceeding supplementary to execution, under 2 Rev. St. 1876, p. 231, to reach property of the judgment debtor in the possession of third persons, the necessary affidavit may be made by the attorney of the judgment creditor.—*Eden v. Everson*, 65 Ind. 113.

1 Rev. St. 1876, p. 142, relative to proceedings supplementary to execution, does not contemplate pleadings in such proceedings as in ordinary civil cases.—Id.

**[f] (Sup. 1879)**

In proceedings against the judgment debtor and his debtor, the sworn answers of the defendants, denying that there is any indebtedness between them, are not conclusive, and the plaintiff may controvert them.—*Toledo, W. & W. R. Co. v. Howes*, 68 Ind. 458.

**[g] (Sup. 1879)**

Where a judgment creditor institutes proceedings supplementary to execution to subject a debt due the defendant to the payment of the judgment, it is not necessary to make a transcript of the judgment, or any part of it, an exhibit in the case.—*Dunning v. Rogers*, 69 Ind. 272.

**[h] (Sup. 1882)**

A complaint in proceedings supplementary to execution averred that the plaintiff had recovered before a justice of the peace a judgment against the principal defendant of which he had caused a transcript to be filed with the clerk of the county and recorded in the order book of the circuit court, and at the same time had filed his affidavit for execution on the judgment that execution had been issued, and had been returned by the sheriff with an indorsement of "No property found," that the other defendants as administrators of a certain decedent have in their custody and control funds due to the principal defendant as heir at law to the decedent's estate, the same being in excess of the amount of property exempt by law and applicable to plaintiff's claim. Held, that

under the Code, §§ 518, 519, providing that, if the defendant in the judgment is a resident of the state, the execution must have issued to the sheriff of the county where he resides, the complaint was demurrable, in the absence of an allegation that the debtor resided in the county where the suit was brought.—*Fowler v. Griffin*, 83 Ind. 297.

[l] (Sup. 1883)

Rev. St. 1881, § 819, relating to supplementary proceedings, provides that if it is sought to reach property of the judgment debtor in the possession of a third party, or any debt due to the judgment debtor, there must have been an execution issued, which may or may not have been returned, and there must be an affidavit that such third party "has property of such judgment debtor, or is indebted to him in any amount, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law." *Held*, that a complaint in such proceedings is insufficient which does not show that the judgment defendant had claimed any property as exempt from execution, or that he had no property subject to execution, or that he had not sufficient property exempt from execution to satisfy the judgment, or what amount he would be entitled to claim as exempt, but which alleges that the property sought to be reached, together with the amount already in the hands of the judgment defendant subject to be claimed as exempt from execution, exceeds the amount exempt by law.—*Dillman v. Dillman*, 90 Ind. 583.

[j] (Sup. 1884)

In order to reach the funds of a judgment debtor in the hands of third parties, Rev. St. 1881, § 816, providing that an affidavit must be filed showing that the debtor has property which he unjustly refuses to apply to the judgment, must be complied with.—*Earl v. Skiles*, 93 Ind. 178.

[k] (Sup. 1884)

Under Rev. St. 1881, §§ 815, 816, 819, authorizing proceedings supplementary to execution against the execution defendant when there has been a return of the execution unsatisfied, providing for similar proceedings before the execution is returned while it is in the hands of the sheriff, and declaring that after the issuing or return of an execution such proceedings may be had against third persons, who are indebted to the execution defendant or who have property in their possession belonging to him, a verified complaint by an execution plaintiff stating that an execution was issued on his judgment which was wholly unsatisfied; that the execution defendant had property in the county which he wrongfully refused to apply to the payment of the judgment, but which could not be reached or levied on by execution, and that a third person doing business in the county was indebted to the judgment debtor in a large amount to the plaintiffs unknown, but which together with all other property claimed as exempt from

execution exceeded the amount of the property so exempt by law from execution, was insufficient because it did not show any necessity for the proceedings, and also for the reason that it did not contain a sufficient description of the property sought to be reached.—*Cushman v. Gephart*, 97 Ind. 46.

[i] (Sup. 1889)

Rev. St. § 819, provides that after the return of execution nulla bona, and upon affidavit that a third person has property of the debtor which, together with other property claimed as exempt, exceeds the exemption allowed, such person may be required to appear and answer. *Held*, that an affidavit which avers a return of execution nulla bona, and that a third person has in his possession notes belonging to the debtor, which, with other property in the hands of the debtor subject to be claimed as exempt, exceeds the amount allowed by law, is sufficient. It is immaterial that the return of nulla bona was made more than a year before the affidavit.—*Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38; *Same v. Holeman*, 119 Ind. 141, 21 N. E. 470.

[m] (Sup. 1890)

A complaint showing a judgment in favor of plaintiff; an execution to the county of the debtor's residence, he being an unmarried man; its return unsatisfied; an indebtedness by two defendants to the judgment debtor in specific sums, not exempt from execution, and his refusal to apply the same in satisfaction of the judgment, and that a third defendant is asserting some claim to that indebtedness,—states facts sufficient to require all the defendants to answer.—*American White Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855.

Where it does not appear that the third defendant asserted any claim to the indebtedness until after the institution of the proceedings, an order making him a party to answer as to his interest is proper.—*Id.*

[n] (App. 1891)

A complaint in supplementary proceedings alleged that defendant had money in his hands belonging to the judgment debtor, and was indebted to her in the sum of \$1,500, which plaintiff sought to have applied on his judgment, but contained no allegations of facts constituting a trust or fraud. The proof showed that the debtor was a daughter of defendant, who received a deed of land from her husband, and agreed to pay his daughter \$1,500 as part of the consideration, and that she, by an instrument in writing, reciting as consideration support by her father, relinquished to him all claim to such money. *Held*, that under the complaint the court could not make any deductions of fraud or of a trust, and that the variance between the allegations and proof was fatal.—*Harris v. Howe*, 2 Ind. App. 419, 28 N. E. 711.

In proceedings supplementary to execution under Rev. St. 1881, § 822, the fraudulent character of a transfer of property may be inquired into, but plaintiff must disclose in his com-

plaint or affidavit the nature of the claim he seeks to enforce against the third party, and if he relies upon a fraudulent transaction between the judgment debtor and such third person there should be proper averments thereof; and so, if he regards the transaction as amounting to a trust, he should set out the facts constituting the trust.—Id.

[c] (App. 1892)

Although Code Civ. Proc. § 822, provides that supplementary proceedings, "after the order has been made requiring parties to appear and answer, shall be summary without further pleadings," yet, where an attaching creditor filed an answer and cross-complaint, it is not cause for reversal that the court overruled demurrers thereto, and denied a motion to strike out the same.—First Nat. Bank of Kendallville v. Stanley, 4 Ind. App. 213, 30 N. E. 799.

[p] (Sup. 1897)

A complaint in supplementary proceedings which seeks to subject property in the hands of a third person to satisfaction of the levy must allege that the execution defendant had no other property, and that the creditor could not enforce his rights without resort to the property claimed.—Vordermark v. Wilkinson, 46 N. E. 336, 147 Ind. 56.

[q] (App. 1899)

In supplementary proceedings to reach a legacy of the judgment debtor in the hands of an executor, a complaint alleging that plaintiff's judgment is unpaid, that the executors have in their hands a legacy belonging to the judgment debtor, and that it is subject to execution, is sufficient, without alleging that the year for the settlement of the estate has expired, and that the estate is solvent, as such allegations are matters of defense.—Murphy v. Busick, 53 N. E. 475, 22 Ind. App. 247, 72 Am. St. Rep. 304.

[r] (App. 1906)

A complaint in supplementary proceedings which alleged that plaintiff had recovered a judgment in a justice's court against defendant for less than \$50, that the execution issued had been returned "No property found," that another execution issued out of the circuit court on the transcript and judgment being filed therein had been returned unsatisfied, that a third person was indebted on account of wages to defendant, that defendant had no other property, and that the judgment was founded on defendant's failure to pay commutation, as provided by Burns' Ann. St. 1901, § 6825, and was without right of exemption, stated a cause of action under sections 827, 831, authorizing a judgment creditor on the return of an execution unsatisfied to require a judgment debtor and a third person indebted to him to answer, and the allegation that the debtor unjustly and wrongfully refused to apply the wages to the satisfaction of the judgment, essential under section 828, was surplusage.—Hobbs v. Town of Eaton, 78 N. E. 333, 38 Ind. App. 628.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1125, 1131-1135.

§ 391. Modification or vacation of orders or proceedings.

[a] (Sup. 1887)

In the absence of statutory provisions to the contrary, where a writ or order can only be issued upon affidavit or verified complaint, a motion to quash the writ or order will call in question the sufficiency of the affidavit; but the statute must be followed, and as the statute (Rev. St. 1881, § 822) governing proceedings supplementary to execution provides that "the sufficiency of the order, and of the affidavit first filed by the plaintiff, may be tested by demurrer, or motion to dismiss or strike out," their sufficiency cannot, in such cases, be tested by motion to quash the writ and order.—Hutchinson v. Trauerman, 112 Ind. 21, 13 N. E. 412.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1142, 1143, 1145.

See, also, 17 Cyc. pp. 1435-1437.

§ 392. Dismissal of proceedings.

[a] (Sup. 1868)

Under 2 Gav. & H. St. p. 261, requiring an affidavit in proceedings supplementary to execution that a judgment had been recovered and execution issued and returned nulla bona, a proceeding without such affidavit should be dismissed.—Mason v. Weston, 29 Ind. 561.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1143-1145.

§ 394. Proceedings on examination.

Answer as admission, see EVIDENCE, § 227.

[a] (Sup. 1887)

The modes of procedure and rules of practice prescribed by the Civil Code in civil actions are applicable in proceedings supplementary to execution, except where the statute authorizing and regulating such proceedings has expressly or by fair construction prescribed a different mode of procedure or practice therefor.—Hutchinson v. Trauerman, 13 N. E. 412, 112 Ind. 21.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1147-1155.

See, also, 17 Cyc. pp. 1437-1443.

§ 397. — Scope of inquiry.

[a] (Sup. 1867)

In proceedings supplementary to execution, the court has no power to adjudicate and settle controverted questions of right between the judgment debtor and third parties, nor to set aside a sale or conveyance of property by the debtor on the ground of fraud.—Burt v. Hoettinger, 28 Ind. 214.

## [b] (Sup. 1889)

Where the person summoned sets up ownership in another, it is proper to try and determine the question of ownership.—*Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38.

## [c] (Sup. 1890)

Questions asked a judgment debtor, as to what he had done with the proceeds of certain property disposed of by him, are proper; but questions as to what property his son had other than that he had given him, and as to what the son paid and received in transactions with other persons, are properly excluded.—*Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

## [d] (App. 1906)

A supplementary proceeding is an independent action in no way affecting the merits of the action in which the original judgment was rendered, and any evidence affecting the original judgment is inadmissible.—*Hobbs v. Town of Eaton*, 78 N. E. 333, 38 Ind. App. 628.

## FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1137, 1149.

See, also, 17 Cyc. pp. 1440-1442.

## § 398. — Conduct of examination.

Pleadings and affidavits as evidence, see ante, §§ 377, 387.

Variance between pleadings and proofs, see ante, §§ 377, 387.

## [a] (Sup. 1861)

In proceedings against debtors of the judgment debtor, where the issuance of execution is put in issue, it must be proved.—*Chandler v. Caldwell*, 17 Ind. 256; *Same v. Davis*, Id. 262.

## [b] (Sup. 1864)

It is doubtful whether 2 Gav. & H. Rev. St. p. 261, § 522, requiring other persons in supplemental proceedings to answer touching the property of the debtor, contemplates the formation of issues in supplemental proceedings as in ordinary cases.—*Cooke v. Ross*, 22 Ind. 157.

## [c] (Sup. 1880)

A judgment debtor who admits by his pleadings in supplementary proceedings that money was realized by a partition sale of premises in which he was interested has the burden of showing what disposition was made of the proceeds of such sale.—*Sherman v. Carvill*, 73 Ind. 126.

## [d] (Sup. 1882)

In proceedings supplementary to execution, where the complaint shows that, upon the filing of a transcript of a justice's judgment and an affidavit by the plaintiff, the clerk of the supreme court issued an execution to the sheriff, it will be presumed that the clerk had received a certificate from the justice showing

that an execution had been issued upon the judgment to the proper constable and returned nulla bona, as required by Code, § 541.—*Fowler v. Griffin*, 83 Ind. 297.

## [e] (Sup. 1882)

In an action by heirs of a deceased judgment creditor to subject to the judgment an interest in another decedent's estate, on the ground that such interest was assigned to the judgment debtor, the burden is on them to show such assignment.—*Fowler v. Hobbs*, 86 Ind. 131.

## [f] (Sup. 1882)

Where, in proceedings supplementary to execution, the issue tendered by the plaintiff was that the money belonged to the judgment debtor, and was subject to seizure to pay the plaintiff's claim, and the debtor had no right to claim it as exempt from execution, as he was not a resident householder, it was not error to exclude evidence that an assignment of the property by the debtor was fraudulent.—*Lowry v. McAlister*, 86 Ind. 543.

In proceedings supplementary to execution, the execution plaintiff must affirmatively show that the property sought to be reached is subject to execution.—Id.

## [g] (Sup. 1884)

In supplementary proceedings, trials either of law or fact may be had, and, if so had, error occurring therein must be saved and presented in and by the record, in the same manner as in any other civil action.—*Kissell v. Anderson*, 73 Ind. 485.

## [h] (Sup. 1884)

Under an affidavit in supplementary proceedings that A. was indebted to the judgment debtor in the value of lands conveyed by the latter to the former, proof that the conveyance was in consideration of A.'s agreement to support the debtor during life, and pay certain other debts of his, did not show that A. was indebted to the value of the lands.—*Pounds v. Chatham*, 96 Ind. 342.

## [i] (Sup. 1886)

Upon a proceeding supplementary to execution, the party prosecuting the proceeding is not concluded by the evidence of the defendant that he is a householder and has no property subject to execution, and it is error for the court to refuse to hear evidence to the contrary.—*Bipus v. Deer*, 106 Ind. 135, 5 N. E. 894.

## [j] (Sup. 1887)

The trial court is not obliged to make a special finding of facts, and state its conclusions of law, upon request of a party, in proceedings supplementary to execution.—*Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412.

Where the evidence does not even tend to sustain the decision and order of the trial court on every material point, in a proceeding supplementary to execution, the judgment will be reversed on appeal.—Id.

[k] (*Sup.* 1890)

Deeds and mortgages executed by the judgment debtor to various parties are immaterial, as the judgment creditors can inquire of the debtor about the different transactions to which said instruments related.—*Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 494.

In supplementary proceeding, it is not necessary to show what is expected to be proved by a question in order to raise the question of its admissibility, as the very nature of the proceeding is to obtain information from the adverse party, the character of which is unknown to the party making the examination.—*Id.*

[l] (*App.* 1892)

As the hearing is required by law to be summary, and the character of the judgment expressly prescribed, special findings are not authorized, and, if made, will be treated as a general finding.—*Balz v. Bennighof*, 5 Ind. App. 522, 32 N. E. 595.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1150-1152, 1155.

### § 402. Order for payment or delivery of property.

Appealability, see APPEAL AND ERROR, § 73.  
Findings, see ante, § 398.

[a] (*Sup.* 1859)

Where an execution creditor attempted to reach accounts due his debtor by proceedings under 2 Rev. St. p. 152, but failed to file the affidavit required in order to bring in the debtor's debtor, it was error for the court to order defendant, to deliver the claims and demands to be sold on execution, and that he be enjoined from collecting the same.—*Brisco v. Askey*, 12 Ind. 606; (1861) *Chandler v. Keaton*, 17 Ind. 215.

[b] (*Sup.* 1861)

In proceedings in aid of execution against A., B., and C., alleging the issue of an execution on a judgment against A., and that B. and C. had in their hands personal property belonging to A. with which the judgment might be paid, the court found that B. and C. had in their hands choses in action belonging to A. sufficient to pay the plaintiff's judgment, and ordered that they deliver over to the sheriff notes and accounts sufficient to pay the same. *Held* that, the accounts not being subject to sale on execution without the consent of the debtor, the order directing their delivery to the sheriff, to be applied on the execution, was unauthorized.—*Chandler v. Caldwell*, 17 Ind. 256; *Same v. Davis*, *Id.* 262.

[c] (*Sup.* 1865)

A person, on being summoned in supplementary proceedings to answer as to an indebtedness to the execution debtor, testified that he had executed certain notes to the latter, which had been assigned to other parties by the debtor. *Held*, that an order directing

the payment of the money due on the notes in to court was erroneous.—*McKnight v. Knisely*, 25 Ind. 336, 87 Am. Dec. 364.

[d] (*Sup.* 1867)

Where, in proceedings supplementary to execution, two persons were summoned as debtors of the judgment debtor, one of whom denied without oath, and the other denied under oath, and subsequently received money owing to the debtor from him who took no oath, an order that the money so received be paid to the creditor, with costs, was enforceable, being a substantial compliance with 2 Gav. & H. St. p. 261, § 522 et seq., providing that in such proceedings the court may order any property of the debtor, not exempt, in the hands of himself or any other person, to be applied to the judgment.—*Devan v. Ellis*, 29 Ind. 72.

[e] (*Sup.* 1878)

In supplementary proceedings to recover property assigned by the judgment debtor by an instrument void as to the judgment creditor, it is proper to render judgment requiring the assignees as individuals to pay the money into court for the benefit of the creditors. It is not necessary to render judgment against the assignees as trustees.—*Eden v. Everson*, 65 Ind. 113.

[f] (*App.* 1906)

In proceedings supplementary to execution issued under a commutation money judgment, the complaint alleged that a third person was indebted to the debtor on account of wages in the sum of \$40, and that the debtor had no other property. The evidence showed that the third person had in its possession property belonging to the debtor, which property was not by the terms of the original judgment exempt from its payment. *Held*, that a decision ordering the application of the wages to the judgment was not contrary to law.—*Hobbs v. Town of Eaton*, 78 N. E. 333, 38 Ind. App. 628.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1156-1159.

See, also, 17 Cyc. pp. 1444-1451.

### § 403. Actions by creditors or officers.

By receivers, see post, § 411.

Finding in supplementary proceedings, see ante, § 398.

Jurisdiction and venue of supplementary proceedings, see ante, § 371.

Parties and pleadings in supplementary proceedings, see ante, §§ 377, 387.

Trial and evidence in supplementary proceedings, see ante, § 398.

[a] (*Sup.* 1859)

2 Rev. St. p. 152, providing that, on proof by affidavit that any person or corporation has property of a judgment debtor or is indebted to him in any amount, such person may be required to appear and answer in proceedings supplementary to execution, and that the court may

order any property of the judgment debtor or any debt due to him to be applied to the satisfaction of the judgment, and authorizing the court to restrain any transfers of the judgment debtor's property, does not entitle plaintiff to bring an action under such statute to set aside a sale made at the instance of another creditor as illegal, since such a case is not within the statute.—*Witherow v. Higgins*, 13 Ind. 440.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1131-1140.

**§ 404. Receivers.**

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1160-1191.

See, also, 17 Cyc. pp. 1451-1473.

**§ 411. — Actions.**

[a] (Sup. 1880)

A party who is appointed receiver of a railroad company, on the application of one of its judgment creditors, in proceedings supplementary to execution, cannot sue in his own name on a note belonging to said company, unless he shows that he is so authorized by the order appointing him.—*Garver v. Kent*, 70 Ind. 428; *Moriarty v. Same*, 71 Ind. 601; *Harrell v. Same*, Id. 602.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1183-1190; 24 CENT. DIG. Fraud. Conv. § 640.

See, also, 17 Cyc. pp. 1466-1473.

**§ 413. Lien or other rights acquired by proceedings.**

[a] (Sup. 1860)

Where, pending supplementary proceedings, and while a demurrer to the complaint was in dispute, the execution debtors made a joint assignment, the creditors, by instituting the proceedings, acquired a lien on the funds sought to be reached which defendants could not divest by making the assignment.—*Graydon v. Barlow*, 15 Ind. 107.

[b] (Sup. 1864)

Creditors, who regularly institute supplementary proceedings, acquire a lien on the claim intended to be reached from the time of the service of process on the defendant, and the subsequent assignment of the claim does not divest that lien; nor is it divested by a subsequent amendment of the original affidavit.—*Cooke v. Ross*, 22 Ind. 157.

[c] (Sup. 1865)

A. being summoned, in a proceeding supplementary to execution, to answer as to an alleged indebtedness to the execution defendant, it appeared that he had executed certain promissory notes to the latter, payable at a bank in

this state, which had been assigned to other parties before the commencement of the proceedings in payment of pre-existing debts. The court directed that the money due upon the notes should be paid into court, and that the assignees should be made parties to try the question whether they were holders of the paper in good faith. *Held* that, where commercial paper is received in payment and extinguishment of a pre-existing debt, the holder is entitled to protection, and that the order of the court directing the assignees of the notes to be made parties was not authorized by the statute.—*McKnight v. Knisely*, 25 Ind. 336, 87 Am. Dec. 364.

[d] (Sup. 1872)

If, after service of the notice of proceedings supplementary to execution upon one indebted to the execution defendant, and before service upon the defendant himself the latter assigns the claim held by him, no lien is acquired thereon by the proceeding.—*Hoadley v. Caywood*, 40 Ind. 239.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1192.

See, also, 17 Cyc. pp. 1485-1486; note, 3 L. R. A. (N. S.) 123.

**§ 414. Liens and claims of third persons.**

[a] (Sup. 1890)

In proceedings supplementary to execution, parties may be brought in by proper pleadings, and required to answer in respect to any interest or conflicting claim which they may have or assert to the property or indebtedness due to execution defendant which is sought to be reached.—*American White Bronze Co. v. Clark*, 23 N. E. 855, 123 Ind. 230.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1193;

4 CENT. DIG. Assign. § 154.

See, also, 17 Cyc. p. 1486.

**§ 416. Disobedience to order or subpoena as contempt.**

Persons liable in general, see CONTEMPT, § 29.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1195-1204.

See, also, 17 Cyc. pp. 1473-1481.

**XI. EXECUTION AGAINST THE PERSON.**

Habeas corpus to procure discharge, see HABEAS CORPUS, § 33.

Imprisonment for debt, see CONSTITUTIONAL LAW, § 83.

In justice's court, see JUSTICES OF THE PEACE, § 135.

Of defendant, in bastardy proceedings, see BASTARDS, § 83.



**§ 421. Nature and purpose of remedy.**

[a] (Sup. 1887)

Proceedings for an execution against the body are a "civil action," within the meaning of the Code.—*Baker v. State ex rel. Mills*, 109 Ind. 47, 9 N. E. 711.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1207.

See, also, 17 Cyc. p. 1490.

**§ 422. Constitutional and statutory provisions.**

[a] (Sup. 1881)

So far as it relates to judgments entered and replevied before it took effect, Act April 15, 1881, §§ 1, 2, providing for the collection of judgments for fines and forfeitures by execution, and the imprisonment of the defendant upon the expiration of the stay secured to him by the entry of replevin bail, are unconstitutional, as attempting to restore a right to imprison where the same had been fully terminated by the entry of replevin bail.—*Dinckerlocker v. Marsh*, 75 Ind. 548.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1208.

See, also, 17 Cyc. pp. 1490, 1491.

**§ 426. Previous issue and return of execution against property.**

[a] (Sup. 1822)

Where, after a judgment creditor issued a fi. fa. against defendant on a replevin bond, and it was returned, "No goods and chattels, and not levied on real estate by order of plaintiff's attorney," plaintiff had a right to issue a ca. sa. against defendant, since plaintiff may sue out one form of writ, and abandon it, and sue out another of a different sort, if he so elects.—*Steele v. Murray*, 1 Blackf. 179.

[b] (Sup. 1832)

A capias ad satisfaciendum cannot be issued by the clerk of a circuit court unless a fieri facias be first issued and returned nulla bona, or an affidavit be made by the plaintiff that the debtor is about to leave the state, etc.—*Gwinn v. Hubbard*, 3 Blackf. 14.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, § 1211.

See, also, 17 Cyc. p. 1504.

**§ 433. Proceedings to procure.**

Invalid writ as consideration for prison limits bond, see post, § 448.

[a] (Sup. 1887)

An execution against the body impliedly allowed by Const. art. 1, § 22, which prohibits imprisonment for debt except in cases of fraud, is an extraordinary remedy; and, where it is resorted to, the affidavit or verified complaint should show that the amount due upon the judgment cannot be collected by an ordinary execution against the property of the judg-

ment debtor.—*Baker v. State ex rel. Mills*, 109 Ind. 47, 9 N. E. 711.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1232-1236.

See, also, 17 Cyc. pp. 1505-1508.

**§ 444. Return.**

[a] (Sup. 1843)

In debt on a sheriff's bond for an escape on execution, parol evidence is inadmissible to contradict the sheriff's return.—*Lines v. State ex rel. Jones*, 6 Blackf. 464.

In debt on a sheriff's bond for an escape on execution, the sheriff cannot be permitted to amend his return after the plaintiff's testimony had closed, and a witness had been examined by the defendant.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1256-1259.

See, also, 17 Cyc. pp. 1518, 1519.

**§ 446. Discharge on consent of creditor.**

[a] (Sup. 1843)

A defendant in custody on a capias ad satisfaciendum may be discharged without prejudice, under Act 1841, by the attorney at law for plaintiff.—*Neff v. Powell*, 6 Blackf. 420.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1265-1268.

See, also, 17 Cyc. p. 1521.

**§ 448. Discharge on prison limits bond.**

Liabilities on bonds, see post, § 453.

[a] (Sup. 1836)

A bond for the limits, although insufficient as a statute bond, may be good at common law.—*Spader v. Frost*, 4 Blackf. 190.

Though the condition of a bond for the prison limits does not contain a recital of the matters which led to its execution, and which shows a connection between it and the oblige, and thus fails to show consideration, the bond may still be sued on, and the omission be supplied by averments.—*Id.*

[b] (Sup. 1845)

Where a debtor was arrested on an invalid writ, a bond executed by him for prison limits was without consideration.—*Gresham v. Bowen*, 7 Blackf. 423.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1275-1286.

See, also, 17 Cyc. pp. 1531-1541.

**§ 449. Discharge on bond to proceed under insolvent laws.**

[a] (Sup. 1842)

A debtor on the prison limits has the same right to apply for the benefit of the insolvent

act as if he were in close confinement.—*Babcock v. Cummins*, 6 Blackf. 206.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1287-1291.

See, also, 17 Cyc. pp. 1523, 1525.

**§ 450. Discharge on surrender of or disclosure as to property.**

[a] (Sup. 1853)

Under Rev. St. 1843, providing that the magistrate can discharge an insolvent, where the person is actually imprisoned on such arrest, the actual imprisonment means confinement in the jail proper, as distinguished from "prison limits"; hence a person not actually in the jail is not entitled to be discharged by a magistrate.—*Wendover v. Tucker*, 4 Ind. 381.

There are but two cases under Rev. St. 1843 in which a magistrate can discharge an insolvent: (1) Where a person taken on a ca. sa. is in the hands of the officer making the arrest. (2) Where the person is actually imprisoned in jail on such arrest.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1292-1305.

See, also, 17 Cyc. pp. 1526-1531.

**§ 451. Discharge of poor debtors.**

Effect as discharging judgment, see JUDGMENT, § 890.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1306-1361.

See, also, 17 Cyc. pp. 1541-1567.

**§ 452. Rearrest.**

[a] (Sup. 1856)

The illegal discharge of a prisoner arrested on ca. sa. amounts only to an escape, and the defendant may be arrested on the same or another execution.—*Freeman v. Smith*, 7 Ind. 582.

[b] (Sup. 1871)

Where a creditor has obtained a judgment against the sheriff, on his bond, for the escape of a judgment debtor without his consent, but such judgment has not been paid, the debtor cannot be rearrested and imprisoned, under the statute, after the expiration of three months.—*Ex parte Voltz*, 37 Ind. 175, 10 Am. Rep. 86.

[c] (Sup. 1871)

Where a defendant in bastardy is adjudged to pay a certain sum, and was committed for failure to pay the sum, and escapes from the jail without the sheriff's consent, and the sheriff, on being sued for the escape, suffers judgment and pays the amount, he may again arrest the defendant and hold him in jail in execution on the original judgment.—*Ex parte Voltz*, 37 Ind. 237.

**FOR CASES FROM OTHER STATES,**

SEE 21 CENT. DIG. Execution, §§ 1362, 1363.

See, also, 17 Cyc. pp. 1568, 1569.

**§ 453. Liabilities on bonds, undertakings, or recognizances.**

Validity of bond, see ante, § 448.

[a] (Sup. 1834)

A declaration on a bond for the prison limits given on a capias, averring breach of the condition of the bond, must also allege the existence of the judgment and execution under which the bond was given.—*Martin v. Kennard*, 3 Blackf. 430.

[b] (Sup. 1836)

If an execution debtor escape from prison bounds, the bond for the limits is forfeited; and his subsequent voluntary return to the bounds before commencement of suit is no defense to it.—*Spader v. Frost*, 4 Blackf. 190.

It is a good defense to an action for the breach of a bond for prison limits that the execution debtor left the bounds with the previous consent and license of plaintiff.—*Id.*

In an action on a bond for the prison limits, a replication setting out the condition of the bond, etc., should aver the existence of a judgment on which the execution issued, and it should conclude with a verification.—*Id.*

In an action on a bond for the prison limits, in case of an escape, the measure of damages is the amount of the debt for which the debtor was committed, together with interest and costs.—*Id.*

[c] (Sup. 1841)

The surety in a bond for the prison limits cannot surrender his principal, who has escaped, in discharge of the condition of the bond.—*Buford v. Ganson*, 5 Blackf. 585.

[d] (Sup. 1842)

Where a bond in an action of debt was conditioned that the principal obligor would continue within the prison limits of a county which bounded on the Ohio river, where the obligor went out in a boat one-third way across the river, he was guilty of a breach of the bond, since the boundary of such a county is low-water mark.—*Cowden v. Kerr*, 6 Blackf. 280.

[e] (Sup. 1843)

If, in a suit on a bond for the prison limits, the alleged breach be an escape before the passage of Act 1842 abolishing imprisonment for debt a plea relying on that act is bad.—*Bowen v. Gresham*, 6 Blackf. 452.

The declaration on a bond for the prison limits described the judgment under which the imprisonment took place as of a certain date and amount, and averred that the judgment was erroneously recited in the condition of the bond as of a different date and amount, setting them out. *Held*, that the declaration was bad

on general demurrer, but that such mistake in the recital in the condition of the bond might be corrected by a court of chancery.—Id.

The declaration in a suit on a bond for the prison limits, in the condition of which bond the judgment under which the imprisonment took place was erroneously recited as to date and amount, may describe the condition without noticing the mistake in the recital, and defendants will be estopped from showing the judgment to be different from that recited.—Id.

[f] (Sup. 1853)

It is a breach of the prison limits bond to accept and act on a magistrate's discharge on surrender of property.—Wendover v. Tucker, 4 Ind. 381.

#### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1364–1381.

See, also, 17 Cyc. pp. 1525, 1535–1541.

### XII. WRONGFUL EXECUTION.

Liability of sheriff or constable, see SHERIFFS AND CONSTABLES, §§ 110–113.

#### § 454. Nature and grounds of liability.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1382–1386.

See, also, 17 Cyc. pp. 1570, 1571.

#### § 455. — In general.

[a] (Sup. 1859)

Where a levy was wrongfully made on part of a lot of saw logs, which were subsequently sold on the execution without distinguishing which part, and the purchaser neither took possession nor assumed any dominion or control over the property, although he gave his note for the amount of the sale, which was not due when the action was brought, it was held that trespass would not lie against the officer and purchaser.—Conkey v. Amis, 13 Ind. 260, 74 Am. Dec. 251.

[b] (Sup. 1881)

Where personal property on which an execution has been levied is replevied from the execution creditor and officer by a third person, and in such replevin final judgment is rendered in favor of such creditor and officer, and thereupon the officer sells the property to satisfy the original judgment, the third person cannot afterwards maintain an action against the creditor and officer for a wrongful sale, since the fact that the creditor could have execution on the replevin judgment or a remedy on the replevin bond does not bar his remedy by execution of the original judgment.—Dawson v. Sparks, 77 Ind. 88.

[c] (Sup. 1890)

The action in the absence of malice or want of probable cause against a plaintiff who

has enforced payment of an erroneous judgment is not founded upon any supposed wrong that he has committed, but lies to compel a restitution of any benefits which accrued to him, on the ground that in equity and good conscience he ought, after the reversal, to restore to the defendant everything of value which he received on account of the erroneous judgment.—Thompson v. Reasoner, 24 N. E. 223, 122 Ind. 454, 7 L. R. A. 495.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1385.

#### § 462. Persons liable.

[a] (Sup. 1844)

If one of two judgment debtors, who knows the judgment has been paid, procures a *fi. fa.* to issue on the judgment, and assist in its execution on the other's goods, he is liable in trespass to the party injured.—Glover v. Horton, 7 Blackf. 295.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1389–1393.

See, also, 17 Cyc. pp. 1572–1574.

#### § 463. Actions.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1394–1406.

See, also, 17 Cyc. pp. 1574–1579.

#### § 466. — Defenses.

[a] (Sup. 1877)

In an action by an execution debtor, against his execution creditor and a constable, to recover damages for the trespass of the latter in selling the goods of the debtor, without appraisement, on an execution in favor of the creditor, on a judgment against the debtor not waiving appraisement, it is not sufficient to answer that such judgment had been rendered for a tort committed by defendant.—Smith v. Davis, 58 Ind. 434.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1396.

See, also, 17 Cyc. p. 1576.

#### § 470. — Pleading.

Filing written instruments with pleadings, see PLEADING, § 310.

##### FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, § 1400.

See, also, 17 Cyc. p. 1576.

#### § 472. — Damages.

[a] (Sup. 1880)

Where one has only an equity of redemption in mortgaged chattels, damages recoverable for their sale under execution will not be more than nominal, if the equity is valueless.—Geisendorff v. Eagles, 70 Ind. 418.

[b] (Sup. 1882)

Where one whose personal property has been sold on execution obtains a reversal of the judgment, in his action against the judgment creditor his damages will not be restricted to the amount for which the property sold. He may recover its value.—*Smith v. Zent*, 83 Ind. 86, 43 Am. Rep. 61; *Zent v. Smith*, 83 Ind. 442.

[c] (Sup. 1882)

In such case plaintiff is also entitled to recover costs of summoning witnesses to prove the value of such property.—*Zent v. Smith*, 83 Ind. 442.

FOR CASES FROM OTHER STATES,

SEE 21 CENT. DIG. Execution, §§ 1403, 1404; 15 CENT. DIG. Damag. § 204.

See, also, 17 Cyc. pp. 1577-1579.

**EXECUTIVE POWER.**

See—

Constitutional limitations. CONSTITUTIONAL LAW, §§ 76-80.

Determination of existence of war and restoration of peace. WAR, § 6.

**EXECUTOR DE SON TORT.**

See EXECUTORS AND ADMINISTRATORS, §§ 538-544.

**This Digest is compiled on the Key-Number System. For explanation, see page iii.**

# EXECUTORS AND ADMINISTRATORS.

## *Scope-Note.*

[INCLUDES general administration of decedents' estates under testamentary or judicial appointment; rights, powers, duties, and liabilities of executors or administrators in respect to the collection, management, and disposition of their testators' or intestates' estates; and legal proceedings relating thereto.

[EXCLUDES probate, establishment, interpretation, and effect of wills (see *Wills*); testamentary powers and trusts (see *Powers; Trusts*); rights upon distribution of intestates' estates (see *Descent and Distribution*); administration of community property (see *Husband and Wife*); settlement of partnership affairs by surviving partners or by statutory partnership administrators (see *Partnership*); and particular rights and liabilities of devisees and legatees (see *Wills*), and of heirs and next of kin (see *Descent and Distribution*). For complete list of matters excluded, see cross-references, post.]

## *Analysis.*

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**WILLS.****I. ADMINISTRATION IN GENERAL.**

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**§ 1. Nature of the trust.**

[a] (**Sup. 1906**)

Executors and administrators derive their powers from the will of testator or from the statutes, and they have no general powers beyond those necessary to carry out those expressly conferred.—*Hayes v. Shirk*, 107 Ind. 569, 78 N. E. 653.

[b] (**App. 1906**)

Administration on the estate of a decedent imports a reduction of the estate to money, the payment of debts, and the distribution of the proceeds to those legally entitled. Judgment 70 N. E. 1024, 38 Ind. App. 33, affirmed on petition for rehearing.—*Mefford v. Lamkin*, 76 N. E. 1024, 77 N. E. 960, 38 Ind. App. 33.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. § 1½.

See, also, 18 Cyc. p. 64.

**§ 2. What law governs.**

[a] (**Sup. 1859**)

The disposition, succession, and distribution of personal property is governed by the law of the country of the owner's or intestate's domicile at the time of his death.—*Warren v. Hofer*, 13 Ind. 167.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 2, 652.

See, also, 18 Cyc. p. 74.

**§ 3. Necessity of administration.**

Dependent on amount of estate as determined by inventory, see post, § 63.

Dependent on title of legatee to chose in action, see **WILLS, § 724.**

Evidence of necessity in proceedings to remove administrator, see post, § 35.

Necessity of making sole distributee party to action where administrator is appointed after an order has issued that administration is unnecessary, see post, § 29.

Revocation of order dispensing with administration and appointment of administrator, see post, § 20.

[a] (**Sup. 1877**)

A creditor of a decedent cannot maintain an action on his claim against the heirs of the decedent, where there has been no ad-

ministration, as he must collect his claim through an administration under 2 Rev. St. 1876, p. 492, providing for the settlement of decedents' estates by an administration under the approval of a proper court.—*Leonard v. Blair*, 59 Ind. 510.

[b] (**Sup. 1879**)

In an action to have a deed declared fraudulent, and to subject certain real estate to the payment of a debt, it appeared that the alleged fraudulent grantor, who was the father of his grantee, had been absent and unheard of for over 15 years. Held that, since the grantor was presumed to be dead, the action could not be maintained against his heir until administration had been taken out on the grantor's estate.—*Baugh v. Boles*, 66 Ind. 376.

[c] (**Sup. 1879**)

A creditor of a decedent can collect his claim against the decedent's estate in no other way than through an administration of such estate, unless his claim is secured by a mortgage or specific lien on particular property; and without such administration he cannot recover his claim from the widow, heirs, devisees, or legatees, or even from an executor de son tort.—*McCoy v. Payne*, 68 Ind. 327.

[d] (**Sup. 1884**)

Where a complaint in an action on a note and mortgage against the maker and certain other heirs of a decedent showed that the proper court had decreed all the estate of one of such heirs to the widow, and she and her children were made parties to the suit, there was no necessity for an administrator of the estate or that such administrator should be a party.—*Salter v. Salter*, 98 Ind. 522.

[e] (**Sup. 1884**)

Where there is no administration, and there are no debts to pay, the heirs may collect the debts payable to their deceased ancestor.—*Holzman v. Ilibben*, 100 Ind. 338.

[f] (**Sup. 1885**)

Where there is no widow, and no debts against a decedent's estate, the heirs can collect debts due it without an administrator; but the existence of such right does not prevent the appointment of an administrator for the purpose of collecting such debts.—*Langsdale v. Woollen*, 99 Ind. 575.

[g] (**Sup. 1889**)

Where a testator bequeaths all his estate to his widow for life, remainder to his children, with power to her, as executrix, to sell any of the estate for the payment of his debts, or for

making advancements to the children, and she, without qualifying as executrix, sells part of the estate, and gives the proceeds to some of the children, they are, after her death, liable to account to their co-heirs without administration being had on the testator's estate, where it appears that he left no debts.—*Robertson v. Robertson*, 120 Ind. 333, 22 N. E. 310.

Where there are no debts and nothing besides to be done, the account may be adjusted between the heirs without the expense of an administrator.—*Id.*

[h] (Sup. 1891)

The heirs of a decedent, though of full age, cannot, by agreement among themselves, settle his estate, so as to defeat the right of a county, to which decedent was largely indebted for taxes, to have such estate administered in due course of law.—*Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

[i] (App. 1895)

Where personal property is not needed to pay debts, the heirs may distribute it among themselves without formal administration, and the title they take they derive in the same manner as the title they acquire to real estate of the deceased.—*Rountree v. Pursell*, 39 N. E. 747, 11 Ind. App. 522.

[j] (App. 1904)

The estate of a decedent cannot be a party to an action without some representative.—*Guernsey's Estate v. Pennington*, 70 N. E. 1008, 33 Ind. App. 119.

[k] (App. 1904)

A claim for taxes is not required to be filed against a decedent's estate, it being the duty of the executor or administrator to take notice of and pay the tax before his final settlement.—*Cullop v. City of Vincennes*, 72 N. E. 166, 34 Ind. App. 667.

[l] (App. 1908)

If a testate's widow is the sole legatee, and all debts and expenses are paid, there need be no administration of the estate.—*Block v. Butt*, 41 Ind. App. 487, 84 N. E. 357.

[m] (Sup. 1909)

Where limitations have begun to run against a creditor's claim at decedent's death, and the creditor desires to prevent its being barred, he must procure the appointment of an administrator.—*Hildebrand v. Kinney*, 172 Ind. 447, 87 N. E. 832.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 3-14½, 1782; 6 CENT. DIG. BANKS, § 332.

See, also, 18 Cyc. pp. 58-64; notes, 15 L. R. A. 490; 1 L. R. A. (N. S.) 885.

§ 4. Fact of death.

Evidence of death, see DEATH, §§ 2-4.

Presumption in collateral proceedings from grant of letters of administration, see post, § 29.

Setting aside administrator's report for fraudulent representation as to death, see post, § 509 (4).

[a] (Sup. 1879)

After five years' absence without tidings, raising the presumption of death, the appointment of an administrator is proper.—*Baugh v. Boles*, 66 Ind. 376.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 15, 16.

See, also, 18 Cyc. p. 65; notes, 30 Am. Rep. 748, 47 Am. Rep. 465.

§ 6. Intermeddling in administration.

Executors de son tort, see post, §§ 538-544.

[a] (Sup. 1881)

While an executor and his bondsmen are liable for defalcations of the former committed during his tenure of office, yet the executor cannot, after his removal from office, be attached and imprisoned for such defalcations under Decedents' Estates Act, § 30, providing for such proceedings in case of an intermeddling with the estate by an executor who has been removed.—*Phelps v. Martin*, 74 Ind. 330.

[b] (App. 1907)

*Burns' Ann. St. 1901*, § 2413 (Rev. St. 1881, § 2258), making persons liable who unlawfully intermeddle with the property of a decedent, does not apply to a decedent's widow who is decedent's only heir and as such sells his real estate.—*Tippecanoe Loan & Trust Co. v. Carr*, 40 Ind. App. 125, 78 N. E. 1043.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 18.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Allegations in action by heirs, see DESCENT AND DISTRIBUTION, § 91.

Appointment of creditor of legatee as executor of testator's estate as affecting right to enforce claim, see WILLS, § 867.

Appointment pending appeal from judgment denying probate of will, see WILLS, § 368.

Competency as witnesses of persons interested in estate in proceedings for appointment or removal as to transactions with person since deceased, see WITNESSES, § 132.

Foreign appointment, see post, § 517.

Letters of administration as documentary evidence, see EVIDENCE, § 340.

Powers before issue of letters or qualification, see post, § 77.

Property to be included in accounting, see post, § 465.

Review of decisions, see APPEAL AND ERROR, §§ 671, 949.

Right and duty of surviving partners to liquidate partnership affairs, see **PARTNERSHIP**, §§ 244, 245.

### § 8. Jurisdiction of courts.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 21-28.

See, also, 18 Cyc. pp. 65-73; note, 33 Am. Dec. 239.

### § 9. — In general.

[a] (Sup. 1866)

Where the intestate was not an inhabitant of this state at the time of his death, and left no assets in the state, and none came into it afterwards, no jurisdiction is conferred on the court to grant letters of administration in any county of the state, and such letters, if granted, are coram non judice and void.—*Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

[b] (App. 1902)

For purposes of administration the situs of a debt is the domicile of the debtor, and not the place where the evidence of the debt is located.—*Michigan Trust Co. v. Probasco*, 63 N. E. 255, 29 Ind. App. 109.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 21, 27, 28.

### § 10. — Domicile of decedent.

Annulment of appointment made in wrong county, see post, § 31.

[a] (App. 1894)

Rev. St. 1881, § 2228, subd. 1, providing that letters of administration may be granted in the county of which intestate was, at his death, an inhabitant, is not connected with or dependent on the following subdivisions, requiring the possession of assets by the intestate; and an administrator may be appointed in the county of the intestate's residence, though there are no tangible assets to administer.—*Toledo, St. L. & K. C. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 22, 23.

See, also, 18 Cyc. p. 67.

### § 11. — Existence of assets.

[a] (App. 1894)

Rev. St. 1881, § 2242, requiring the filing of a bond by the administrator in double the value of the personal estate, and section 2260, requiring the filing of an inventory within 60 days after his appointment, do not necessarily show the legislative intention that there must be some personal property to be administered in every case where an administrator is appointed.—*Toledo, St. L. & K. C. R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199.

[b] (App. 1900)

Letters of administration should be granted, if there be no tangible assets, where it ap-

pears that the estate has a right of action.—*Ex parte Jenkins*, 58 N. E. 560, 25 Ind. App. 532, 81 Am. St. Rep. 114.

Where an application for letters of administration alleged that the only asset of the estate was a cause of action for the death of decedent, it was error to deny the application on the ground that limitations had run against such an action, since the applicant was only required to show a prima facie right to letters, and limitations might not prevent the prosecution of the action, in that they might have been waived or would not be relied on.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 25.

See, also, 18 Cyc. p. 67; note, 24 L. R. A. 684.

### § 12. — Situs of assets.

Ancillary appointment, see post, § 518.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 24.

See, also, 18 Cyc. pp. 69-73.

### § 13. — Particular courts.

[a] (Sup. 1866)

The jurisdiction of the court of common pleas to grant letters of administration is derived from the statute, and can only be exercised in the cases provided for thereby.—*Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 26.

See, also, 18 Cyc. p. 65.

### § 14. Appointment of executor.

[a] (Sup. 1898)

Burns' Rev. St. 1894, § 2375 (*Horner's* Rev. St. 1897, § 2222), providing that, on probate of a will, the circuit clerk shall issue letters testamentary to the person named as executor; section 2376 (2223), providing that every person named as executor who shall qualify and give bond shall be named in the letters, and, if not thus named, shall be deemed superseded; and section 2379 (2226), providing that, if there be no person named in the will as executor, letters of administration with the will annexed shall be granted to any competent residuary legatee,—admit of a testator's delegating by will the power to legatees to name the executor.—*Wilson v. Curtis*, 51 N. E. 913, 151 Ind. 471, 68 Am. St. Rep. 236.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 29-31, 42.

See, also, 18 Cyc. pp. 74-76, 1351.

### § 17. Right to appointment as administrator.

[a] (Sup. 1851)

Where the largest creditor of an estate applied for administration, and asked that two certain persons be associated with her, she was entitled to the appointment, and the clerk was

authorized to appoint the others as requested; hence it was error to revoke such appointment at the instance of other creditors.—*Brown v. King*, 2 Ind. 520.

[b] (Sup. 1881)

2 Rev. St. 1876, p. 492, § 7, providing that letters of administration shall be granted to the next of kin, being mandatory, it is error to refuse to appoint a son of the deceased as administrator, if he is eligible and qualified.—*Hayes v. Hayes*, 75 Ind. 393.

[c] (Sup. 1884)

Where the next of kin does not select an administrator, any creditor may do so; and a failure to select does not warrant the presumption that decedent left no personal property.—*Loving v. King*, 97 Ind. 130.

[d] (Sup. 1887)

Any competent person, regardless of his place of residence, who shows that he is interested in an estate, and that a necessity exists for the appointment of an administrator, so as to enable persons who are indebted to make payment, may secure such appointment, if the statutory time for making application by those having the preference has expired without any application or appointment.—*Gale v. Corey*, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362.

[e] (App. 1907)

The guardian of an infant, who, if of age, would be entitled to letters of administration upon the estate of decedent, is in right of his ward entitled to letters of administration in preference to strangers, and stands, so far as his right to administer upon the estate is concerned, in place of his ward.—*In re Weeks' Estate*, 81 N. E. 107, 40 Ind. App. 139; *Kinnick v. Coy*, Id.

[f] (Sup. 1909)

The word "creditor," in *Burns' Ann. St. 1908*, § 2742, subd. 3, and section 2744, providing for the appointment as administrator of the largest creditor applying and residing in the state, is used in the usual sense as one whom the decedent owes, and hence, if one who had incurred the expense of the burial of a decedent could procure the appointment of an administrator, it would not be under the statute as a creditor, but under the equitable power of the court in order to collect his charges. Reversed.—*Hildebrand v. Kinney*, 172 Ind. 447, 87 N. E. 832.

[g] (App. 1909)

The statute fixing the order of preference in which administration shall be granted is mandatory, and the court has no power or discretion to arbitrarily refuse to appoint an applicant for letters entitled thereto by its terms, and issue the same to one whom it postpones to him.—*In re Ellis' Estate*, 43 Ind. App. 620, 88 N. E. 341; *Cooper v. Cooper*, Id.

The paramount object of the statute fixing the order of preference in which letters of ad-

ministration shall be granted is to secure to those having a beneficial interest in the property the right to administer.—Id.

The phrase "next of kin," as used in the statute fixing the order of preference in which letters of administration shall be granted, means persons who are next of kin at the death of the intestate, and who inherit the estate left by the decedent, and the addition of the words "having an inheritable interest in the estate" adds nothing to the force of the term.—Id.

In view of the purpose of the statute fixing the order of preference in granting administration, to secure the right to administer to those beneficially interested in the property, a creditor is entitled to preference over a relative of decedent who has no interest in the estate.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 43-59.

See, also, 18 Cyc. pp. 83-93, 106; note, 93 Am. Dec. 685.

§ 18. Qualifications of administrator.

Disqualification ground for removal, see post, § 35.

[a] (Sup. 1864)

2 Gav. & H. St. p. 486, § 10, providing that letters of administration shall not be granted to married women, and section 2, p. 584, providing that they shall not be granted to a married woman unless her husband consents, forbid the granting of letters without the husband's consent.—*Jenkins v. Jenkins' Adm'r*, 23 Ind. 79.

The consent of a husband that his wife should act as administratrix does not make him co-administrator.—Id.

[b] (Sup. 1880)

There is no law which forbids the appointment of the same person as administrator or executor of two or more estates or wills, nor any provision requiring a resignation or revocation of the letters in one case, because of conflicting interests or of claims in favor of one estate against the other.—*Wright v. Wright*, 72 Ind. 149.

[c] (Sup. 1891)

That the county treasurer holds claims against the estate for a large amount of unpaid taxes does not render him an improper person to be appointed administrator.—*Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 60-77.

See, also, 18 Cyc. pp. 93-96, 103, 19 Cyc. p. 1250; notes, 16 L. R. A. 538, 24 L. R. A. 289; note, 1 L. R. A. (N. S.) 341; note, 113 Am. St. Rep. 362.

§ 20. Proceedings for appointment.

Courts invested with appellate jurisdiction, see COURTS, § 220 (2).

Of administrator de bonis non, see post, § 37.



Of administrator with will annexed, see post, § 21.

Of temporary or special administrator, see post, § 22.

[a] (Sup. 1883)

Where the county court had found that the estate of a decedent was of less value than \$500, and had made an order vesting the entire estate in the widow and dispensing with letters of administration a subsequent appointment of an administrator without any order revoking the first decision, or without notice to the widow, was voidable, and not void.—*Ferguson v. State ex rel. Hagans*, 90 Ind. 38.

[b] (Sup. 1890)

The circuit court having a wide discretion regarding the appointment of administrators, the supreme court will not set aside its appointment, except where there has been an abuse of such discretion.—*Wallis v. Cooper*, 123 Ind. 40, 23 N. E. 977.

[c] (App. 1894)

The proceedings for the appointment of an administrator are purely statutory, and must be conducted in conformity to the statute governing the same.—*Toledo, St. L. & K. C. R. Co. v. Reeves*, 35 N. E. 199, 8 Ind. App. 687.

[d] (App. 1894)

Rev. St. 1881, § 2229, provides that if several persons, of the same degree of kindred, are entitled to administration, letters may be granted to one or more of them, "but males shall be preferred to females." *Held* that, in a petition by a son of decedent for the removal of a daughter from the office of administrator, and the appointment of himself to that position, the allegation that petitioner has "the lawful right to be preferred as administrator of said estate" is insufficient, without showing that he is otherwise qualified to hold the office.—*Andis v. Lowe*, 8 Ind. App. 687, 34 N. E. 850.

[e] (App. 1900)

While the circuit court has discretion in granting or refusing applications for letters of administration, where the proceeding is purely ex parte, and the verified application shows the party entitled to letters, they should be granted.—*Ex parte Jenkins*, 58 N. E. 560, 25 Ind. App. 532, 81 Am. St. Rep. 114.

[f] (App. 1909)

The statute relating to the application for letters of administration does not prescribe any precise form therefor, and does not require that the application shall be in writing, but does require an examination of the applicant, under oath, touching the time and place of death, whether decedent left a will, and concerning the applicant's qualification; and hence it is not an objection to an application that it fails to show the applicant's qualification and competency.—*Cooper v. Cooper*, 43 Ind. App. 620, 88 N. E. 341.

On appeal by one who applied for letters of administration prior to the appointment of another against whom he claimed a preference, it was insisted that he had no standing in the appellate court until the letters which had been granted were set aside. *Held* that, as the ground of his complaint was the court's action in refusing to entertain his application, which antedated the appointment made, whatever error the court committed was before the appointment, and the question of preference was properly before the court on the appeal.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 83-105.

See, also, 18 Cyc. pp. 119-127.

§ 21. Administrator with will annexed.

Administration of estate by administrator with will annexed, see post, § 121.

Appointment of administrator de bonis non with will annexed, see post, § 37.

[a] (Sup. 1873)

Where a will has been probated, and an heir named therein as executor has by mutual consent acted as such and made distribution, without qualifying, the husbands of a number of the heirs cannot, without notice to him, on settlement of the claims, have a stranger appointed as administrator with the will annexed, after the time for the person named as executor to qualify has expired.—*Hays v. Vickery*, 41 Ind. 583.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 106-115.

See, also, 18 Cyc. pp. 98-103.

§ 22. Temporary or special appointment.

Administration of estate by temporary or special administrators, see post, § 122.

Revocation, see post, § 32.

Special appointment to sell and convey property, see post, § 32.

[a] (Sup. 1850)

By Rev. St. 1838, p. 178, § 18, when any one dies intestate in vacation and his estate requires immediate care, the clerk of the Probate Court is authorized to grant special letters of administration, which must be confirmed by an order of the court at its next succeeding term, or the appointment will cease to be of any effect.—*State ex rel. Barrell v. Chrisman*, 2 Ind. 126.

[b] (Sup. 1851)

By Rev. St. p. 506, the clerk of the probate court has authority to grant letters of administration in vacation, when the right to administration is not controverted and the court is bound to ratify such appointment, unless some valid objection be made to it.—*Brown v. King*, 2 Ind. 520.

[c] (Sup. 1902)

Burns' Rev. St. 1901, § 2393 (Rev. St. 1881, § 2239; Horner's Rev. St. 1901, § 2239).

enacts that where any person shall have died testate, and notice of contest of testator's will shall have been given, a special administrator may be appointed, who shall collect the debts, by suit or otherwise, and sell the personal property, etc., in the same manner, as the administrator of an intestate. Burns' Rev. St. 1901, § 2391 (Rev. St. 1881, § 2237; Horner's Rev. St. 1901, § 2237), provides that if delay is occasioned in the granting of letters testamentary, or if, before the term allowed for the granting of letters, it shall be made to appear that any one is intermeddling with the estate, or that there is no one having authority to care for the same, the court shall issue special letters to collect and preserve the property. *Held*, that where the application for appointment of a special administrator showed that decedent had died testate, and that the will was being contested, a finding that the special administrator was appointed under Burns' Rev. St. 1901, § 2393 (Rev. St. 1881, § 2239; Horner's Rev. St. 1901, § 2239), and not under Burns' Rev. St. 1901, § 2391 (Rev. St. 1881, § 2237; Horner's Rev. St. 1901, § 2237), was proper—*Bruning v. Golden*, 64 N. E. 657, 159 Ind. 190.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 116-127.  
See, also, 18 Cyc. pp. 108-113.

**§ 23. Second or additional appointment.**

[a] (Sup. 1887)

Letters of administration granted by a court to one neither of kin to the deceased nor a creditor, within the 20 days allowed by Rev. St. 1881, § 2227, for the qualification of certain persons preferred therein, are not absolutely void; and new letters cannot be granted, even to a person of the preferred class, until the former are revoked or set aside upon proper application.—*Jones v. Bittinger*, 110 Ind. 476, 11 N. E. 456.

[b] (App. 1899)

An order denying the joint petition of a widow and a son of deceased to appoint the son co-administrator with the widow will not be disturbed on appeal, in the absence of evidence that the trial court abused its discretion.—*Shrum v. Naugle*, 53 N. E. 243, 22 Ind. App. 98.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 128-131.  
See, also, 18 Cyc. pp. 113, 114.

**§ 25. Acceptance and oath of office.**

Failure to qualify, see post, § 30.

Powers before qualification, see post, § 77.

[a] (Sup. 1825)

An executor has no right to the property of the testator unless he accepts the executorship.—*Calloway v. Doe ex dem. Joyes*, 1 Blackf. 372.

[b] (Sup. 1868)

The fact that an administrator's oath of office was sworn to before a notary, and not before a clerk of the court, if erroneous, does not render the administration of the estate void; and hence the validity of the administration cannot on that ground be attacked in a collateral suit.—*Picken v. Hill*, 30 Ind. 269.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 141-143.  
See, also, 18 Cyc. p. 127.

**§ 26. Bond.**

Bond of surviving partner, see PARTNERSHIP, § 250.

Estoppel by recitals in bond, see ESTOPPEL, § 22.

Failure to give or invalidity ground for removal, see post, § 35.

Failure to qualify, see post, § 30.

Liabilities on bonds, see post, §§ 527-537.

Powers before qualification, see post, § 77.

Special bond for sale of property under order of court, see post, § 351.

[a] (Sup. 1827)

R. L. 1824, p. 323, requiring executors and administrators to give bond with surety, imposes on them no new duties, but merely gives an additional remedy to creditors, legatees, and persons entitled to distribution.—*Eaton v. Benefield*, 2 Blackf. 52.

[b] (Sup. 1903)

Under Burns' Rev. St. § 5494, foreign surety companies may be received as sureties on bonds of executors.—*Barricklow v. Stewart*, 68 N. E. 316, 31 Ind. App. 446.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 144-170.  
See, also, 18 Cyc. pp. 128-138.

**§ 27. Issuance of letters.**

As evidence of death, see DEATH, § 4.

Powers before issuance of letters, see post, § 77.

Revocation of letters, see post, § 32.

Special letters of administration granted in vacation, see ante, § 22.

[a] (Sup. 1843)

Letters testamentary, which, when granted, were entered of record, and were afterwards, when delivered to the executor, certified by the clerk to be true copies of the record, were valid as the original letters.—*Bales v. Binford*, 6 Blackf. 415.

[b] (App. 1903)

By the express provisions of Burns' Rev. St. 1901, § 2398, the acts of the clerk of the court in vacation in granting letters testamentary should be ratified by the court, unless good cause be shown for vacating such acts.—*Bar-*

ricklow v. Stewart, 68 N. E. 316, 31 Ind. App. 446.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 171-176.

See, also, 18 Cyc. p. 138.

**§ 29. Operation and effect of appointment.**

Of administrator de bonis non, see post, § 37.

[a] (Sup. 1856)

A defendant in a petition by an administrator to sell real estate, cannot set up, by way of answer, that his appointment was invalid.—Riser v. Snoddy, 7 Ind. 442, 65 Am. Dec. 740.

[b] (Sup. 1872)

In a collateral proceeding it will be conclusively presumed that a man is dead when it appears that letters of administration have been granted on his estate by the proper tribunal.—Jenkins v. Peckinpaugh, 40 Ind. 133.

[c] (Sup. 1883)

A complaint alleged that one R., deceased, having been appointed commissioner to make sale in partition proceedings of land in which plaintiff was interested, had failed to pay over the money. The action was against the administrator and the sureties of said R. One of the sureties filed a pleading as an answer to the complaint, and as a cross-complaint against the administrator, averring that R. left a widow and less than \$500 of property, and that the county court made an order vesting the estate entirely in the widow and dispensing with letters of administration, and that without notice to the widow and without any order setting aside the previous order, the court granted letters to said administrator who had been and was in collusion with the plaintiff, aiding her in the prosecution of said claim against the said R. and against the sureties. *Held*, that such pleading did not show a defect in parties in not joining the widow, and was demurrable.—Ferguson v. State ex rel. Hagans, 90 Ind. 38.

Where the appointment of an administrator is not void, such appointment cannot be attacked collaterally for irregularities, though such irregularities would be ground in a direct proceeding for revoking his letters.—*Id.*

[d] (App. 1902)

It will be presumed, in the absence of evidence to the contrary, in proceedings to which an administrator appointed at the request of the creditors and heirs of intestate is a party, that the appointment was made on sufficient grounds.—Peterson v. Erwin, 62 N. E. 719, 28 Ind. App. 330.

[e] (App. 1906)

Where a court of a county other than that in which intestate was an inhabitant at the time of his death, erroneously appointed an administrator of his estate, such appointment was neither void nor subject to collateral at-

tack, and, while voidable on a direct attack, furnished complete protection to the administrator so long as it remained unrevoked.—Williams v. Dougherty, 39 Ind. App. 9, 78 N. E. 1067.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 177-182.

See, also, 18 Cyc. pp. 139-144; note, 81 Am. St. Rep. 535.

**§ 30. Failure to qualify or act.**

[a] (Sup. 1873)

Where a will has been duly probated, and one of the heirs, legatees, or devisees under the will, named therein as executor, has, by mutual consent and understanding of all the persons interested in the estate as such heirs, legatees, or devisees, acted as such executor and proceeded to make distribution of the personal property without qualifying as executor, the husbands of a part of the heirs cannot, without notice to the person so acting as executor, on application to the clerk, have a stranger appointed as administrator with the will annexed, after the time for the person named as executor in the will to qualify has expired. The heirs having consented that the person named as executor should act without qualifying, it would be a fraud on him, and on the other heirs, legatees, and devisees, to assert that he had waived his right by not qualifying within the time limited by statute.—Hays v. Vickery, 41 Ind. 583.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 183-185.

See, also, 18 Cyc. p. 144.

**§ 31. Termination of authority in general.**

[a] (Sup. 1881)

On judgment declaring a will invalid, an appeal was taken to the supreme court, pending which a general administrator was appointed; special administrators having been appointed during the pendency of the action in the court below before judgment. *Held*, that the effect of such appeal was not to annul such judgment, that the appointment of the general administrator was proper, and that upon a judgment of reversal resulting in a final adjudication declaring the will valid, the rightful executor might be installed in his office.—Hayes v. Hayes, 75 Ind. 395.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 186-190.

See, also, 18 Cyc. pp. 145-148.

**§ 32. Revocation of letters.**

Action in representative capacity after revocation, see post, §§ 432, 433.

Exclusive or concurrent jurisdiction of proceedings to revoke letters, effect of priority of jurisdiction, see COURTS, § 475.

Necessity before appointment of successor, see ante, § 23.

On suggestion of *amicus curiæ*, see *AMICUS CURIÆ*, § 3.

[a] (*Sup.* 1845)

If a probate court revoke letters of administration, it must be presumed, till the contrary appear, that the same court granted them.—*State ex rel. Adams v. Johnson*, 7 Blackf. 529.

[b] (*Sup.* 1846)

Letters of administration, granted in vacation, within 30 days after the intestate's death, to any other person than his widow, she not having relinquished in writing her right to administer, should, on her application, be revoked at the next term of the probate court, and letters granted to her.—*Mills v. Carter*, 8 Blackf. 203.

[c] (*Sup.* 1866)

When letters of administration are issued in a county where the granting of them is not authorized by statute, the court in which they are issued may, upon its own motion, institute proceedings to set them aside, or it may be done by any one interested in any wise in the estate, or on the suggestion of an *amicus curiæ*.—*Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

A railroad company, against whom an action is being prosecuted by an administrator to recover damages for an injury causing the death of the intestate, has such an interest as to make it a competent party to petition the court for a revocation of the letters of administration.—*Id.*

[d] (*Sup.* 1885)

Whenever the court has issued letters of administration, which are not authorized by, but directly contravene, the express provisions of the statute, such court may of its own motion revoke the letters so issued.—*Croxton v. Renner*, 2 N. E. 601, 103 Ind. 223.

[e] (*Sup.* 1889)

A complainant in a suit to annul letters of administration, on the ground that there were no assets belonging to the estate when the administrator was appointed, must aver that fact in positive terms. A complaint alleging that, if there were any, they had been fully administered before defendant received his appointment, is bad.—*Langsdale v. Woollen*, 120 Ind. 78, 21 N. E. 541.

[f] (*App.* 1906)

Under *Burns' Ann. St.* 1901, § 2381, providing that letters of administration shall be granted in the county where intestate was an inhabitant at his death, where the court of a county other than that of which intestate was an inhabitant at death appointed an administrator of his estate, such appointment was properly annulled on the application of any person interested or on suggestion of an *ami-*

*cus curiæ*.—*Williams v. Dougherty*, 39 Ind. App. 9, 78 N. E. 1067.

[g] (*App.* 1907)

*Burns' Ann. St.* 1901, § 2398 (Rev. St. 1881, § 2243), providing that on the convening of court it shall approve and confirm letters of administration granted by the clerk in vacation, unless for good cause shown they shall be revoked, is mandatory, and the court has no authority arbitrarily to revoke letters granted by the clerk.—*Kinnick v. Coy*, 40 Ind. App. 139, 81 N. E. 107.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 191-212.

See, also, 18 Cyc. pp. 151-159.

### § 33. Resignation and discharge.

[a] (*App.* 1909)

An order discharging an administrator on a settlement made by him without giving notice required by statute would not affect the rights of heirs or creditors not appearing at the final settlement.—*Fox v. Rhodes*, 43 Ind. App. 573, 88 N. E. 92.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 213-222.

See, also, 18 Cyc. pp. 148-151.

### § 35. Removal.

Change of venue, see *VENUE*, § 36.

Courts invested with appellate jurisdiction, see *COURTS*, § 220 (2).

Effect on pending action, see post, § 440.

Intermeddling after removal, see ante, § 6.

Scope and sufficiency of objections to evidence in proceedings for removal, see *TRIAL*, § 81.

Waiver of privilege of excluding testimony of physicians as to communications, see *WITNESSES*, § 219.

[a] (*Sup.* 1858)

Where a petition was filed in vacation for the removal of an administrator, and the clerk gave notice of the pendency of suit by publication, an order of court for such publication was unnecessary.—*Crabb v. Atwood*, 10 Ind. 331.

The record being silent on the subject, it will be presumed that a publication of notice of petition for the removal of defendant as administrator was founded on a proper affidavit of the defendant's nonresidency.—*Id.*

[b] The widow of a decedent has sufficient interest in the administration of the estate to authorize her to apply for the removal of the administrator.—(*Sup.* 1859) *Pace v. Oppenheim*, 12 Ind. 533; (1860) *Evans v. Buchanan*, 15 Ind. 438.

[c] (*Sup.* 1859)

The failure of an administrator appointed as successor to a prior administrator to make out a new inventory of the property is a breach of duty for which he may be removed from office.—*Pace v. Oppenheim*, 12 Ind. 533.

[d] (Sup. 1860)

Neglect on the part of an administrator to file an account for nearly a year after the time fixed by the court for that purpose, he having money in his hands belonging to the estate and not paid over according to law, is sufficient of itself to authorize his removal.—*Evans v. Buchanan*, 15 Ind. 438.

[e] (Sup. 1862)

In a doubtful case the supreme court will not interfere with the action of the court of common pleas in removals of executors, administrators and guardians.—*Whitehall v. State ex rel. Hall*, 19 Ind. 30.

[f] (Sup. 1864)

2 Gav. & H. St. pp. 491, 493, §§ 22, 28, make the marriage of an administratrix the cause of her removal, unless her husband files his written consent to her continuing as such.—*Jenkins v. Jenkins' Adm'r*, 23 Ind. 79.

[g] (Sup. 1865)

The fact that an administrator can neither read nor write is not a sufficient ground for removing him on an application of a creditor under the statute.—*Gregg v. Wilson*, 24 Ind. 227.

[h] (Sup. 1871)

In a proceeding under the statute for the settlement of decedents' estates to remove an administrator, on the ground that he has failed to make a true and complete inventory of the estate of the decedent, no other pleadings are authorized than the sworn application. The only judgment the court can render is one removing or refusing to remove. The statute is simply mandatory, and the action of the court is very much within the discretion of the judge.—*Williams v. Tobias*, 37 Ind. 345.

[i] (Sup. 1871)

On an application to remove an executor because of his removal from the state and the subsequent resignation of the resident executor, it is no ground for denying the application that the executor who has removed states that he changed his residence to the place where a large portion of the property of the estate was situated for the purpose of managing it to better advantage, under 2 Gav. & H. St. p. 488, § 16, providing that if an administrator or executor shall remove from the state, and there be no remaining executor or administrator in the state, the proper court shall grant letters of administration to any person entitled thereto.—*Ewing v. Ewing*, 38 Ind. 390, 392.

[j] (Sup. 1876)

A court cannot order the removal of an administrator, nor appoint his successor, on petition of a creditor asking an order on the administrator to pay his claim against such estate, but neither asking nor assigning any reason for the removal of such administrator.—*Vail v. Givan*, 55 Ind. 59.

An administrator of a decedent's estate, which is in process of settlement, can only be

removed upon the verified petition of a person interested in such estate, or of a co-administrator, or of the surety of such administrator, which must specify one or more of the causes for such removal, as enacted in 2 Rev. St. 1876, p. 491, § 22; and, if filed by a person claiming an interest, the petition must show the nature of such interest by alleging the facts constituting it.—*Id.*

Where a petition for the removal of an administrator of the estate of a decedent is filed by a person claiming an interest in such estate, the petition must show the nature of such interest by alleging the facts constituting it.—*Id.*

[k] (Sup. 1876)

Where an administrator refuses to obey an order of the court directing him to pay over money in his possession, it is the duty of the court to remove him from office and appoint another person, who shall be directed to bring an action against the administrator on his official bond.—*Fuhrer v. State ex rel. Attorney General*, 55 Ind. 150.

[l] (Sup. 1876)

Where no exception is taken to an order removing an administrator of an estate of which the court has jurisdiction, and directing that he forthwith account and pay over the assets of such estate, he will be deemed, on appeal, to have acquiesced therein.—*Ex parte Simpson*, 55 Ind. 415.

[m] (Sup. 1881)

In suit to remove an administrator under sections 22 and 161 of the act concerning the settlement of decedents' estates, he has the right, by special pleas or by answer in denial, to tender or form issues of fact to be tried as such.—*Phelps v. Martin*, 74 Ind. 339.

[n] (Sup. 1881)

Where the administrator fails to render the funds of the estate productive and pay to the legatee for life the income, or suffers it to become endangered, the court on application will compel him to perform his duty in such respect, or discharge him at once, and appoint another trustee.—*Brannock v. Stocker*, 76 Ind. 558; *Wilborn v. Same*, 78 Ind. 602.

[o] (Sup. 1882)

An administrator may be removed for habitual drunkenness, without other evidence of his incapacity to perform his duty as administrator.—*Gurley v. Butler*, 83 Ind. 501.

[p] (Sup. 1883)

Under Rev. St. 1881, § 2246, providing that, on the filing of an application to remove an administrator, the clerk shall issue citation to the person complained against, "requiring him to appear and answer," and that at the next term of court "the court shall hear the proofs and allegations," an answer and other pleadings necessary to form an issue may be filed.—*McFadden v. Ross*, 93 Ind. 134.

Where the answer in a proceeding to remove an administrator, for failure to file an inventory and reports, admits, and attempts to excuse, such failure, the court may properly determine the case without evidence; and its action will not be reviewed on appeal, unless an abuse of discretion is shown.—Id.

Act June 17, 1852, § 23, provides for the filing of a petition for the removal of an executor or administrator, and then provides that on the filing of such application, or upon order of court, the clerk shall issue a citation to the person complained against requiring him to appear and "answer," and it is further provided that at the term of court next after the notice the court shall proceed to hear the proofs and allegations. *Held*, that the statute contemplates the filing of an answer, the formation of issues, and a trial upon the evidence, as in civil actions.—Id.

[q] (Sup. 1891)

The removal of an administrator is largely in the discretion of the court.—*Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

In proceedings for the removal of an administrator, evidence of a wish of decedent, communicated to his son, that his estate should not be administered on, was hearsay and immaterial.—Id.

On a proceeding to remove an administrator, evidence of unsatisfied mortgages of record held by decedent is competent as showing the necessity of administration.—Id.

Evidence of the custom of the court of the county in the appointment of administrators was wholly immaterial.—Id.

[r] (App. 1894)

Failure of an administrator to give a bond or to file an inventory within the time required by law, or, if there are no assets, to file a statement showing such fact, is good ground for his removal.—*Toledo, St. L. & K. C. R. Co. v. Reeves*, 35 N. E. 199, 8 Ind. App. 667.

[s] (App. 1903)

The next of kin of a testator filed a petition reciting that the bond filed by the executor was invalid, in that the bonding company had no authority on file in the county showing it authorized to transact such business, and praying that the court appoint a special administrator. The executor filed a demurrer because the petition and objections did not state a cause of action, or entitle the petitioner to the ouster prayed for. *Held*, that a contention that the demurrer should not have been considered, because the petition did not pretend to be a complaint or cause of action, was immaterial, since, by whatever name the paper be called, it asked the removal of the executor.—*Barricklow v. Stewart*, 68 N. E. 316, 31 Ind. App. 446.

The fact that the bond given by an executor is invalid is no ground for his removal on

petition, the most that could be required of him being a new bond.—Id.

The demurrer having stated a statutory ground—"want of facts sufficient to constitute a cause of action"—fairly applied to the objections set out in the petition.—Id.

[t] (App. 1906)

An appeal by an administrator from an order directing him to give a new bond, and removing him for failure to comply therewith, is governed by the Civil Code, and not by Burns' Ann. St. 1901, §§ 2609-2612, authorizing administrators to prosecute certain appeals without bond.—*Moore v. Bankers' Surety Co.*, 73 N. E. 607, 34 Ind. App. 633.

On appeal from an order directing an administrator to file a new bond, and removing him from his office for failure to do so, the estate, being uninterested, was not a proper party.—Id.

[u] (App. 1906)

A judgment removing an administrator does not deprive him of his right of appeal.—*Williams v. Dougherty*, 77 N. E. 305, 37 Ind. App. 449.

[v] (Sup. 1908)

Where an administrator made an improper loan, which was afterwards repaid with interest, there was only a technical devastavit, and the court did not abuse its discretion in refusing to remove the administrator.—*Scott v. Smith*, 171 Ind. 453, 85 N. E. 774.

In determining the question of making an allowance to an administrator for costs and expenses in contesting a proceeding to remove him, the question is whether his conduct was such as reasonably to justify the institution of the proceeding.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 227-262.

See, also, 18 Cyc. pp. 159-170, 1354.

#### § 37. Administrators de bonis non.

Administration of assets coming to hands of administrator de bonis non, see post, § 120. Administrator with will annexed, see ante, § 21.

Appointment in proceedings to set aside settlement of executor's accounts, see post, § 509 (7).

Conditions precedent to setting aside fraudulent conveyances by predecessor, see FRAUDULENT CONVEYANCES, § 241.

Recovery of overpayments made by executor, see post, § 287.

[a] (Sup. 1873)

Letters of administration cannot be legally granted and confirmed while letters granted and confirmed to an executor named in the will are in full force.—*Landers v. Stone*, 45 Ind. 404.

[b] Under Rev. St. §§ 2240, 2254, letters of administration de bonis non may issue where a vacancy occurs in the administration of an estate prior to the final settlement, but letters de bonis non cannot issue where there has been a final order of settlement which remains unrevoked.—(Sup. 1881) *Pate v. Moore*, 79 Ind. 20; (1885) *Croxton v. Renner*, 103 Ind. 223, 2 N. E. 601.

[c] (Sup. 1885)

An administrator de bonis non may be appointed, notwithstanding the regular administrator has been discharged because he could discover no assets.—*Langsdale v. Woollen*, 99 Ind. 575.

[d] (App. 1893)

Under Acts 1891, pp. 107, 108, relating to the appointment of an administrator de bonis non after the administrator has been officially discharged on the application of creditors or legatees whose debts or legacies, in whole or in part remain unpaid, or of any person entitled to share in the distribution of the estate, etc., the remedy afforded is purely cumulative.—*Barnett v. Vanmeter*, 33 N. E. 666, 7 Ind. App. 45.

Under Acts 1891, pp. 107, 108, relating to the appointment of an administrator de bonis non after the administrator has been officially discharged, and it appears that there are assets belonging to the estate which should be administered, it devolves on the court to determine when the administrator de bonis non is appointed, whether or not there are such unadministered assets, and, when the appointment has been made, the administrator occupies the same position that a general administrator does, and the appointment cannot be attacked in a collateral proceeding, and every presumption will be in favor of its validity.—Id.

In an action by an administrator de bonis non on a bond payable to decedent, defendant alleged that decedent's estate had been administered, and finally settled by judgment of the probate court, and that such judgment remains in force; but did not allege that the claim in suit was considered in such administration. *Held*, that the answer was bad as a plea in bar, since Acts 1891, pp. 107, 108, provide that whenever the administrator or executor has been finally discharged, and no administration of said estate is pending, and there are assets of the estate of decedent within the state that have not been and should be administered, an administrator de bonis non of the estate may be appointed with the same powers as are given to administrators and executors by law. *Lotz, J.*, dissenting.—Id.

[e] (App. 1895)

Act March 5, 1891 (Rev. St. 1894, § 2395), providing that on a showing that an administrator has been finally discharged, that no administration is pending, and that there are assets within the jurisdiction of the state which have not been, but should be, administered, a

court of probate having jurisdiction may, on the application of any unpaid creditor or legatee, or of any one entitled to share in the estate, appoint an administrator de bonis non with the powers of an administrator, applies to estates administered upon, and in which final reports had been made and approved, before the passage of the act.—*Wahl v. Schierling*, 11 Ind. App. 696, 39 N. E. 533.

[f] (App. 1899)

When claims in favor of an estate have never come into the hands of the administrator, and have not been administered, an unpaid creditor's remedy, after final settlement, is under Burns' Rev. St. 1894, § 2395, which provides for an administrator de bonis non.—*Postal v. Kreps*, 54 N. E. 816, 23 Ind. App. 101.

[g] (App. 1902)

Since the passage of Burns' Rev. St. 1901, § 2395, providing that when an administrator has been discharged, and there is no administration pending in the state and there are assets of the estate that should be administered, then on the application of any creditor or legatee an administrator de bonis non may be appointed, the approval of the final account of an administrator is not an adjudication that he has turned into the estate all the assets belonging to it, becoming conclusive after three years, but, without setting a final settlement aside, an administrator de bonis non may be appointed to take charge of any assets omitted from the former administration.—*Michigan Trust Co. v. Probasco*, 63 N. E. 255, 29 Ind. App. 109.

Where a person is appointed administrator de bonis non, he has from the date of his appointment the same power and is charged with the same duties as a general administrator, every presumption being indulged in in favor of the validity of the appointment which cannot be attacked collaterally.—Id.

[h] (App. 1904)

In proceedings by an heir for the appointment of an administrator de bonis non, the widow of the decedent appeared and objected to the appointment; denying that the applicant was an heir, and alleging that the estate had been fully administered. On trial the findings were for the applicant, and an administrator was appointed. *Held* that, in an action by him for property of the estate, which the widow had conveyed to the defendants to conceal it, the record of these proceedings was conclusive on defendants; they being in privity with the widow.—*Weaver v. Meyer*, 70 N. E. 409, 32 Ind. App. 587.

[i] (App. 1909)

Under Burns' Ann. St. 1908, § 2757, providing that whenever it is shown that an administrator or executor has been finally discharged, and that there is no administration pending, and that there are assets within the jurisdiction of the state that have not been and should be administered, etc., an administrator

de bonis non may be appointed, a petition for the appointment of an administrator de bonis non, which failed to allege that there were assets within the jurisdiction of the state which had not been and should be administered, or to describe property not accounted for in the final report, was insufficient.—*Clark v. Schindler*, 43 Ind. App. 269, 87 N. E. 44.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 267-278.

See, also, 18 Cyc. pp. 103-107; note, 24 Am. Dec. 379; note, 108 Am. St. Rep. 413.

### III. ASSETS, APPRAISAL, AND INVENTORY.

Assets ground of jurisdiction of administration of estate, see ante, § 11.

Body of decedent, see DEAD BODIES, § 1.

Property available for payment of debts, see post, §§ 270-272.

Property covered by bond of executor or administrator, see post, § 528.

Right and duty of surviving partner as to partnership affairs, see PARTNERSHIP, §§ 244-246, 249.

#### § 38. Property constituting assets in general.

[a] (Sup. 1902)

Where a husband devises property to his wife for life, and directs the disposition of the portion remaining at her death, the portion so remaining at her death is a part of his estate, and not subject to the control of her administrator.—*Jester v. Gustin*, 63 N. E. 471, 158 Ind. 287.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 323.

See, also, 18 Cyc. pp. 171, 172.

#### § 39. Real property and estates and interests therein.

Property available for payment of debts, see post, § 272.

Title and authority of executor or administrator in general, see post, § 129.

[a] (Sup. 1838)

A land certificate to which a person was entitled in his lifetime issues to his heirs.—*Shanks v. Lucas*, 4 Blackf. 476.

[b] (Sup. 1846)

On the death of a mortgagor, the equity of redemption descends to his heirs.—*Shaw v. Hoadley*, 8 Blackf. 165.

[c] (Sup. 1880)

Terms of years and other estates less than freehold pass to the executor or administrator, and are not subjects of descent.—*Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161.

[d] (Sup. 1881)

In an action for trespass to leasehold estate of a decedent, the administrator should sue

alone, such estate being personalty, the title to which would descend to him.—*Schee v. Wiseman*, 79 Ind. 389.

[e] (Sup. 1882)

The right to enforce a lien for taxes paid on an invalid sale, given by Rev. St. 1881, § 6497, to "the grantee, his heirs and assigns," held to belong to the purchaser's heirs, and not to his personal representatives.—*Stephenson v. Martin*, 84 Ind. 160.

[f] (Sup. 1884)

A lease of lands for the lessor's life is a chattel, which, on the death of the lessee, goes to his administrator, who alone can sue for possession.—*Cunningham v. Baxley*, 96 Ind. 367.

[g] (Sup. 1885)

An heir has the right to land to the exclusion of the administrator, unless it is required for the payment of debts.—*Humphries v. Davis*, 100 Ind. 369.

[h] (Sup. 1886)

The executors can take land to the exclusion of the heir or devisee only when it is needed for the payment of the testator's debts.—*Hochstedler v. Hochstedler*, 9 N. E. 467, 108 Ind. 506.

[i] (App. 1906)

The two-thirds interest of a father in the estate of his daughter who dies intestate is subject to the payment of the debts of the intestate.—*Weaver v. Gray*, 37 Ind. App. 35, 76 N. E. 795.

[j] (App. 1909)

The administrator of an incompetent leaving no debts has no interest in the real estate, but it descends to the heir, who alone may sue to set aside a conveyance made by the incompetent.—*Kamman v. D'Heur & Swain Lumber Co.*, 43 Ind. App. 672, 88 N. E. 348.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 280, 285-294.

See, also, 18 Cyc. pp. 180-189.

#### § 40. Proceeds of sale of real property.

Property available for payment of debts, see post, § 272.

[a] (Sup. 1856)

Where the vendor of land dies before payment of the purchase money, his personal representatives will be entitled to receive the purchase money.—*Henson v. Ott*, 7 Ind. 512.

[b] (Sup. 1877)

Money received by an executor from a railroad company for a release to a right of way over lands belonging to his testator's estate forms no part of the assets of the estate.—*Hankins v. Kimball*, 57 Ind. 42.

[c] (Sup. 1892)

A father made a contract to convey land to his son, and provided that the price should



be paid to his "heirs" after his death. *Held*, in a suit by his other children to declare and enforce a vendor's lien, that the word "heirs" was used in the sense of "children," and that the purchase money was not payable to the vendor's administrator.—*Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898.

[d] (*App.* 1907)

Where the sole heir sold land belonging to decedent's estate, and chargeable with the payment of decedent's debts, the administrator is not entitled to convert the proceeds into assets for the payment of debts, as the sale does not abridge the administrator's right to convert the land into assets for that purpose.—*Tippecanoe Loan & Trust Co. v. Carr*, 40 Ind. App. 125, 78 N. E. 1043.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. § 282.

See, also, 18 Cyc. p. 181.

§ 41. Rents and profits.

Property available for payment of debts, see post, § 272.

Title and authority as to rents and profits, see post, § 131.

Title and authority of representative, see post, § 131.

[a] Rents of real estate of a decedent, accruing before his death, do not vest in the heir, but go to the personal representative.—(*Sup.* 1863) *King v. Anderson*, 20 Ind. 385; (1884) *Dorsett v. Gray*, 98 Ind. 273.

[b] The rents and profits of a decedent's real estate, accruing after his death, do not go to the personal representative, but vest in the heirs and distributees.—(*Sup.* 1863) *King v. Anderson*, 20 Ind. 385; (1881) *Evans v. Hardy*, 76 Ind. 527; (1881) *Trimble v. Pollock*, 77 Ind. 576; (1884) *Dorsett v. Gray*, 98 Ind. 273.

[c] (*Sup.* 1882)

Where heirs are present and take charge of the realty, money received by an administrator for rent does not become a part of the assets, except under order of court or by agreement of the heirs.—*Kidwell v. Kidwell*, 84 Ind. 224.

[d] (*Sup.* 1885)

Rents accruing prior to an intestate's death are part of the assets; but, unless the land is required to pay the debt, they go to the heir.—*Humphries v. Davis*, 100 Ind. 369.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 283; 49 CENT. DIG. WILLS, §§ 1759-1780.

See, also, 18 Cyc. p. 182; note, 40 L. R. A. 321.

§ 42. Crops and products of land.

[a] (*Sup.* 1875)

The executor of a deceased person, and not a devisee, is entitled to crops growing on the de-

vised premises at the time of the testator's death.—*Humphrey v. Merritt*, 51 Ind. 197. .

[b] (*Sup.* 1876)

The emblements and annual crops with which an administrator is chargeable do not include those planted after his intestate's death.—*Rodman v. Rodman*, 54 Ind. 444.

[c] (*Sup.* 1878)

B. rented of S. a field adjacent to S.'s dwelling house, and sowed it in grain, which was growing at the death of S. By the terms of the tenancy B. was not to have any of the straw raised on the field. *Held*, that S.'s widow could recover from B. for a conversion of such straw as matured within "one year from the death of her husband."—*Swain v. Bartlow*, 62 Ind. 546.

[d] (*Sup.* 1881)

The words "emblements and annual crops," as used in 2 Rev. St. 1876, p. 505, § 34, requiring the administrator to take possession of and inventory "emblements and annual crops, whether severed or not from the land, raised by labor," do not include uncut grass growing in the field. That descends with the land to the heir.—*Evans v. Hardy*, 76 Ind. 527.

[e] (*Sup.* 1882)

Title to land being in the heirs, all the crops planted and growing after decedent's death belong to the heirs.—*Kidwell v. Kidwell*, 84 Ind. 224.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 284.

See, also, 18 Cyc. p. 184.

§ 43. Personal property in general.

Title and authority of executor or administrator, see post, § 153.

[a] (*Sup.* 1877)

Shares of bank stock belonging to a decedent estate are personalty.—*Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198.

[b] (*Sup.* 1877)

Where the owner agrees with a pork packer to have his hogs packed and is to be charged the regular rates for packing and 10 per cent. interest on all moneys "advanced on the hogs packed," the owner controlling their sale after being packed, and dies before they are disposed of, they constitute assets of his estate.—*East v. Ferguson*, 59 Ind. 169.

[c] (*Sup.* 1880)

Personal property, whether in possession or in action, does not descend to the heirs, but goes to the personal representatives of the deceased.—*Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161.

[d] (*Sup.* 1882)

The personalty of the deceased goes to the administrator, and not to the heir.—*Pond v. Sweetser*, 85 Ind. 144.

## [c] (Sup. 1891)

Shares of stock in a corporation are personal property, and on the death of the owner descend to his heirs at law subject to the right of his administrator to sell the same in the manner prescribed by the laws of the state.—*Citizens' St. Ry. Co. v. Robbins*, 26 N. E. 116, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445.

## [f] (App. 1903)

Burns' Rev. St. 1901, § 2417, provides that the "apparel and ornaments" of the widow of a decedent shall not be considered as part of his estate, and that wearing apparel of the decedent may be distributed by the widow among near relatives. Section 240 provides that all words, except technical words, having a peculiar and appropriate meaning at law, shall be taken in the usual sense. *Held*, that neither a watch, nor a watch chain, nor a charm, nor a ring, nor a diamond stud worth \$500, constituted wearing apparel of the decedent, within the meaning of the statute.—*Coffinberry v. Madden*, 66 N. E. 64, 30 Ind. App. 360, 96 Am. St. Rep. 349.

## [g] (Sup. 1906)

In the absence of a testamentary provision to the contrary, an executor is entitled to all of decedent's personal property for the purpose of administration.—*Hayes v. Shirk*, 167 Ind. 569, 78 N. E. 653.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 279, 281.

See, also, 18 Cyc. p. 172.

## § 44. Interests in partnerships.

Right and duty of surviving partner, see PARTNERSHIP, §§ 244-246, 249.

## [a] (Sup. 1883)

As the law vests the surviving partner with exclusive right and management of the assets of a firm for the purpose of closing the business, the surviving partner is not liable to an action by the administrator of the deceased partner until demand is made for settlement, and refusal.—*Anderson v. Ackerman*, 88 Ind. 481.

## [b] (App. 1905)

The administratrix of a deceased partner is entitled to no part of the partnership assets until the debts have been paid and accounts adjusted.—*Harrah v. State ex rel. Dyer*, 76 N. E. 443, 77 N. E. 747, 38 Ind. App. 495.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 295.

See, also, 18 Cyc. p. 189.

## § 45. Trust estates and other equitable estates and interests.

Right of action to enforce trust, see post, § 129.

## [c] (Sup. 1867)

An administrator cannot maintain an action to enforce a resulting trust in lands unless

it is shown that the lands, when recovered, will be needed for payment of debts.—*Matlock's Adm'r v. Nave*, 28 Ind. 35.

## [b] (Sup. 1874)

Pending attachment proceedings, an order of court was made, by consent of all parties in interest, that the sheriff should sell the goods attached on credit, taking the purchaser's notes with approved security. The sheriff made the sale, but took the notes payable to himself individually, and died before termination of the suit. *Held* that, as his administrators were not parties in interest, they could not maintain an action on the notes.—*Pratt v. Carr*, 46 Ind. 67.

Pending attachment proceedings, an order of court was made, by consent of all the parties in interest, authorizing the sheriff to sell the goods seized on credit, taking the notes of the purchasers with approved security. The sheriff made the sale, but took the notes payable to himself individually, and died before the termination of the suit. *Held*, that the sheriff had no interest in the notes which would pass to his administrator, but held them only as a trustee.—*Id.*

## [c] (Sup. 1882)

A. for many years held a sum of money, but not upon an express trust, the interest of which he annually paid to B. *Held*, that B.'s administrator could not maintain an action to recover the amount, no express trust being shown.—*Belknap v. Caldwell*, 82 Ind. 270.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 296,

307; 6 CENT. DIG. BANKS, § 332.

See, also, 18 Cyc. pp. 185, 193, 194.

## § 46. Interests under insurance policies.

Affecting right of election under will, see WILLS, § 785.

Right to proceeds of life or accident insurance policy payable to insured, his representatives or estate, see INSURANCE, § 583.

Right to proceeds of mutual benefit insurance, see INSURANCE, § 795.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 297.

See, also, 18 Cyc. p. 191.

## § 47. Legacies and distributive shares.

## [a] (Sup. 1870)

Where funds have remained on deposit with a clerk of court for seven years, waiting the call of a distributee, the other distributees are not the proper parties to sue therefor, on the theory that said distributee would be presumed to be dead, as such a claim could be sued for only by the personal representative of such distributee.—*Turner v. Campbell*, 34 Ind. 317.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 298.

See, also, 18 Cyc. p. 174.

**§ 48. Debts and rights of action.**

Assignment and transfer by executor or administrator, see post, § 171.

Indorsement and transfer of bills and notes, see post, § 170.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 301-305, 1873.

See, also, 18 Cyc. pp. 175-179.

**§ 49. — In general.**

Right of action for damages as property right, see DAMAGES, § 7.

**[a] (Sup. 1839)**

An administrator of the grantee of a deed containing covenants which run with the land cannot sue on such covenants without showing some special damage to have accrued to his intestate.—*Martin v. Baker*, 5 Blackf. 232.

**[b] (Sup. 1869)**

The heirs at law of a decedent against whose estate it appears any debts exist cannot maintain an action for money due the estate.—*Walpole's Adm'r v. Bishop*, 31 Ind. 156.

**[c] (Sup. 1870)**

Where a covenant against incumbrances in a deed of real estate is broken, and damages for the breach accrue during the lifetime of the person holding under such covenant, the right to sue on the covenant is a chose in action which does not descend to the heir, but his administrator must sue.—*Frink v. Bellis*, 33 Ind. 135, 5 Am. Rep. 193.

**[d] (Sup. 1871)**

Under 2 Gav. & H. St. p. 527, § 151, authorizing executors and administrators to sue, a right of action upon a breach of a covenant of seisin, although committed during the life of the covenantee, passes to his executor or administrator.—*Burnham v. Lasselle*, 35 Ind. 425.

**[e] (Sup. 1880)**

The general rule is that damages to land remaining uncollected do not pass to the vendee or descend to the heir.—*Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161.

**[f] (Sup. 1881)**

Where a covenant of warranty is broken in the lifetime of the covenantee, and possession is surrendered by him to the holder of the paramount title, and the covenantee has died, the action for the breach should be brought by the administrator.—*Wilson v. Peelle*, 78 Ind. 384.

[g] Where the owner died after a right of action accrued for an appropriation of land by a railroad, such right did not descend to his heir, but was a chose in action recoverable by his administrator.—(Sup. 1892) *Harshbarger v. Midland R. Co.*, 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083; (1899) *Indianapolis & V. R. Co. v. Price*, 53 N. E. 1018, 153 Ind. 31.

**[h] (App. 1909)**

An action for waste committed on real estate during the lifetime of an incompetent, who had conveyed the property, passes on his death to the administrator.—*Kamman v. D'Heur & Swain Lumber Co.*, 43 Ind. App. 672, 88 N. E. 348.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 301, 303-305.

See, also, 18 Cyc. p. 175.

**§ 52. — Evidence of indebtedness.****[a] (Sup. 1852)**

In an action of assumpsit by an administrator for a quantity of charcoal delivered and money lent by the intestate to the defendant, the plaintiff proved the first item clearly, and, in order to prove the latter, introduced a witness who testified that he heard the defendant tell the intestate at, etc., that, if the latter would advance the money and purchase iron for a wagon, he would put the iron on the wagon, sell the wagon, and pay the intestate what he owed him, and that the intestate purchased and paid for the iron and delivered it to the defendant. The witness was the holder of a claim against the intestate's estate, but it did not appear that the estate was insolvent. The jury found for the plaintiff the said items of indebtedness, with interest till the giving of the verdict. *Held*, that the jury were authorized to infer that the intestate bought iron enough to iron the wagon and to allow interest on both items to the time of giving their verdict.—*Martin v. Barlow*, 3 Ind. 367.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 1873.

See, also, 18 Cyc. pp. 175-179.

**§ 54. Ownership of property at time of death.****FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 306, 308-310, 1875.

See, also, 18 Cyc. pp. 191-195.

**§ 56. — Property disposed of by decedent.****[a] (Sup. 1894)**

Where a widow, holding land conveyed her by her husband, has agreed with his heirs to convey it to them, they to give her certain money and provisions, and pay expenses incurred by her in regard to the land, the administrator cannot, in order to subject the land to debts of deceased, sue her for specific performance, since she promised nothing for the creditor; nor would the land, if validly conveyed to her, and by her conveyed to said heirs, be subject to said debts.—*Wilson v. Boone*, 136 Ind. 142, 35 N. E. 1096.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 308.

### § 57. — Property fraudulently conveyed.

Conditions precedent to suit to set aside, see post, § 431.

Remedies of creditors, see post, § 423.

#### [a] (Sup. 1832)

G. recovered judgment in 1826 against W. and another, administrators of the estate of H. for a debt due from the intestate. A bill in chancery was filed in March, 1827, by G. against the heirs and representatives of H. The object of the bill was to obtain a discovery of assets, etc., and to render liable to the judgment at law certain real estate, for which H. in his lifetime held a title bond, and which bond he had fraudulently assigned to W., his father-in-law, for the express purpose of defrauding G. This fraudulent assignment was made in 1819, pending a suit by G. against the assignor, for a part of the same debt for which the judgment in 1826 was obtained. In 1825, after H's death, W. obtained from the obligor of the title bond, on paying a small balance of the purchase money left unpaid by H., a deed for the lands described in the bond, and soon afterwards W. conveyed a part of the property, without valuable consideration, to his daughter, who was the widow of H. *Held*, that the lands described in the deed to W. from the obligor of the title bond were subject to the judgment of G., and should be sold.—*Wayman v. Hardin*, 3 Blackf. 26.

#### [b] (Sup. 1835)

Where a conveyance made by an intestate in his lifetime has, after his death, been avoided by his creditors as being fraudulent as to them, and the land sold by decree of court, neither the administrators nor the probate court has any control over the proceeds of sale.—*Bank of United States v. Burke*, 4 Blackf. 141.

[c] An administrator, whose intestate's estate is insufficient to pay his debts, may avoid a fraudulent disposition of property made by him in his lifetime.—(Sup. 1862) *Hess v. Hess' Adm'r*, 19 Ind. 238; (1881) *Martin v. Bolton*, 75 Ind. 295.

#### [d] (Sup. 1862)

The personal representative of a deceased fraudulent assignor of choses in action cannot recover the choses or their value from the fraudulent assignee for the purpose of distribution to the heirs of the deceased assignor because such assignment, though fraudulent, is good against the assignor and his heirs.—*Hess v. Hess' Adm'r*, 19 Ind. 238.

#### [e] (Sup. 1876)

A personal representative of decedent cannot impeach a transfer made by him, though it is fraudulent as to creditors.—*Garner v. Graves*, 54 Ind. 188.

#### [f] (Sup. 1881)

A personal representative of decedent can impeach a transfer made by him, though it is fraudulent as to creditors.—*Johnson v. Jones*, 79 Ind. 141.

#### [g] (Sup. 1881)

A complaint by an administrator under 2 Rev. St. 1876, p. 527 (Rev. St. 1881, § 2335), to set aside a fraudulent conveyance by his intestate, should show that at the time of his death he did not have sufficient other property to pay his debts, or that there was not at the commencement of the suit sufficient other property to satisfy the claims of creditors.—*Cox v. Hunter*, 79 Ind. 590.

#### [h] (Sup. 1883)

After a creditor has maintained an action under Rev. St. § 2335, to set aside fraudulent conveyances of land by a decedent, the land becomes assets in the hands of the administrator or executor.—*Bottorff v. Covert*, 90 Ind. 508.

Under Rev. St. 1881, § 2335, rendering lands fraudulently conveyed liable to be sold for the debts of a decedent, an executor or administrator who has been authorized to sell lands thus conveyed can file a petition, before the sale, to avoid the fraudulent conveyance.—*Id.*

#### [i] (Sup. 1884)

Property fraudulently conveyed by a deceased debtor is assets of his estate, and must be administered the same as other assets.—*Vestal v. Allen*, 94 Ind. 268.

#### [j] (Sup. 1898)

Under Burns' Rev. St. 1894, §§ 2486-2488, it is only when it is necessary to pay the debts of the estate of a decedent that an administrator can sustain an action to set aside conveyances of real estate made by his intestate.—*Jarrell v. Brubaker*, 49 N. E. 1050, 150 Ind. 260.

The setting aside of a fraudulent conveyance made by decedent, in an action by his administrator (Burns' Rev. St. 1894, §§ 2486-2488; Horner's Rev. St. 1897, §§ 2333-2335), gives the administrator such an interest in the property as to authorize him to bring an action to vacate a writ of venditioni exponas issued thereon.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 309.

See, also, 18 Cyc. p. 195.

### § 59. — Evidence of ownership.

#### [a] (App. 1898)

In an action by an administrator for possession of notes of his decedent, assessment lists made by decedent in his life would be competent evidence, as tending to prove ownership of the property listed.—*McAfee v. Montgomery*, 51 N. E. 957, 21 Ind. App. 196.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1875.

See, also, 18 Cyc. p. 193.

### § 62. Appraisal and inventory.

Admissibility in evidence in action to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, § 288.

Appraisal of property to be sold under order of court, see post, § 353.

Necessity for appraisal before allotment of widow's allowance, see post, § 192.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 311-322.

See, also, 18 Cyc. pp. 197-203.

### § 63. — Necessity and purpose.

[a] (Sup. 1859)

By 2 Rev. St. p. 279, estates worth less than \$300 are to be inventoried and appraised and settled without an administrator; but, if it turn out that it be worth more than \$300, an administrator is to be appointed, and, when appointed, he is to proceed de novo to make a new inventory and appraisement, and the former appraisement is not conclusive.—Pace v. Oppenheim, 12 Ind. 533.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 311, 312.

See, also, 18 Cyc. p. 197.

### § 66. — Property to be included.

[a] (Sup. 1883)

The gift of a part of an executor's note to him by the testator, if perfected by delivery, would have excused the executor from including such part of the note in the inventory of the testator's estate, but, in that event, he should have charged himself as executor, in some manner, with the residue of the note.—Taylor v. Burk, 91 Ind. 252.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 315.

See, also, 18 Cyc. p. 199.

### § 72. — Operation and effect.

[a] (Sup. 1876)

The fact that an administrator has included in the inventory the annual crops planted after the intestate's death does not render the estate, or himself as administrator, liable for them to the owner.—Rodman v. Rodman, 54 Ind. 444.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 321.

See, also, 18 Cyc. p. 202.

## IV. COLLECTION AND MANAGEMENT OF ESTATE.

Actions by or against executors or administrators, see post, §§ 421-457.

Administration of insolvent estates, see post, §§ 410-418.

By surviving partner, see PARTNERSHIP, §§ 244-247, 254, 255.

Foreign and ancillary administration, see post, § 519.

Liabilities for conduct and defense of actions, see post, § 457.

Liabilities of executor de son tort to rightful executor or administrator, see post, § 540.

Liabilities on sale of property under order of court, see post, §§ 391, 392.

Liability of clerk of court on official bond for misappropriation of funds of estate, see CLERKS OF COURTS, § 74.

Removal of executor or administrator for mismanagement, see ante, § 35.

Review of accounting and settlement of personal representative, see post, § 510.

Review of decisions, see APPEAL AND ERROR, § 671.

Surviving partner, see PARTNERSHIP, § 249.

Validity and execution of testamentary powers, see POWERS.

### (A) IN GENERAL.

By surviving partner, see PARTNERSHIP, §§ 244, 245, 249, 255.

Estoppel of administrator to assert claim in favor of estate, see ESTOPPEL, § 70.

### § 74. Representation of decedent.

Representation of creditors in collection of assets, see post, § 86.

[a] (Sup. 1873)

Letters testamentary give the executor the power and right to administer all the property of the testator, though a part of the property is not bequeathed by the will.—Landers v. Stone, 45 Ind. 404.

[b] (App. 1907)

The law does not enlarge the rights of an administrator beyond the rights of the deceased if he were alive; but the administrator stands as the representative of the deceased in his place and in his stead with no greater or less power.—Hatfield v. Mahoney, 39 Ind. App. 499, 79 N. E. 408, 1086.

#### FOR CASES FROM OTHER STATES,

See 18 Cyc. p. 206.

### § 76. Jurisdiction of courts.

[a] (App. 1902)

An administrator de bonis non sued to determine the ownership of certain building stock, which he claimed as an asset of his decedent's estate, and which was also claimed as an asset of the estate of the former administrator, and was in possession of her executor, a corporation domiciled in another state from that in which the building association was situated. It was sought to restrain the administrator of the former administrator from collecting the certificate and the association from paying it, but no personal judgment was sought against either of the parties defendant. *Held*, that the fact that defendant had inventoried the certificate as an asset of the estate of its decedent did not destroy the jurisdiction of the

court over the subject-matter.—*Michigan Trust Co. v. Probasco*, 63 N. E. 255, 29 Ind. App. 109.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 323, 336-338.

See, also, note, 32 Am. Dec. 632.

**§ 77. Powers before issue of letters or qualification.**

Petition to sell real estate before appointment, see post, § 336.

[a] (Sup. 1824)

Executors must prove the will and take out letters testamentary before the filing of their declaration.—*Call v. Ewing*, 1 Blackf. 301.

[b] (App. 1900)

Acts done by an executor in the interest of his trust, prior to his qualification as such, become binding on the estate upon his qualification; hence plaintiffs, who had, in their capacity as attorneys, given defendant, previous to his qualification, advice as to whether he could qualify as executor and as to his bond, and had rendered services in procuring such bond, are entitled to file their claim therefor against, and collect the same out of, the estate which defendant represented.—*Baker v. Cauthorn*, 55 N. E. 963, 23 Ind. App. 611, 77 Am. St. Rep. 443.

[c] (Sup. 1908)

Both at common law and under the statute an executor succeeds to the possession of the testator, and under *Burns' Ann. St. 1901*, § 2378, it is his duty, even before letters are issued to him, to care for and preserve the property, and he may therefore bind the estate in matters pertaining to the custody and care of the assets.—*Alerding v. Allison*, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. Rep. 363.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 326-329.

See, also, 18 Cyc. pp. 212-214; note, 55 Am. Dec. 436.

**§ 81. Execution of provisions of will in general.**

Power of executor over property not passing by will, see ante, § 74.

[a] (Sup. 1906)

The proceedings of an executor in the settlement of an estate are based on preliminary judgment, which establishes the validity of the will, subject only to the statutory right of contest, and it is the intention of the statute that, in the absence of an intervening contest, the estate shall proceed to final settlement and the assets be distributed under the will as though those provisions were not subject to contest.—*Foley v. O'Donoghue*, 167 Ind. 134, 77 N. E. 352.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 323, 334.

See, also, 18 Cyc. p. 207.

**§ 82. Instructions of court.**

As to deposit of money, see post, § 105.

Disobedience of orders ground for removal, see ante, § 35.

For application of rents of realty to payment of debts, see post, § 272.

Sales without order of court, see post, §§ 136-148, 157-168.

[a] (App. 1910)

The denial of a petition by an administrator for leave to expend funds of the estate for the erection of a monument cannot be reviewed except for an abuse of discretion.—*In re Gray's Estate*, 91 N. E. 745.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 335.

See, also, 18 Cyc. pp. 208, 1352; note, 99 Am. Dec. 394.

**§ 83. Discovery and collection of assets.**

By special administrator, see post, § 122.

By surviving partner, see PARTNERSHIP, §§ 244, 245, 249.

Control over property fraudulently conveyed after vacation of conveyance, see ante, § 57.

Property constituting assets, see ante, §§ 38-72.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 339-396.

See, also, 18 Cyc. pp. 215-233; note, 115 Am. St. Rep. 208.

**§ 85. — Proceedings for discovery of assets.**

[a] (Sup. 1832)

G. recovered judgment in 1826 against W. and another, administrators of the estate of H., for a debt due from the intestate. A bill in chancery was afterwards, viz., in March, 1827, filed by G. against the heirs and representatives of H. The object of the bill was to obtain a discovery of assets, etc., and to render liable to the judgment at law certain real estate for which H. in his lifetime held a titlebond, and which bond he had fraudulently assigned to W., his father-in-law, for the express purpose of defrauding G. This fraudulent assignment was made in 1819, pending a suit by G. against the assignor, for a part of the same debt for which the judgment in 1826 was obtained. In 1825, after H.'s death, W. obtained from the obligor of the titlebond on paying a small balance of the purchase money left unpaid by H., a deed for the lands described in the bond; and soon afterwards W. conveyed a part of the property, without valuable consideration, to his daughter, who was the widow of H. Held, that the administrators of H. should account for assets, to a certain amount, found to be in their hands.—*Wayman v. Hardin*, 3 Blackf. 26.

[b] (Sup. 1900)

A complaint disclosing defendant's possession of money and property of the estate of a decedent, to which complainant is entitled as administratrix, and his refusal to settle, entitles complainant to an accounting.—*Shrum v. Simpson*, 57 N. E. 708, 155 Ind. 160, 49 L. R. A. 792.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 323, 339-358.

See, also, 18 Cyc. pp. 215-218.

### § 86. — Collection and protection of assets in general.

Exclusive or concurrent jurisdiction of action to set aside fraudulent conveyance, see COURTS, § 472.

[a] (Sup. 1835)

Payments made to an infant administratrix by the debtors of the intestate, and delivery of goods to her by her co-administrators, made while her letters were unrevoked, were as if her authority was undisputed, as the granting of letters is a judicial act, and individuals may presume the appointment valid.—*Ray v. Doughty*, 4 Blackf. 115.

[b] (Sup. 1870)

An administrator can receive, as satisfaction of a note payable to him as administrator, a claim existing in favor of the maker against a third person.—*Hancock v. Morgan*, 34 Ind. 524.

[c] (Sup. 1880)

An executor may assign or release debts of the estate, may exercise acts of ownership over them, in regard to their security or collection, and may extend the time of payment of a debt.—*Underwood v. Sample*, 70 Ind. 446.

[d] (Sup. 1831)

So long as the state remains unsettled, and the choses in action are in the hands of the administrator, he is entitled to reduce them to money by suit or otherwise.—*Brannock v. Stocker*, 76 Ind. 573.

[e] (Sup. 1884)

An administrator represents creditors in the collection of money due the estate, and whether the money is owing from a public officer or private individual, he has a right to secure it for the purpose of making it assets, and may maintain an action therefor.—*Henry v. State ex rel. Franklin*, 98 Ind. 381.

[f] (Sup. 1894)

Where there are no unpaid claims against an estate, and the administrator has sufficient funds to pay the cash legacies, he will not be allowed to sue a distributee to foreclose a mortgage, when it has been agreed that he should take his mortgage notes as part of his distributive share, and he is willing to do so, and the only reason for bringing the action is to coerce the distributee to agree to a greater al-

lowance to the administrator and his attorney than the court had allowed.—*Raugh v. Weis*, 138 Ind. 42, 37 N. E. 331.

[g] (Sup. 1895)

An executor is bound to acquire the assets of the estate and distribute the same, likewise an administrator, and for this purpose he is required to take such steps as may be necessary to correct all mistakes and errors in any former proceeding in the estate.—*Glessner v. Clark*, 39 N. E. 544, 140 Ind. 427.

[h] (Sup. 1899)

Where some of the children of a mortgagee, for whose benefit a purchase-money mortgage was taken, are dead, and their administrator in the settlement of their estates did not take into account their interest in the mortgage, the failure of the administrator to make inquiries concerning the indebtedness of the mortgagor to the estates does not affect the rights of the parties to the mortgage. Judgment (Sup. 1897) 47 N. E. 1063, reversed on rehearing.—*Brunson v. Henry*, 52 N. E. 407, 152 Ind. 310.

[i] (Sup. 1905)

Where sureties have been compelled to make payment for breaches of an official bond by the principal, an executrix of a surety is entitled to sue in her representative capacity to enforce a demand in favor of her decedent against the principal's estate and a grantee to whom he had fraudulently conveyed property.—*Coffinberry v. McClellan*, 73 N. E. 97, 164 Ind. 131.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 323, 359-383.

See, also, 18 Cyc. pp. 218-226.

### § 87. — Compromise or release of claims.

See ante, § 86.

[a] (Sup. 1870)

Where an administrator holds a note payable to him as such, and agrees to receive in satisfaction thereof a claim by the maker against a third party, the maker cannot be released without the assignment of the claim to the administrator and an agreement by said third person to pay the administrator.—*Hancock v. Morgan*, 34 Ind. 524.

[b] (Sup. 1887)

An administrator has power, in good faith and upon a sufficient consideration, to release the maker of a note due the estate.—*Latta v. Miller*, 109 Ind. 302, 10 N. E. 100.

[c] (Sup. 1887)

Rev. St. § 2265, authorizes executors and administrators to release and discharge mortgages when the debts secured thereby are paid. Held, that a recorded release given by the administratrix of the mortgagor can be relied upon without further inquiry, by subsequent

mortgagees, who act in good faith without notice.—*Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655.

[d] (Sup. 1903)

A railroad employé was a member of a relief association organized and supported by the company and employes. The by-laws provided for the payment of benefits in case of injury or death, and that the acceptance of such benefits should release the company from all liability, and that no payments should be made while any suit for damages was pending, or if damages were recovered. The employé was killed through the negligence of the company, leaving a widow, to whom his benefit certificate was payable, and children. The widow was appointed administratrix, and the amount due under such certificate paid to her on her executing a receipt acknowledging the sum paid as received in full satisfaction of such certificate and of all claims or demands against the relief fund and railroad company on account of such death. She signed the receipt individually and as "admrx." *Held* that, as such administratrix, she had authority to so settle the claim, and the settlement was binding on the children.—*Pittsburgh, C. & St. L. R. Co. v. Gipe*, 65 N. E. 1034, 160 Ind. 360.

Though her signature to the receipt did not state of what estate she was administratrix, it must be inferred from the context that she signed as administratrix of her deceased husband.—*Id.*

Though the amount paid under the certificate was only the amount which by its terms was payable to the widow, by receiving it as administratrix also she was bound thereby to account for it in her capacity as administratrix, and it therefore furnished consideration for the release in that capacity.—*Id.*

The authority given to administrators by Burns' Rev. St. 1901, §§ 2454, 2456, to compromise debts due to the estate only when ordered by the probate court, relates only to debts and demands in favor of the estate, and does not relate to the right of action given for wrongfully causing the death of the decedent.—*Id.*

[e] (App. 1903)

A release by an executor of a judgment which is a lien on realty is valid, where it is not executed without consideration, and no fraud, collusion, or wasting of the assets of the estate is shown.—*McCleary v. Chipman*, 68 N. E. 320, 32 Ind. App. 489.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 323, 384-392.

See, also, 18 Cyc. pp. 226-229; note, 14 L. R. A. 414.

§ 89. — Failure to collect.

[a] (Sup. 1886)

An executor who fails to use due diligence in collecting a claim due the estate becomes personally liable for any loss caused thereby, though the claim may be a debt from himself individually.—*Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751.

[b] (App. 1910)

Where a distributee of an estate did not dispute the alleged insolvency of a debtor to the estate until 37 years after decedent's death, a finding that the claim was uncollectible, and that the administrator should not be charged therewith would not be set aside.—*Fletcher v. Nicholson*, 90 N. E. 910.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 393-396.  
See, also, 18 Cyc. pp. 231-233.

§ 90. Custody and management of estate.

Authority of administrator de bonis non to carry on business of decedent, see post, § 120. By surviving partner, see PARTNERSHIP, §§ 244, 245, 249, 254, 255.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 397, 398, 400-406.  
See, also, 18 Cyc. pp. 233-245.

§ 91. — In general.

[a] (Sup. 1889)

It is proper for an administrator whose intestate has signed certain notes as surety to take from the principal debtor, without order of court therefor, a chattel mortgage to indemnify the estate against loss on account of such notes.—*Walling v. Lewis*, 119 Ind. 496, 21 N. E. 1108.

[b] (Sup. 1906)

Where property on the death of the owner descends to the heirs, the executor has no control over it unless so provided by the owner's will.—*Hayes v. Shirk*, 167 Ind. 509, 78 N. E. 653.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 397, 398, 400-402.  
See, also, 18 Cyc. pp. 233-237.

§ 92. — Performance of decedent's obligations.

Discharge of contracts by death of party, see CONTRACTS, § 311.

[a] (Sup. 1865)

The administrator of a deceased tenant cannot, by selling and assigning the lease, relieve himself from the obligation to pay rent accruing subsequent to the death of his intestate.—*Carley v. Lewis*, 24 Ind. 23.

[b] (Sup. 1837)

Where the owner of a stallion insures the getting of a mare with foal by such stallion



upon condition that the owner of the mare should not part with such ownership within 11 months, he to forfeit the insurance and pay an agreed price for the service if he should do so, and, the owner of the mare having died, his executor sells the mare within the 11 months, the estate is liable to pay for such service, although the mare is not with foal, as the fact of his death did not relieve his executors from the necessity of complying with the condition.—*Cummins v. Peed*, 109 Ind. 71, 9 N. E. 603.

[c] (App. 1909)

A contract of a person of unsound mind, but not judicially declared incompetent, may be avoided by his representative, where such person continued incompetent until death.—*Wilson v. Fahnstock*, 86 N. E. 1037.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 403-406.  
See, also, 18 Cyc. p. 239.

### § 93. — Continuance of decedent's business.

By surviving partner, see PARTNERSHIP, § 255.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 407, 408.  
See, also, 18 Cyc. pp. 241-245.

### § 94. Partnership.

Right and duty of surviving partner, see PARTNERSHIP, §§ 244, 245, 249.

[a] (Sup. 1856)

After the dissolution of a partnership, one of the partners received, and undertook to collect and account for, the partnership claims. He died, and the uncollected claims came into the hands of his administrator. The survivor brought an action against the administrator for carelessly losing such claims, and the action was sustained.—*Brandon v. Judah*, 7 Ind. 545.

[b] (Sup. 1873)

Before a suit can be maintained by an administrator de bonis non against a surviving partner to recover the share of the decedent in the partnership assets, a demand for a settlement and accounting is necessary. The fact that the surviving partner was the original administrator, and never made any settlement as such, and had been removed and the plaintiff appointed in his place, does not obviate the necessity of such demand, unless it is shown that, as surviving partner, he has violated his trust by failing to discharge his duties.—*Skillen v. Jones*, 44 Ind. 130.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 409.  
See, also, 18 Cyc. p. 245; notes, 27 L. R. A. 340; 28 L. R. A. 99, 105, 136; notes, 56 Am. Dec. 517; 86 Am. Dec. 600.

### § 95. Contracts.

Application of statute of frauds to promises by executor or administrator, see FRAUDS, STATUTE OF, §§ 9-12.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 410-419.

See, also, 18 Cyc. pp. 247-253; note, 52 Am. St. Rep. 118.

### § 96. — In general.

[a] (Sup. 1358)

Where a contract of an agent of an administrator does not relate to a subject-matter about which, as administrator, he is authorized to negotiate, he is personally responsible; or, if the agent exceeded his authority, the agent might be liable.—*Lewis v. Reed*, 11 Ind. 239.

[b] (Sup. 1881)

Contracts of executors, though made in the interests and for the benefit of the estate they represent, if made upon a new and independent consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate.—*Holderbaugh v. Turpin*, 75 Ind. 84, 39 Am. Rep. 124.

The mere fact that matters involved in an individual contract of an administrator grew out of an action prosecuted by him as administrator will not warrant the inference, as against the positive allegations of the complaint against him, that he bound himself only in his representative capacity.—*Id.*

[c] (Sup. 1882)

A mere promise made by an administrator will not bind the estate represented by him, unless it appears that he had the right to charge the estate, or that the consideration for the promise arose prior to the intestate's death.—*Moody v. Shaw*, 85 Ind. 88.

[d] (App. 1891)

The personal promise of an administrator to pay a debt contracted by decedent, if the assets of the estate are not sufficient, is without consideration and void.—*Vogel v. O'Toole*, 2 Ind. App. 196, 28 N. E. 209.

[e] (Sup. 1906)

An executor has no power to make a new and independent contract imposing a charge on decedent's estate, even for the benefit of the estate.—*Hayes v. Shirk*, 167 Ind. 560, 78 N. E. 653.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 410, 412, 413, 417, 418.

See, also, 18 Cyc. p. 247.

### § 97. — Services.

By co-executor, see post, § 125.

Expenditures for counsel fees, see post, § 111.

[a] (Sup. 1858)

An administrator can appoint an agent to do particular acts. Thus he may employ an

attorney or an auctioneer to sell goods which he is authorized by court to sell at public sale.—*Lewis v. Reed*, 11 Ind. 239.

[b] (Sup. 1877)

If an executor or administrator employs an attorney at law to transact business connected with the settlement of his decedent's estate, without a special agreement to look to such estate alone for payment, he will be personally liable to the attorney for the value of such services.—*Long v. Rodman*, 58 Ind. 58.

[c] (Sup. 1883)

An executor or administrator may, when proper to do so, employ an attorney in the management of the estate and in such case he is personally liable for the payment of his fees, unless there is a special agreement that the attorney shall look to the estate alone for their payment.—*Scott v. Dailey*, 80 Ind. 477.

[d] (Sup. 1884)

An agreement by an administrator to pay for sawing certain logs belonging to his intestate binds the administrator personally.—*Bott v. Barr*, 95 Ind. 243.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 411, 411½.

See, also, 18 Cyc. p. 249; note, 93 Am. Dec. 393.

§ 99. — Bills and notes.

Indorsement and transfer by executor or administrator, see post, § 170.

[a] (Sup. 1827)

An administrator upon whom an invalid bill of exchange was drawn promised the holder, if he would retain the bill, it should be paid whenever a certain farm should be sold. Held that, as the consideration arose after the intestate's death, no action would lie against the administrator, so as to charge the estate of the intestate.—*Mills v. Kuykendall*, 2 Blackf. 47.

[b] (Sup. 1861)

A note given by administrators in part payment of a debt of the deceased, if it can be enforced, is collectible from the assets of the estate, unless some cause can be shown for fixing an individual liability on the administrators.—*Grimes v. Blake*, 16 Ind. 160.

[c] (Sup. 1877)

Where, in renewal of a matured promissory note executed by his decedent, the administrator or executor of an estate, as such, executes to the payee a new promissory note, he thereby becomes personally liable, but the estate is not bound.—*Cornthwaite v. First Nat. Bank of Rockville*, 57 Ind. 268.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 415, 417, 754.

See, also, 18 Cyc. p. 252.

§ 100. — Guaranty or suretyship.

[a] (Sup. 1862)

The rule that where a creditor has the personal security of his debtor, and also holds property of the debtor as a pledge for the same indebtedness, he must hold the property for the benefit of the surety as well as his own, applies to and affects persons acting in a fiduciary capacity as executors.—*Stewart v. Davis' Ex'r*, 18 Ind. 74.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 416.

See, also, 18 Cyc. p. 253.

§ 104. Interest on funds of estate.

On amount of uncollected proceeds of sale, see post, § 161.

Right of heir to interest or distributive share, see post, § 313.

[a] (Sup. 1835)

An administrator is liable for any interest he may have collected on any debts due the estate.—*Ray v. Doughty*, 4 Blackf. 115.

[b] (Sup. 1867)

An executor or administrator cannot be charged with interest on money collected by him merely because he has not reported it or paid it into court, where there has been no order of the court requiring him to do so.—*Dufour v. Dufour*, 28 Ind. 421.

Mere delay in closing the administration of an estate, when it does not appear to have been needless, though accompanied by demands of the executor for credits which the court properly disallows, will not justify the court in charging him with interest on balances in his hands.—Id.

Where an executor has improperly kept the legatees out of the use of their money, he is liable for interest thereon, and mere delay in settling the estate is sometimes prima facie evidence of his having done so; but where an estate is large, consisting of real estate, directed to be subdivided into town lots and sold, and the proceeds collected, and of choses in action to be collected in several counties, and where the executor has years before the final settlement of the estate paid out to the legatees very nearly the whole of their shares, such delay is not shown.—Id.

[c] (Sup. 1870)

An administrator delayed some 10 years in settling the estate, using the money of the trust in his own private speculations and, upon a reference of his accounts to a master, it did not appear that there was any reason for any unusual delay in the settlement, and the administrator refused to account to the master for the result of said speculations. The master in making his report charged interest after the first year from the granting of administration on balances in the hands of the administrator. Held, that there was no error of which the administrator could avail himself, though the mas-

ter should have charged compound interest, making annual rests, in the accounts for that purpose.—*Johnson's Adm'r's v. Hedrick*, 33 Ind. 129, 5 Am. Rep. 191.

Where an administrator delayed in settling an estate, using the money of the trust in his own speculations, and upon reference of his accounts to a master it did not appear that there was any reason for the delay, and the administrator refused to account to the master for the result of such speculation, the administrator was chargeable with interest on the balances in his hands from the first year after the granting of letters.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 423-432.

See, also, 18 Cyc. pp. 255-263; note, 29 L. R. A. 622.

#### § 105. Deposits.

[a] (Sup. 1867)

An executor or administrator has no authority to pay a balance in his hands into court, except in pursuance of an order of the court.—*Dufour v. Dufour*, 28 Ind. 421.

[b] (Sup. 1884)

A finding that for five years a bank in which an administrator deposited the funds of the estate had the reputation of being an unsafe and weak bank in Indianapolis and the surrounding neighborhood, which reputation the administrator could have learned by ordinary and reasonable diligence, is not sustained where the evidence conclusively showed that the general public opinion was that the bank was a safe place of deposit from the time the administrator was appointed until the time of its failure, and that he did not rely on public opinion alone, but made inquiry as to the condition of the bank, and was informed by another banker that it was solvent.—*Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739.

An administrator is not liable for the loss of estate funds, deposited by him in a bank generally reputed and supposed by him to be solvent, by the subsequent failure of the bank.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 399.

See, also, 18 Cyc. p. 257; note, 98 Am. St. Rep. 371.

#### § 106. Loans.

[a] (Sup. 1846)

Where an administrator loaned the money of the estate while debts remained unpaid, he is guilty of waste, and liable for the amount so loaned.—*State ex rel. Adams v. Johnson*, 7 Blackf. 529.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 433.

See, also, 18 Cyc. p. 264.

#### § 108. Expenditures.

Advances to pay claims against estate, see post, § 266.

By surviving partner, see PARTNERSHIP, § 249.

Compensation of executor or administrator, see post, §§ 488-501.

Expenses as claims against estate, see post, § 218.

On sale of property of decedent, see post, § 401.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 435-462, 763.

See, also, 18 Cyc. pp. 265-287.

#### § 109. — In general.

[a] (Sup. 1886)

The court made an allowance for the expense of removing and reintering the remains of a deceased person upon the petition of the administratrix, and subsequently set aside the allowance on the petition of the heirs. *Held* that the court had authority to set aside the allowance, and that the fact that the administratrix had expended money on the faith of the order of the court did not preclude the court from annulling it upon evidence that the petition on which it was made did not fully and truly state the facts.—*Watkins v. Romine*, 106 Ind. 378, 7 N. E. 193.

[b] (App. 1910)

There was no abuse of discretion in denying the petition of an administrator for leave to expend funds of the estate in the erection of a mausoleum in honor of the family of which decedent was a member on the family burial plat, far removed from decedent's grave.—*In re Gray's Estate*, 91 N. E. 745.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 435-438, 440-447, 763.

See, also, 18 Cyc. p. 265.

#### § 111. — Counsel fees and costs.

Allowance in probate proceedings or actions relating to wills or probate, see WILLS, §§ 406-415.

Appeal from allowance, who entitled to appeal, see APPEAL AND ERROR, § 151.

Costs in action by or against executors or administrators, see post, § 456.

Costs on accounting, see post, § 511.

Expenses as credit in account, see post, § 485.

[a] (Sup. 1870)

A decedent's estate is chargeable with the reasonable expenses of the executor in an unsuccessful effort made by him in good faith to resist a contest of the will of the decedent.—*Bratney v. Curry*, 33 Ind. 399.

[b] (Sup. 1883)

Under Rev. St. 1881, § 2396, it is the duty of the court to make an allowance to the executor or administrator for reasonable attorney fees where an attorney is employed in the man-

agement of the estate.—*Scott v. Dailey*, 89 Ind. 477.

[c] (*Sup.* 1884)

An administrator of an estate, on settlement of his accounts, cannot receive credit for attorney's fees incurred by him and paid to a firm of lawyers of which he is himself a member and entitled to share in the account so paid.—*Taylor v. Wright*, 93 Ind. 121.

[d] (*App.* 1894)

The court may allow reasonable attorneys' fees to an executor where he employs counsel in the management of the estate.—*Roll v. Mason*, 37 N. E. 298, 9 Ind. App. 651.

Where a matter in litigation concerns an executor both personally and officially, it is proper to apportion the counsel fees.—*Id.*

[e] (*App.* 1902)

An estate is not chargeable with the expenses of litigation carried on by the administrator in which the estate has no interest.—*Cullen v. State ex rel. Brown*, 62 N. E. 759, 28 Ind. App. 335.

[f] (*App.* 1907)

Though executors promise to pay a certain sum as attorney's fees, if the amount is excessive there is no consideration for the promise as to such excess.—*Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523.

[g] (*App.* 1910)

The probate court in making an administrator allowance for attorney's fees acts largely within its discretion.—*Richey v. Cleet*, 92 N. E. 175.

The probate court is not bound by any contract made between the administrator and his attorneys, unless it has been specifically authorized by the court, and before an administrator or his attorney can claim to be allowed for such services, under a contract, it must be shown that the contract was reasonable and just to the estate.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 448-462.  
See, also, 18 Cyc. pp. 273-283.

§ 113. Confession of judgment.

[a] (*App.* 1837)

Rev. St. 1894, § 2480 (Rev. St. 1881, § 2325), providing that the trial of claims against a decedent's estate, transferred to the issue docket, shall be conducted as in ordinary civil cases, refers to the manner of proceeding, and has no reference to Rev. St. 1894, § 522 (Rev. St. 1881, § 514), providing that defendant may offer any amount, and, if a greater amount is not recovered, costs shall be on plaintiff, and does not authorize an administrator to allow judgment to go by confession, which power, given an administrator by Act Sept. 19, 1881, § 103 (Rev. St. 1881, § 2327), was taken away by Act March 7, 1883, § 35 (Acts 1883, p. 164).

—*Hanna v. Dunham*, 38 N. E. 343, 10 Ind. App. 611.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 464.  
See, also, 18 Cyc. p. 211.

§ 114. Estoppel.

To deny validity of election under will, see WILLS, § 799.

[a] (*Sup.* 1837)

Where a third person is induced to purchase a note due from an intestate's estate by the promise of an administrator that it would be paid, the administrator is personally liable thereon.—*Hackleman v. Miller*, 4 Blackf. 322.

[b] (*Sup.* 1881)

A claim against an estate was based on a note executed by decedent. The answer averred that at the time the decedent, who had died intestate, executed the note, he also executed a mortgage on certain land to secure its payment, and that afterwards the note was indorsed to W. from whom the plaintiff claimed title to the note; that while foreclosure proceedings were pending, but before final judgment, W. indorsed the note to plaintiff, who was then, and continued to be, a nonresident, but who had notice of the pendency of the foreclosure proceedings, and that the plaintiff gave to the heirs of the decedent no notice of the indorsement of the note to him by W. *Held*, that such paragraph was not bad because it did not aver that defendant, as the administrator of decedent, did not have notice of the assignment of the note by W. to the plaintiff, as the defendant was not a party to the foreclosure proceedings, and as the administrator of decedent was not a necessary party to those proceedings.—*Lewis v. Wintrobe*, 76 Ind. 13.

[c] (*Sup.* 1887)

One who purchases land from the grantees of devisees thereof, agreeing to pay, as part of the price, costs adjudged against the administrator of the estate personally, is estopped to dispute a claim of the administrator against the estate for such costs, although the claim, if allowed, would be a charge on the real estate.—*Mackey v. Ballou*, 112 Ind. 198, 13 N. E. 715.

[d] (*Sup.* 1906)

Real estate when assessed for a street improvement stood in the name of the executor of the deceased owner. After the confirmation of the assessment, and within the time given by the statute, an instrument, reciting a waiver of irregularities in the assessment, and containing a promise to pay the same in installments, was executed by the executor, who had no authority under the will or by the court to do so. One purchased the street improvement bonds on the faith of the executor's promise. *Held*, that the agreement, though void as against the estate of the deceased owner, was valid, as against the estate of the executor.—*Hayes v. Shirk*, 167 Ind. 569, 78 N. E. 653.

[e] (Sup. 1908)

Where a decedent's estate has received the benefit of a contract made by the executor, such contract cannot be repudiated by those in charge of the estate.—*Alerding v. Allison*, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. Rep. 363.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 465, 466.  
See, also, 18 Cyc. p. 211.

**§ 115. Individual interest in transactions.**

Failure to collect debt due from executor, see ante, § 89.

Payment of attorney's fees to firm of which administrator is a member, see ante, § 111.

Property acquired by executor or administrator from devisees, heirs, or third persons, see post, § 152.

Property acquired by executor or administrator from legatees, distributees, or third persons, see post, § 172.

Purchase of property of estate at execution sale, see EXECUTION, § 228.

[a] (Sup. 1830)

Where an administrator so confounds property of decedent with his own that it cannot be distinguished, he must bear all the loss caused by the confusion.—*Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123.

[b] (Sup. 1863)

Where an executor appropriates the assets of an estate to the payment of his individual debts, with the knowledge of his creditors, the latter may be required to repay the same to the estate.—*Austin v. Willson's Ex'rs*, 21 Ind. 252.

[c] (Sup. 1873)

A person receiving in exchange for property sold to an administrator for his own use promissory notes belonging to the estate, with notice from the character of the transaction that the transfer of the notes was a breach of the administrator's duty, cannot hold the notes or profit by their purchase as against those rightly entitled to them.—*Thomasson v. Brown*, 43 Ind. 203.

[d] (Sup. 1874)

The fiduciary character of an executor or administrator extends to all the legatees, and he cannot purchase the legacy of any of them for his benefit or the benefit of the other legatees; and any conveyance of, or receipt for, a legacy he may take for less than its value, is void as to such difference, which he holds as trustee for the legatee.—*Goodwin v. Goodwin*, 48 Ind. 584.

[e] (Sup. 1881)

Where an administratrix transferred a note belonging to the estate, but payable to her individual order, without consideration, to one who had notice of the true ownership of the note, her indorsement passed no title to the indorsee.—*Krutz v. Stewart*, 70 Ind. 9.

[f] (Sup. 1882)

A transfer of the note belonging to the estate for the individual benefit of the administrator, being known to the indorsee, will not vest a title in the indorsee.—*Rogers v. Zook*, 86 Ind. 237.

[g] (Sup. 1882)

An executor has no authority to use assets belonging to the estate for his personal benefit; and hence a creditor of an executor, who accepts a pledge of a note belonging to the estate as security for the executor's debt, acquires no rights thereon.—*Nugent v. Laduke*, 87 Ind. 482.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 467, 468.  
See, also, 18 Cyc. pp. 287-289.

**§ 117. Waste, conversion, or embezzlement of assets.**

By surviving partner, see PARTNERSHIP, §§ 245, 249.

Confusion of goods of estate with individual property, see ante, § 115.

Criminal responsibility for embezzlement, see EMBEZZLEMENT, § 18.

Ground for removal, see ante, § 35.

Liability of co-administrator, see post, § 125.

Loaning money before payment of debts as waste, see ante, § 106.

Payment of individual debts with funds of estate, see ante, § 115.

Pledge of assets for individual debt, see ante, § 115.

Sale of firm assets for individual benefit, see ante, § 115.

[a] (Sup. 1881)

2 Rev. St. 1876, p. 545, § 161, providing that, if an executor embezzle or conceal property, the court shall attach his person and examine him under oath, and on his refusal to deliver may commit him, does not apply to an intermeddling with the property by an administrator after his removal.—*Phelps v. Martin*, 74 Ind. 339.

[b] (Sup. 1889)

A devastavit occurs whenever an executor or administrator wastes the assets of the estate and consists of any act, omission, or mismanagement by which the estate suffers loss, or a devastavit may result from the payment of claims which by the exercise of proper diligence the administrator might have ascertained to be unjust and illegal.—*Beardsley v. Marsteller*, 22 N. E. 315, 120 Ind. 319.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 323, 469-471.

See, also, 18 Cyc. pp. 290-292.

**§ 118. Loss of assets.**

[a] (Sup. 1865)

An administrator is bound to adopt such precautions against loss by fire of property of the deceased as prudent men are, under similar

circumstances, accustomed to use to indemnify themselves against the like casualty.—*Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 472-482.

See, also, 18 Cyc. pp. 292-296.

**§ 119. Torts.**

[a] (Sup. 1877)

An administrator, as such, cannot commit a tort; and a tort committed by him is committed individually, and renders him liable therefor as an individual.—*Rose v. Cash*, 58 Ind. 278.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 483.

See, also, 18 Cyc. p. 296; note, 52 Am. St. Rep. 118.

**§ 120. Administrators de bonis non.**

Action on bond of predecessor, see post, § 537 (6).

Part payment by administrator de bonis non as removing bar of limitations, see LIMITATION OF ACTIONS, § 155.

Part payment of debt to administrator de bonis non, as removing bar of limitations, see LIMITATION OF ACTIONS, § 154.

Pleading in action by, see post, § 443.

Proof of authority, see post, § 445.

Right of predecessor to order for payment of debt or balance due him, see post, § 464.

[a] (Sup. 1832)

An administrator de bonis non cannot sue the representative of a former executor or administrator, at law or in equity, for assets wasted or converted by the first administrator or executor, but such suit must be brought directly by creditors, legatees, or distributees.—*Anthony v. McCall*, 3 Blackf. 86.

[b] (Sup. 1842)

An administrator de bonis non may maintain an action on a promissory note given to a former administrator as such.—*Sheets v. Pabody*, 6 Blackf. 120, 38 Am. Dec. 132.

[c] (Sup. 1843)

An administrator of an estate having died, an administrator of his estate was appointed. Such administrator and two others fraudulently appropriated the last-named estate to their own use. The heirs at law of the first decedent obtained a decree against them for waste. *Held*, that the administrator de bonis non of the first decedent could neither sue for said waste nor enforce said decree, it belonging to the complainants in their suit.—*Ferguson v. Sweeney*, 6 Blackf. 547.

[d] (Sup. 1848)

An administrator having a devastavit died, and his administrator was sued in chancery by

the administrator de bonis non of the first intestate for such devastavit. *Held*, that the suit would not lie. *Held*, also, that under the statute the administrator thus sued was liable for the devastavit to the creditors, etc., of the first intestate.—*Young v. Kimball*, 8 Blackf. 167.

[e] (Sup. 1849)

Rev. St. p. 559, provides that "any subsequent administrator with the will annexed shall have execution upon any judgment that may have been recovered by any person who preceded him in the administration of the same estate." A husband and wife conveyed the wife's separate property to D., who gave notes in payment, and executed a mortgage to the husband as security therefor. After the husband's death his administrator foreclosed the mortgage, and caused the mortgaged property to be reconveyed to the wife, and entered satisfaction on the record. *Held*, that an administrator de bonis non was the proper party to file a bill to have such entry of satisfaction set aside, since he would have control of the decree after the entry was set aside.—*Talbott v. Dennis*, 1 Ind. 471, Smith, 357.

An entry by an administrator of satisfaction of a decree to foreclose a mortgage belonging to his intestate, in consideration of a conveyance by the mortgagor to the widow of the intestate, is a fraudulent violation of duty, and may be set aside on bill filed by a subsequent administrator de bonis non.—*Id.*

[f] (Sup. 1856)

Prior to the law of 1849, an administrator de bonis non could not sue his predecessor in the trust for a breach of duty.—*Graham v. State ex rel. Reynolds*, 7 Ind. 470, 65 Am. Dec. 745.

[g] (Sup. 1865)

A testator devised a house and land to his widow, and the residue of the estate, both real and personal, was given to a nephew and sister in equal parts. The nephew was appointed one of the executors, and directed with the counsel of his co-executors to continue the business of milling and merchandise as the testator had conducted it. *Held*, that the authority to carry on the mill was personal to the nephew, and that an administrator de bonis non appointed on the resignation of the nephew had no power to continue the business, and was not chargeable with the rents arising from real estate which was used in connection with the mill.—*Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324.

[h] (Sup. 1834)

Where an administrator is garnished by a creditor of a legatee or distributee, an order for payment thereof binds a subsequent administrator, so that he cannot, in the settlement of his trust, take credit for payment thereof to such distributee or legatee.—*Simonds v. Harris*, 92 Ind. 505.

[l] (Sup. 1888)

Since an administrator de bonis non, who has obtained a judgment on the bond of a former administrator for conversion of assets, has a lien on land purchased with the converted funds and afterwards fraudulently conveyed, he may proceed in equity to enforce it as against the purchasers, notwithstanding he may have a remedy at law against the sureties.—*Duffy v. State ex rel. Rogers*, 115 Ind. 351, 17 N. E. 615.

It is the duty of the administrator de bonis non to collect and distribute a debt due the estate by a former administrator, whether there are creditors of the estate or not, so that it is not necessary in a suit based on such a cause of action to allege that there are unpaid debts due from the estate.—*Id.*

[j] (Sup. 1889)

An action by an administrator de bonis non against his predecessor for funds wasted or converted is not maintainable at common law, and can only be brought on the official bond of the latter in certain cases, by virtue of Rev. St. 1881, § 2458, and not against such former administrator or his representative alone.—*Lucas v. Donaldson*, 117 Ind. 139, 19 N. E. 758.

A complaint by an administrator de bonis non against an administrator to recover a sum collected by defendant's intestate as administrator of another estate does not state a cause of action if it fails to allege that there were debts of the estate to be paid, that intestate was in default in failing to pay over the funds, or that the amount so collected was all that was collected by deceased administrator.—*Id.*

[k] (App. 1893)

Under Acts 1891, pp. 107, 108, relating to the appointment of an administrator de bonis non after the discharge of the administrator, and where there are assets belonging to the estate which should be administered, when the court determines from the facts shown that there are assets available which have not been before reached, it will make the appointment of the administrator de bonis non, and such administrator then proceeds in all respects as other administrators in the settlement of the estate, and, if among the assets not administered there should be a chose in action which is due from any debtor to the estate, the administrator de bonis non may sue and recover whatever may be owing from such debtor, and the latter is entitled to the benefit of all defenses that would be available to him in any other action for the same demand.—*Barnett v. Vanmeter*, 33 N. E. 606, 7 Ind. App. 45.

[l] (App. 1899)

Under Horner's Rev. St. 1897, § 2240, imposing on an administrator de bonis non the same rights and liabilities as the administrator first appointed, he cannot bring a common-law action against the estate of his predecessor for a conversion of the trust assets. His remedy is under section 2458, which authorizes him to

sue on the predecessor's bond for such misappropriation.—*Ormes' Estate v. Brown*, 52 N. E. 1005, 22 Ind. App. 569.

[m] (App. 1902)

An administrator de bonis non sued to determine the ownership of certain building stock, which he claimed as an asset of his decedent's estate, and which was also claimed as an asset of the estate of the former administrator, and was in possession of her executor, a corporation, domiciled in another state from that in which the building association was situated. It was sought to restrain the administrator of the former administrator from collecting the certificate and the association from paying it, but no personal judgment was sought against either of the parties defendant. *Held* that, it appearing that the stock was purchased with money belonging to the estate of plaintiff's decedent, the fact that the stock sought to be recovered was not in existence at the time of his death did not rob it of the character of an unadministered asset.—*Michigan Trust Co. v. Probasco*, 63 N. E. 255, 29 Ind. App. 109.

[n] (App. 1904)

The title to personal property passing, under Wisconsin law, to the executor or administrator of a decedent, where a testator in that state bequeathed money and securities to his widow for life, and then to his son, who was made executor, and the son never intended to part with title to the property, the proper party to maintain an action for a conversion of the property after the son's death was the administrator de bonis non, though the widow had been placed in possession of the property.—*Weaver v. Meyer*, 70 N. E. 409, 32 Ind. App. 587.

A complaint alleging that an executor had managed a decedent's estate as such executor till his own death, and had never separated the income from the body of the estate, but handled it as a part of the estate, sufficiently shows that he had never so far executed his trust that the fund ceased to belong to the estate, or that an administrator de bonis non appointed after the executor's death could not maintain an action against persons who had wrongfully secured possession of the fund.—*Id.*

[o] (App. 1905)

An administrator de bonis non has the same powers as the original administrator.—*Cullop v. City of Vincennes*, 34 Ind. App. 667.

#### FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 485-492.

See, also, 18 Cyc. pp. 1309-1320; note, 108 Am. St. Rep. 413.

#### § 121. Administrators with will annexed.

Profert of authority, see post, § 445.

[a] (Sup. 1881)

An administrator with the will annexed is personally liable for depreciation of bank stock bought with trust funds in his own name.—*Gilbert v. Welsch*, 75 Ind. 557.

## [b] (Sup. 1837)

An administrator with the will annexed takes all the power under the will which would devolve on the executor, if one had been named.—*Davis v. Hoover*, 14 N. E. 468, 112 Ind. 423.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 493, 493½.

See, also, 18 Cyc. pp. 1321-1323; note, 40 L. R. A. 33.

## § 122. Temporary or special administrators.

## [a] (App. 1895)

Under Rev. St. 1894, § 2391 (Rev. St. 1881, § 2237), declaring that the powers of a special administrator are "to collect and preserve the property of the testator or of the intestate until demanded by an executor or administrator duly authorized to administer the same," a special administrator has no power to enter into an agreed case with the widow with reference to the disposition of the proceeds of an insurance policy on decedent's life, collected by him as special administrator.—*Tomlinson v. Wright*, 12 Ind. App. 292, 39 N. E. 884.

## [b] (App. 1897)

Under Horner's Rev. St. 1897, § 2237, providing that a special administrator shall collect and preserve the property of the estate until demanded by an administrator duly appointed, the special administrator has no authority to allow or pay claims, or enter into an agreed case in relation to the money collected by him.—*State ex rel. Wright v. Tomlinson* (Ind. App.) 45 N. E. 1116, 16 Ind. App. 662, 59 Am. St. Rep. 335.

## [c] (Sup. 1902)

Under Burns' Rev. St. 1901, § 2393 (Rev. St. 1881, § 2239; Horner's Rev. St. 1901, § 2239), providing that a special administrator of a testator shall collect the debts by suit or otherwise in the same manner as the administrator of an intestate, the special administrator has authority to bring an action for an accounting against a surviving partner.—*Bruning v. Golden*, 64 N. E. 657, 159 Ind. 199.

On the final account of a special administrator of a testator, he claimed credits for expenses on sale of personal property, fees in a suit brought by him against an heir for a partnership accounting, in which suit the administrator was defeated, and for his services. The heir in question had obtained a decree enforcing a lien on all real estate descending to the only other heir; and he contended that the items of the account should not be allowed, because, the amount of the lien being greater than the property devised to the other heir, an allowance of the items would, in effect, compel him to pay the whole of the items. *Held*, that the contention was of no merit.—*Id.*

Burns' Rev. St. 1901, § 2446 (Rev. St. 1881, § 2291; Horner's Rev. St. 1901, § 2291), provides that an administrator shall not be liable individually for costs in a suit brought by him as administrator. Burns' Rev. St. 1901, § 2393 (Rev. St. 1881, § 2239; Horner's Rev. St. 1901, § 2239), enacts that a special administrator of a testator shall collect the debts, etc., in the same manner as the administrator of an intestate. *Held*, that a special administrator of a testator, suing for a partnership accounting, is not individually liable for costs; he having sued in good faith.—*Id.*

Burns' Rev. St. 1901, § 2393 (Rev. St. 1881, § 2239; Horner's Rev. St. 1901, § 2239), authorizes a special administrator of a testator to collect debts, etc., in the manner of an administrator of an intestate; and Burns' Rev. St. 1901, § 2446 (Rev. St. 1881, § 2291; Horner's Rev. St. 1901, § 2291), provides no administrator shall be personally liable for costs in an action by him as administrator. One of testator's two heirs had sued the other for an accounting as to a partnership between defendant and testator, but the suit was dismissed, and subsequently the special administrator of the testator brought such a suit for an accounting. *Held*, that a contention that the suit was for the benefit of the other heir, and that hence the executor was individually liable for costs, was of no merit.—*Id.*

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 494-495½.

See, also, 18 Cyc. pp. 1325-1326.

## § 123. Coexecutors and coadministrators.

Action by administrator on bond of co-administrator, see post, § 537 (6).

Appointment, see ante, § 23.

Authority of surviving administrator to receive assets of estate from representative of deceased administrator, see post, § 128.

Liabilities on bonds, see post, §§ 527, 531.

Removal, see ante, § 35.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 496-530.

See, also, 18 Cyc. pp. 1330-1348; notes, 14 Am. Dec. 157, 42 Am. Dec. 288; note, 127 Am. St. Rep. 331.

## § 124. — Joint or several authority.

[a] The acts of one of several joint executors or administrators in the administration of an estate are deemed the acts of all.—(Sup. 1846) *Herald v. Harper*, 8 Blackf. 170; (1908) *Aldering v. Allison*, 170 Ind. 253, 83 N. E. 1006, 127 Am. St. Rep. 363.

## [b] (Sup. 1908)

A legatee of household goods, which, with \$500 in money, had been bequeathed to her, refused to accept them, claiming much more under an agreement with the testatrix to pay her by will for services performed. The executors



wanted to use the house, and, to induce the legatee to remove the goods, one of them promised they would see that her claim would not be prejudiced thereby, whereupon she gave him a receipt to return them on demand. *Held*, that the promise was none the less binding on the estate because made by one of the executors, as by accepting and appropriating its benefits the estate must be held to have ratified the agreement made by him, and, besides, the transaction was a matter of administrative detail in which the act of one was as efficient as the act of all.—*Alerding v. Allison*, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. Rep. 363.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 496-507.  
See, also, 18 Cyc. p. 1330.

**§ 125. — Joint or several liability.**

[a] (Sup. 1824)

Each executor of an estate is responsible severally for his own acts, and for money or property which has come to his own hands.—*Call v. Ewing*, 1 Blackf. 301.

[b] (Sup. 1835)

An executor may be passive, by not obstructing his co-executor from obtaining the assets, without making himself responsible, even to the creditors of the testator.—*Ray v. Dougherty*, 4 Blackf. 115.

Where an administratrix, being a minor, takes goods of the estate into her own possession with the knowledge of her co-administrators, and converts them to her own use, her co-administrators are not liable for the devastation.—*Id.*

The widow and administratrix of A., being in the nineteenth year of her age, received from her co-administrators, B. and C., certain goods, as her legal share of her husband's estate. *Held*, that in case she committed a devastation of the goods, and it be considered that B. and C., by the delivery of them to her, had contributed to that devastation, B. and C. may be liable to the creditors of the intestate for such delivery of the goods, but they cannot be liable to the widow herself.—*Id.*

[c] (Sup. 1850)

Co-administrators are not liable for the separate acts of each other. They do not stand in the relation of sureties.—*Davis v. Walford*, 2 Ind. 88.

[d] (Sup. 1877)

Where one of several co-executors, with the knowledge and consent of the others, employs an attorney, without a special agreement with him to look to the estate alone for payment, they all become personally liable for the value of his services.—*Long v. Rodman*, 58 Ind. 58.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 508-522.

**§ 128. Representatives of deceased executors or administrators.**

Party to action on bond of decedent, see post, § 537 (7).

[a] (Sup. 1835)

The administrator of an administrator is not administrator of the first intestate, and has no right to administer his estate; but it is his duty to make a settlement with the probate court of what was done by his intestate, the first administrator.—*Ray v. Dougherty*, 4 Blackf. 115.

Where one of two administrators dies, his administrator is the proper person to pay over any balance of the estate in the hands of his intestate, and the surviving administrator is the proper person to receive it.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 531, 532.  
See, also, 18 Cyc. pp. 1348-1350.

**(B) REAL PROPERTY AND INTERESTS THEREIN.**

By surviving partner, see PARTNERSHIP, §§ 246, 254.

Estoppel of tenant to deny title of executor, see LANDLORD AND TENANT, § 65.

Property available for payment of debts, see post, § 272.

Rights of heirs as against administrators, see DESCENT AND DISTRIBUTION, §§ 78, 79.

**§ 129. Title and authority in general.**

Affecting right of devisee to convey, see WILLS, § 742.

Of surviving partner, see PARTNERSHIP, § 246.  
Real property as assets of estate, see ante, §§ 39, 40.

Right to sue to set aside fraudulent conveyances of decedent, see ante, § 57.

[a] (Sup. 1835)

A land-office certificate issued in favor of the heirs of a decedent cannot be assigned by his administrator.—*Hawkins v. Johnson*, 4 Blackf. 21.

[b] (Sup. 1852)

A mere direction to an executor to sell lands for the purpose of paying legacies or making distribution does not vest any title to the land in the executor.—*Doe ex dem. Clendenning v. Lanius*, 3 Ind. 441, 56 Am. Dec. 518.

[c] (Sup. 1874)

It is only where the personal estate is insufficient to pay the debts of the deceased that the administrator has anything to do with the real estate.—*Edwards v. Haverstick*, 47 Ind. 138.

The administrator of the estate of one who was replevin bail for the stay of execution on a judgment cannot maintain an action to enjoin the levy of an execution issued on such judgment.

ment upon the real estate of his intestate, where he does not show that he will be injured in his representative capacity by the sale of the real estate, or that it is necessary, or will become necessary, to sell the real estate to pay the debts of the intestate, or that the personal estate is insufficient to pay the debts, or that the judgment debtor has property sufficient to pay the debt within reach of the execution.—*Id.*

[d] An administrator takes no title or interest in the realty.—(Sup. 1877) *Hankins v. Kimball*, 57 Ind. 42; (1878) *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114.

[e] (Sup. 1877)

An executor as such has no power to execute to a railroad company a release to a right of way over lands belonging to his testator's estate, and cannot be held liable as executor for money received by him for such release, in an action against him by the devisee.—*Hankins v. Kimball*, 57 Ind. 42.

[f] (Sup. 1878)

A. brought an action as administrator to recover damages for an injury to the lands of his intestate, which bordered upon a river, and were overflowed during freshets; said injury having been caused by the alleged misconduct of the defendant, who owned the lands next below down the stream, in planting a row of trees on his land in such a manner as to operate as a dam and set back the water, so that large quantities of driftwood and other matter, which before had been carried off by the water, were deposited upon the land of the intestate when the water subsided to its usual level. The plaintiff also alleged that he was the sole heir of the intestate. *Held*, that the plaintiff could not maintain the action in his capacity as administrator, but that he might bring the action as heir, and that the defendant was not liable.—*Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114.

[g] (Sup. 1881)

The administrator alone can sue for a trespass on a leasehold estate of the decedent whether committed before or after the death of his intestate.—*Schee v. Wiseman*, 79 Ind. 389.

[h] (Sup. 1897)

The court having, on petition of an administrator to sell real estate to pay debts of decedent, found that he had no right to sell it, he has no interest which will authorize his objecting to the judgment vesting the title to the real estate in decedent's widow; decedent's heirs being the only persons who can object thereto.—*Shobe v. Brinson*, 47 N. E. 625, 148 Ind. 285.

[i] (App. 1903)

Burns' Rev. St. 1901, § 252, provides, "An executor, administrator \* \* \* or a person expressly authorized by statute, may sue, without joining with him the persons for whose benefit the action is prosecuted." Section 263 provides, "All persons having an interest in the

subject of the action, and in obtaining the relief demanded shall be joined as plaintiffs except as otherwise provided in this act." *Held*, that an administrator with the will annexed, who by the terms of the will was given possession of testator's real estate, with power to rent the same, and collect the rents and profits, and distribute them among the devisees, had sufficient interest to maintain an action to restrain a lessee of the land devised from committing waste by cutting growing timber therefrom.—*Halstead v. Coen*, 67 N. E. 957, 31 Ind. App. 302.

[j] (App. 1905)

Where an administratrix, having possession and power to rent real estate by the terms of decedent's will, joined with the devisees, remaindermen, and life tenant, in an action against the tenant of the land, to restrain the latter from cutting timber thereon and for damages for timber already cut, such action is not for waste.—*Halstead v. Sigler*, 74 N. E. 257, 35 Ind. App. 419.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 533-536.  
See, also, 18 Cyc. pp. 297-300.

#### § 130. Possession and use.

By surviving partner, see PARTNERSHIP, § 246.  
Conversion of realty into personality by terms of will as affecting right of executor to possession, see CONVERSION, § 21.

[a] (Sup. 1821)

An executor or administrator entitled to possession of realty until, and for the purpose of, the final settlement of the estate, may maintain ejectment for its possession.—*Duchane v. Goodtitle ex dem. Buntin*, 1 Blackf. 117.

[b] (Sup. 1843)

The heirs of a mortgagee, or, in case of their nonresidence, the executor or administrator of the mortgagee, may sustain ejectment for the mortgage premises against the mortgagor or his tenant claiming under a lease granted after a mortgage without the privity of the mortgagee; and the suit, in such case, may be brought without a demand of possession.—*Doe ex dem. Brown v. Mace*, 7 Blackf. 2.

[c] (Sup. 1853)

An administrator is not entitled to possession of the real estate of the intestate if the heirs are present.—*Comparet v. Randall*, 4 Ind. 55.

[d] (Sup. 1861)

One gave the rents and profits of his farm to his wife and son during life or widowhood of the one and minority of the other, and afterwards, for certain purposes, gave his executor full power to dispose of his real estate in fee simple, or for a term of years, or otherwise. *Held*, that the executor could not maintain a suit for possession against the wife and son during the period of the life or widowhood

or of the minority.—*Thompson v. Schenck*, 10 Ind. 194.

A suit by an executor for possession of a farm will not lie against those claiming under a widow and son, who have the right of possession under a bequest of the rents and profits thereof to them during the life of the widow or minority of the son.—*Id.*

[e] (Sup. 1885)

Real estate, unless otherwise disposed of, goes to the heirs, and not to the executor, and a mere power given to the executor to sell real estate does not give him a right to the possession thereof. To entitle him to such possession, the land or its usufruct must be expressly given to him by the will.—*Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324.

[f] (Sup. 1885)

Where there are no creditors of a deceased intestate, and the property is in the hands of the heir to whom it must ultimately go, the administrator is not entitled to recover possession of it.—*Humphries v. Davis*, 100 Ind. 369.

[g] (App. 1901)

A complaint alleged that plaintiff was beneficiary under decedent's will, and sole legatee of all decedent's property, both personal and real, during her lifetime; that defendant is the executor of the will; that the administration has been pending more than one year; and that defendant has filed an annual report, showing that all debts have been paid, and that there remains in defendant's hands certain money, notes, stocks, and bonds, of which plaintiff is entitled to immediate possession, and which defendant refuses to deliver. The complaint prays possession of the property bequeathed to her. *Held*, that the complaint was insufficient to state a cause of action, since it showed that defendant holds the property lawfully as executor.—*Eddy v. Cross*, 60 N. E. 470, 26 Ind. App. 643.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 535, 537-540.

See, also, 18 Cyc. pp. 300-303.

§ 131. Rents and profits.

As assets, see ante, § 41.

[a] (Sup. 1852)

Under a mere naked power to sell, the executors have no title to the rents and profits.—*Doe ex dem. Clendenning v. Lanus*, 3 Ind. 441, 56 Am. Dec. 518.

[b] (Sup. 1865)

A mere power to sell real estate, given to an executor, does not render him responsible for the rents thereof.—*Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324.

[c] An executor or administrator who has received rents and profits from the lands of his decedent is not chargeable therefor in his administration account, but is personally liable to

the person entitled thereto.—(Sup. 1879) *Hendrix v. Hendrix*, 65 Ind. 329; (1881) *Evans v. Hardy*, 76 Ind. 527.

[d] (Sup. 1879)

A. leased lands from B. to mine coal, A. to pay a certain sum as royalty. The lease also provided that after the first year the rent should not be less than a certain sum; and if no coal was found, and the lease abandoned, said payments were not to be made. The lessor's executor sued the lessee and C., to whom the lessee was alleged to have assigned in writing an interest in the lease to recover rents of the second year, accruing in the lifetime of A's assignee, alleging that the royalty paid by defendants during that year was less than the minimum rent agreed upon. *Held*, that B.'s executor, and not his heir, was the proper party plaintiff.—*McDowell v. Hendrix*, 67 Ind. 513.

[e] (Sup. 1880)

Where an executor is charged by will with the collection of all rents accruing from testator's real estate, he is the proper party to sue for rent accruing after the testator's death upon a lease executed during his lifetime.—*McDowell v. Hendrix*, 71 Ind. 286.

[f] (Sup. 1882)

The personal representative has no title or right to the rents and profits of the real estate of a decedent.—*McClead v. Davis*, 83 Ind. 263; *Kidwell v. Kidwell*, 84 Ind. 224.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 541-544.

See, also, 18 Cyc. pp. 303-308; note, 40 L. R. A. 343.

§ 133. Mortgaged and incumbered property.

[a] (Sup. 1840)

A failure of administrators to redeem land subject to mortgage for the benefit of minor heirs, according to a decree of court, will not be allowed to prejudice such heirs, who will be entitled to the land in the hands of devisees who have paid the mortgagee and received a release from him, although the land has risen considerably in value.—*Linton v. Potts*, 5 Blackf. 396.

[b] (Sup. 1877)

An insolvent debtor, the owner of certain real estate incumbered by a mortgage for purchase money in which his wife had not joined, died intestate, leaving her surviving him, and leaving personal property in excess of the amount allowed by law to his widow, and of the amount necessary to discharge the expenses of administration, his last sickness, and his funeral. The administrator, having in his hands such excess, suffered such real estate to be sold on foreclosure of such mortgage, whereupon the widow brought suit against him to require him to pay to her the one-third value of such real estate. *Held* that she is entitled to a judgment for one-third of such excess, not ex-

ceeding, however, the one-third value of such real estate.—*Morgan v. Sackett*, 57 Ind. 580.

The fact that a mortgage on the realty of a deceased husband was given for the purchase money forms no excuse for the failure of the administrator to protect the widow's interest therein.—*Id.*

[c] (Sup. 1884)

It is the duty of an executor to pay off incumbrances out of the personalty or by the sale of two-thirds of the land, so as to free the widow's interest from liens created in the lifetime of her husband.—*State ex rel. Sparrow v. Kelso*, 94 Ind. 587.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 546-549;  
35 CENT. DIG. MTG. § 1598.  
See, also, 18 Cyc. pp. 309, 310.

#### § 134. Leaseholds of decedent.

[a] (Sup. 1821)

Though an executor, unless authorized by will, has no power over the fee-simple estate, he may maintain ejectment for lands held by his testator for a term of years.—*Duchane v. Goodtitle ex dem. Buntin*, 1 Blackf. 117.

[b] (Sup. 1871)

Under 2 Gav. & H. St. p. 527, providing that executors and administrators shall have the right to sue for the recovery of possession of any property of the estate, and for trespass and waste committed, an administrator of a deceased tenant is a proper party to sue a landlord for forcible entry at the death of the tenant, and taking possession of leased property.—*Smith v. Dodds*, 35 Ind. 452.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 550.  
See, also, 18 Cyc. p. 312.

#### § 136. Sale.

By surviving partner, see PARTNERSHIP, §§ 246, 254.

Under order of court, see post, §§ 319-406.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. 557-606½.  
See, also, 18 Cyc. pp. 317-343.

#### § 137. — Authority and duty in general.

[a] (Sup. 1834)

A conveyance of real estate of a decedent by his administrator, and by his widow as the guardian of his children, is not valid unless the grantors had some special authority for making it.—*Ward v. Crane*, 3 Blackf. 393.

[b] (Sup. 1861)

An executor derives his power to act as such in reference to the transfer of immovable property from a compliance with the law of the place where he attempts to operate under the will, and not from the will alone.—*Lucas v. Tucker*, 17 Ind. 41.

[c] (Sup. 1881)

A widow and executrix to whom property, real and personal, is in effect devised for life, cannot as executrix convert the real estate into money for the support of herself and children, or to pay debts contracted for such support.—*Tate v. McLain*, 74 Ind. 493.

[d] (Sup. 1896)

A domestic executor may sell real estate without a petition or an order of the court.—*Bailey v. Rinker*, 45 N. E. 38, 146 Ind. 129.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 557-559,  
606½.

See, also, 18 Cyc. p. 317; note, 127 Am. St. Rep. 381.

#### § 138. — Power under will.

As creating trust, see WILLS, § 672.

Power to convey to beneficiary electing to take land instead of legacy as authorized by will, see post, § 288.

[a] (Sup. 1887)

Where a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made, the executor, in the absence of such a declaration, if the proceeds be distributable by him, has the power by implication.—*Davis v. Hoover*, 14 N. E. 468, 112 Ind. 423.

The first clause of a will provided that the widow should receive the rents of certain real estate; the last clause, that it should be sold, and the proceeds invested, and the income paid to the widow. *Held*, that it was the duty of the executor to sell in a reasonable time.—*Id.*

[b] (App. 1905)

A will directing that testator's real and personal estate be sold and converted into money, and the proceeds divided, and appointing an executor, does not vest in the executor any title or interest in the property, but gives him a mere naked power to sell the same, and distribute the proceeds as directed.—*Nelson v. Nelson*, 75 N. E. 679, 36 Ind. App. 331.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 560-566,  
568-575; 40 CENT. DIG. POWERS, §§  
84, 85, 87-98.

See, also, 18 Cyc. pp. 318-324; note, 2 L. R. A. (N. S.) 623; note, 87 Am. Dec. 209.

#### § 141. — Manner and conduct.

[a] (Sup. 1884)

Compliance with the statutory requisites as to appraisement, notice, etc., is not essential on the part of an executor empowered by the will to sell lands at his own discretion.—*Munson v. Cole*, 98 Ind. 502.

[b] (Sup. 1890)

Powers conferred by a will included the power to settle, adjust, and compromise all debts owing by the testator, and to make settlement with his former partners and each of them, without authority from any court, and to sell and convey either at public or private sale any or all of the testator's real estate on such terms as to them should seem best. *Held*, that a sale made by the executors under such powers, without giving notice of the time, place, and terms of sale, and without including the value of the real estate in the bond given by them when they qualified, did not render the conveyance invalid.—*Valentine v. Wysor*, 23 N. E. 1076, 123 Ind. 47, 7 L. R. A. 788.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 576.  
See, also, 18 Cyc. p. 325.

#### § 144. — Purchase by executor or administrator.

At execution sale, see EXECUTION, § 228.

Property acquired by executor or administrator from devisees, heirs, or third persons, see post, § 152.

Sale under order of court, see post, § 365.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 579-584.  
See, also, 18 Cyc. pp. 326-329.

#### § 146. — Payment or recovery of purchase money.

[a] (Sup. 1876)

Where an executor, authorized by will to sell real estate, sold it without any contract as to incumbrance, and conveyed by deed without covenants, the fact that taxes were a lien thereon at the time of the sale, and were paid by the purchaser to remove the incumbrance thereof, constitutes no defense to an action for price.—*Boaz v. McChesney*, 53 Ind. 193.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 588-590.  
See, also, 18 Cyc. pp. 331-333.

#### § 147. — Application of proceeds.

See WILLS, § 726.

[a] (Sup. 1882)

A provision in a will giving an executor full power to sell the estate without leave first obtained from court does not restrict the power of the court to require prompt application of the proceeds.—*Ex parte Hayes*, 88 Ind. 1.

[b] (Sup. 1884)

Purchasers of lands from an executor, empowered by will to sell at his discretion, are not compelled to see to the proper application of the purchase money.—*Munson v. Cole*, 98 Ind. 502.

[c] (Sup. 1887)

Where a testator gives the rents and profits of certain premises to his wife for life,

and in a subsequent provision directs that his real estate shall be sold and proceeds loaned, and the interest, after deducting necessary expenses, given to the wife as her own property, in accordance with a previous item, his widow, so long as the real estate remained unsold, was entitled to receive the rents and profits, but it was the duty of the person charged with the execution of the will to sell the real estate within a reasonable time, and thereupon the widow was to take the annual and accruing interest on the purchase money, instead of the rents and profits.—*Davis v. Hoover*, 14 N. E. 468, 112 Ind. 423.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 591-594.  
See, also, 18 Cyc. p. 334.

#### § 148. — Title and rights of purchasers.

Subrogation of purchaser at invalid sale to rights of creditors whose claims are paid from proceeds, see SUBROGATION, § 25.

Subrogation to rights of creditors of estate, see SUBROGATION, §§ 16, 33.

[a] (Sup. 1880)

Where an executor, without authority given by will to enter into covenants, conveys with covenants, they will be deemed the personal covenants of the executor.—*Jones v. Noe*, 71 Ind. 368.

[b] (Sup. 1884)

One who fraudulently makes false representations concerning incumbrances on land that he is about to sell as executor is liable personally.—*West v. Wright*, 98 Ind. 335.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 595-601;  
17 CENT. DIG. DOWER, § 200.  
See, also, 18 Cyc. pp. 336, 337.

#### § 149. — Setting aside.

Instructions invading province of jury, see TRIAL, § 191.

Priority of purchaser's claim for purchase money paid on avoidance, see post, § 263.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 602-606.  
See, also, 18 Cyc. pp. 338-340.

#### § 151. Mortgage.

Under statutes relating to disputed claims against estates of decedents, see EXECUTORS AND ADMINISTRATORS, § 256.

[a] (App. 1900)

Where an executor empowered by a will to mortgage his testator's property executes a mortgage, in his capacity as executor, containing warranties of title and a promise to pay taxes and attorney's fees, and gives his notes for the money secured thereby, he is personally bound therefor, as giving the notes and making the warranties are not necessary to the execution of the power.—*De Coudres v. Union Trust Co.*

58 N. E. 90, 25 Ind. App. 271, 81 Am. St. Rep. 95.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 614-620.

See, also, 18 Cyc. pp. 345-347; note, 127 Am. St. Rep. 381.

**§ 152. Property acquired by executor or administrator.**

[a] (Sup. 1859)

An executor cannot purchase real estate for himself or for another, though it be sold on execution in his favor, levied before he assumed the trust, and though he used efforts to make the property sell for the best price possible.—*Martin v. Wyncoop*, 12 Ind. 266, 74 Am. Dec. 209.

[b] (Sup. 1874)

Where an administrator forecloses a mortgage held by him on his intestate's lands, and himself purchases such lands at the sheriff's sale pending his petition in the proper court to sell, to pay debts, all but the widow's interest in such lands, against which there are no other liens, and the personal estate, with two-thirds of the lands, being ample for the payment of all debts, such sale may be avoided and set aside at the instance of the widow.—*Hunsucker v. Smith*, 49 Ind. 114.

[c] (Sup. 1875)

Where real estate of a decedent has been sold and conveyed by the heirs to the administrator, the latter may recover possession from the decedent's tenant, who is not a creditor of the estate or an heir, where he has given the proper notice to quit, although claims of creditors may have been allowed against the estate to an amount greater than the personal assets.—*Carter v. Lee*, 51 Ind. 292.

[d] (Sup. 1877)

The title of an administrator who buys at a sale under a judgment obtained by his intestate is voidable at the option of the beneficiaries, but it is not void.—*Murphy v. Teter*, 56 Ind. 545.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 621-628;

16 CENT. DIG. DEEDS, §§ 292, 403.

See, also, 18 Cyc. pp. 347-352.

**(C) PERSONAL PROPERTY.**

By surviving partner, see **PARTNERSHIP**, §§ 244, 245, 247, 249, 254, 255.

Property available for payment of debts, see post, § 272.

Rights of distributees as against administrators, see **DESCENT AND DISTRIBUTION**, §§ 76, 78.

**§ 153. Title and authority in general.**

Capacity in which suit should be brought, see post, § 427.

Of surviving partner, see **PARTNERSHIP**, §§ 244, 245, 249.

Personal property as assets of estate, see ante, § 43.

[a] (Sup. 1849)

An executor may maintain an action on notes made to the testator and secured by mortgage, though specifically bequeathed by the testator.—*Crist v. Crist*, 1 Ind. 570, Smith, 370, 50 Am. Dec. 481.

[b] (Sup. 1866)

The administrator of a deceased clerk of the court may maintain an action on a promissory note delivered to the deceased, as money belonging to an estate on final settlement thereof, where such administrator must account for it as money to the distributees of the estate.—*Turner v. Burgess*, 26 Ind. 195.

[c] (Sup. 1874)

An administrator has a claim superior to that of the heirs to the assets of the estate until the debts of the estate have been paid.—*Bearss v. Montgomery*, 46 Ind. 544.

[d] (Sup. 1881)

An administrator can sue for conversion of the intestate's property occurring since the death, and before the granting of administration.—*Gerard v. Jones*, 78 Ind. 378.

[e] (Sup. 1882)

The title to personal property of a decedent vests in the personal representative until distributed.—*Pond v. Sweetser*, 85 Ind. 144.

[f] (Sup. 1887)

If an attorney, after the death of his client, collects money, and converts it, the client's administrator may maintain an action for the money converted.—*Clegg v. Baumberger*, 110 Ind. 536, 9 N. E. 700.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 629, 630.

See, also, 18 Cyc. p. 353.

**§ 154. Possession and use.**

Right of legatee to possession, see **WILLS**, § 727.

[a] (Sup. 1879)

Testator bequeathed his personal estate to his wife for life, with remainder to his son. The wife died intestate, and the son brought suit against one who was both administrator of the wife and administrator with the will annexed of testator, to recover testator's personal estate. *Held*, that the defendant was entitled to possession until the estate was settled.—*Highnote v. White*, 67 Ind. 596.

[b] (App. 1899)

The administrator is the one to sue for property of intestate converted by another to

his own use.—*Niehaus v. Cooper*, 52 N. E. 761, 22 Ind. App. 610.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 631, 1186;  
16 CENT. DIG. DES. & DIST. §§ 263-275;  
47 CENT. DIG. TROVER. §§ 129, 131; 49  
CENT. DIG. WILLS, §§ 1746-1758.  
See, also, 18 Cyc. p. 354.

**§ 157. Sale.**

By surviving partner, see **PARTNERSHIP**, §§ 245, 254.

Sales under order of court, see post, §§ 319-406.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 634-646½.  
See, also, 18 Cyc. pp. 356-360.

**§ 158. — Authority and duty in general.**

[a] (Sup. 1891)

The common-law right of an administrator to sell and dispose of the personal property of his decedent does not exist in Indiana.—*Citizens' St. Ry. Co. v. Robbins*, 26 N. E. 116, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 634, 635, 646½.  
See, also, 18 Cyc. pp. 356, 357; note, 127 Am. St. Rep. 381.

**§ 160. — Manner and conduct.**

[a] (Sup. 1877)

An executor or administrator must sell the personal property of his decedent's estate at public auction only, unless, upon application to the proper court, he obtains an order authorizing a private sale.—*Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198.

[b] (Sup. 1891)

Under Rev. St. 1881, §§ 2275, 2280, authorizing administrators to sell personal property of their decedents, the sale must be public in the absence of an order from the proper court.—*Citizens' St. Ry. Co. v. Robbins*, 26 N. E. 116, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 637.  
See, also, 18 Cyc. p. 360.

**§ 161. — Terms and conditions.**

[a] (Sup. 1888)

Under Rev. St. § 2303, requiring administrators to show that they used due care in taking notes for the purchase price of personal property, where the makers have become insolvent, an administrator is liable for taking notes executed by insolvent principals and sureties, and should also be charged with interest

on them.—*Lindley v. State ex rel. Wells*, 116 Ind. 235, 18 N. E. 45.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 638.  
See, also, 18 Cyc. p. 361.

**§ 166. — Application of proceeds.**

[a] (Sup. 1891)

Where an administrator sold a note which had been given to intestate by one who subsequently recovered a judgment against the estate, it was the duty of the administrator, after selling the note, to pay the judgment.—*Pence v. Makepeace*, 75 Ind. 450.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 643.  
See, also, 18 Cyc. p. 365.

**§ 167. — Title and rights of purchasers.**

[a] (App. 1894)

A personal representative, in making sale of the effects of a deceased person, may make a warranty, and thus bind himself personally.—*Huffman v. Hendry*, 9 Ind. App. 324, 36 N. E. 727, 53 Am. St. Rep. 351.

A decedent's estate is not liable to one purchasing assets thereof, on the ground that the executor induced the purchase by false representations.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 644.  
See, also, 18 Cyc. p. 366.

**§ 168. — Setting aside.**

[a] (Sup. 1877)

A sale at public auction of personal property belonging to a decedent's estate can be avoided only for fraud or collusion practiced by the purchaser and the executor or administrator making the sale.—*Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198.

[b] (Sup. 1891)

Statements by a brother of a widow, not authorized to act for her, that she would bid a designated sum for her husband's personality at executor's sale, are not binding on her, and will not affect her title, though, in reliance on such statements, some of the creditors absented themselves from the sale.—*Anderson v. Pedigo*, 126 Ind. 564, 26 N. E. 397.

A widow who induces the creditors of her deceased husband to stay away from the executor's sale of the personality by her representation that she will bid a designated sum for the property, and who bids it off for a smaller amount, and at much less than its actual value acquires no valid title, and the sale will be set aside.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 644, 646.  
See, also, 18 Cyc. p. 368.

**§ 169. Mortgage or pledge.**

By surviving partner, see **PARTNERSHIP**, § 245.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 647.

See, also, 18 Cyc. p. 371; note, 127 Am. St. Rep. 381.

**§ 170. Indorsement and transfer of bills and notes.**

Transfer of note taken for debt of estate but made payable to administrator, see post, § 172.

[a] An administrator, by virtue of his appointment, obtains the title in promissory notes or other written evidences of debt held by the intestate at his death and coming to administrator's possession, and may sell, transfer, and indorse the same.—(Sup. 1852) *Thomas v. Reister*, 3 Ind. 369; (1882) *Rogers v. Zook*, 86 Ind. 237; (1883) *Reynolds v. Linard*, 95 Ind. 48.

[b] An executor or administrator of the legal holder of a promissory note has the right to assign it.—(Sup. 1860) *Speelman v. Culbertson*, 15 Ind. 441; (1872) *Hamrick v. Craven*, 39 Ind. 241.

[c] (Sup. 1882)

Where an administrator assigns promissory notes belonging to his decedent's estate, the assignee, under the common law, takes a good and valid title as against a subsequent administrator, heir at law, or creditor of the decedent, since the administrator, under the common law, has the same property in and the same power over the personal estate of his decedent as the decedent had before his death.—*Rogers v. Zook*, 86 Ind. 237.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 648.

See, also, 18 Cyc. p. 358.

**§ 171. Assignment and transfer of rights of action.**

[a] (Sup. 1877)

Neither 1 Rev. St. 1876, p. 635, § 1, making promissory notes negotiable by indorsement, so as to vest the property thereof in the indorsee, nor the rule, arising thereunder, giving an executor the right to transfer by assignment a note due the testator, so as to vest title thereto, applies to certificates of national bank stock, which are, by act of congress, transferable only on the books of the bank.—*Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 649, 650.

See, also, 18 Cyc. pp. 358, 359.

**§ 172. Property acquired by executor or administrator.**

Purchase in own right and payment with funds of estate, see ante, § 115.

[a] (Sup. 1881)

Where an administratrix transferred, without consideration, a note given for a debt due to the estate, but made payable to her individual order, she was guilty of a devastavit.—*Krutz v. Stewart*, 76 Ind. 9.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 650½.

See, also, 18 Cyc. pp. 371-373.

**V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.**

Assignment of dower by probate court incident to administration, see **DOWER**, § 69.

Election between allowance and provision of will, see **WILLS**, § 782.

Sale of real estate under order of court to pay widow's allowance, see post, § 326.

**§ 173. Nature and purpose in general.**

[a] (Sup. 1880)

Prior to Acts 1871, p. 46, a widow had no statutory lien upon her deceased husband's real estate for the amount of the personal estate the statute allowed her to take at its appraised value.—*Scott v. Greathouse*, 71 Ind. 581.

[b] (Sup. 1902)

A demand for her statutory allowance made by a widow on her husband's administrator inures to the benefit of her assignee.—*Brown v. Bernhamer*, 65 N. E. 580, 159 Ind. 538.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 651.

See, also, 18 Cyc. p. 373.

**§ 174. Constitutional and statutory provisions.**

[a] (Sup. 1864)

1 Gav. & H. St. p. 295, § 21, provides that a surviving wife shall be entitled, before any distribution, to \$300 of personal property, to be selected by her at its appraised value, or, if the property shall be sold, then to \$300 out of the proceeds. 2 Gav. & H. St. p. 495, § 43, provides that a widow, at any time before the term of the inventory, may select and take articles therein appraised, not exceeding \$300 in value, and that a return of the kind and amount of goods taken shall be made by the executor. *Held*, that the last statute did not modify the first, so as to limit the right of the widow and require her to make the selection before the inventory was returned by the administrator.—*Hamilton v. Matlock*, 22 Ind. 47.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 653, 654.

See, also, 18 Cyc. p. 374.

**§ 175. Quarantine or other occupation or use of property.**

Persons entitled, see post, § 180.



## [a] (Sup. 1829)

The statutory provision authorizing the widow to continue in possession of the mansion house and the messuage thereto belonging until her dower is assigned applies only to the persons claiming under the deceased husband, and not to those claiming by adverse title.—Taylor v. McCrackin, 2 Blackf. 260.

## [b] (Sup. 1837)

In the statute which authorizes a widow to remain in possession of the mansion house and messuage of her deceased husband, free of rent, until dower shall be assigned to her, the term "messuage" was not intended to include the whole farm or plantation, but only lands adjoining the house to the extent of a few acres.—Grimes v. Wilson, 4 Blackf. 331.

## [c] (Sup. 1867)

Under 1 Gav. & H. Rev. St. p. 297, § 28, providing that a surviving wife and minor children shall in all cases be allowed to remain in the ordinary dwelling house of the family and occupy the same and the messuage thereunto pertaining and fields adjacent, if any, not exceeding 40 acres, free of rent for one year from the death of the husband, a guardian of minor children of a decedent who takes them from the widow within the year is not entitled to recover any portion of the rental value of the real estate on account of the children having been taken away.—Weaver v. Low, 29 Ind. 57.

## [d] (Sup. 1878)

Under 1 Rev. St. 1876, p. 413, § 28, providing that a surviving wife shall in all cases be allowed to remain in the dwelling house of the family and occupy the fields adjacent, not exceeding 40 acres, free of rent for one year from the death of her husband, she is entitled to use the fruits and products of such fields which naturally ripen, mature, and come off during the year in which she has the right to occupy the premises.—Swain v. Bartlow, 62 Ind. 546.

## [e] (Sup. 1881)

A widow, occupying land for the year after the death of her husband, under Rev. St. 1881, § 2492, allowing a widow so to do, is entitled to the husband's share of wheat planted on the land by a tenant before the husband's death, which ripened and was harvested during such year.—Jones v. Jones, 81 Ind. 202.

## [f] (Sup. 1883)

Rev. St. 1881, § 2402, provides that the surviving wife and minor children shall in all cases be allowed to remain in the ordinary dwelling house of the family and to occupy the same and the messuage thereunto appertaining, and fields adjacent, if any, not exceeding 40 acres, free of rent, for one year from the death of her husband. *Held*, that the right to use and occupy the 40 acres includes the right to the crops maturing thereon.—Hoover v. Agnew, 91 Ind. 370.

## [g] (App. 1891)

Under statutes entitling a widow to quarantine in her husband's mansion and messuages, the terms include the rents thereof until assignment of dower.—Willitts v. Schuyler, 3 Ind. App. 118, 29 N. E. 273.

## [h] (App. 1908)

Burns' Ann. St. 1901, § 2653, providing that a surviving wife and minor children shall be allowed to occupy the dwelling house of the family, and the fields adjacent thereto, if any, not exceeding 40 acres, free of rent, for one year from decedent's death, does not give the family of a decedent crops that had been harvested, though not removed from the land, prior to his death.—Bush v. Bush, 41 Ind. App. 46, 83 N. E. 380.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 655-660.  
See, also, 18 Cyc. pp. 375-378.

## § 179. Additional to dower or other interest.

Additional to provision by will, see post, § 186.

## [a] (Sup. 1850)

The widow's allowance is not part of the surplus after payment of debts and expenses of administration to which she is also entitled.—Hays v. Buffington, 2 Ind. 369.

## [b] (Sup. 1856)

St. 1843, giving a widow \$150 out of the estate of her husband, for which she is not to be held to account, was intended as a provision independent of dower.—Cheek v. Wilson, 7 Ind. 354.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 651, 660.  
See, also, 18 Cyc. p. 381.

## § 180. Persons entitled.

## [a] (Sup. 1833)

Under Rev. St. 1881, § 2492, providing that the surviving wife and minor children may occupy the dwelling house of the family and the fields adjacent, not exceeding 40 acres, for one year from the death of the husband without rent, the right of a widow under the statute is not altered by the fact that she was a second wife.—Hoover v. Agnew, 91 Ind. 370.

Under Rev. St. 1881, § 2492, providing that a surviving wife and minor children may occupy the dwelling house of the family and the fields adjacent, not exceeding 40 acres, for one year from the death of the husband, without rent, the rights of the widow under the statute are not altered by the fact that there are no minor children.—*Id.*

## [b] (App. 1891)

Where decedent lived on a farm at the time of his death on which there was growing a crop of wheat on a forty-acre tract of land adjacent to the dwelling planted by a tenant on shares, the widow, though a second wife with-

out issue, was entitled to the statutory right of quarantine.—*Willitts v. Schuyler*, 29 N. E. 273, 3 Ind. App. 118.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 655, 671–680.

See, also, 18 Cyc. pp. 384, 385; note, 21 L. R. A. 241.

**§ 181. Property subject to allowance.**

[a] (Sup. 1848)

Rev. St. 1843, p. 1049, entitling a widow to select property of her deceased husband to the amount of \$150, applies to personal property only.—*Jelly v. Elliott*, 1 Ind. 119, Smith, 82.

[b] (Sup. 1875)

By the statute in force in 1870 (acts 1869, Reg. Sess., 31, and Davis' Rev. St. Supp. 1870, p. 219), if a widow, from any cause, failed or refused to take articles of personal property, at the appraised value, to the full amount of \$500, or any part thereof, she was entitled to receive that amount, or the residue thereof, in cash, out of the first moneys received by the executor or administrator, whether derived from personal or real estate.—*Leib v. Wilson*, 51 Ind. 550.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 681–685.  
See, also, 18 Cyc. p. 386.

**§ 182. Priority over other claims.**

Priority of mortgage, see CHATTEL MORTGAGES, § 138.

[a] (Sup. 1850)

Under Act Feb. 13, 1843 (Rev. St. p. 1049), giving a widow \$150 of her husband's estate, or property to that value, the widow may take the allowance without reference to the debts or expenses of administration.—*Hays v. Buffington*, 2 Ind. 369.

[b] (Sup. 1879)

Under Decedent's Estate Act, § 43, as amended by Act Feb. 8, 1871 (2 Rev. St. 1876, p. 507), providing that a widow's lien on her husband's real estate for her allowance of \$500 shall be paid in the same order as judgments and mortgages, a judgment against a decedent on which execution was issued and levied on his real estate during his lifetime is entitled to priority over the lien of the widow for her \$500 allowance, since the lien for such allowance does not attach until the husband's death.—*Mead v. McFadden*, 68 Ind. 340.

[c] (Sup. 1881)

Under 2 Rev. St. 1876, p. 542, and Acts 1869, p. 32, a widow who receives her husband's entire estate, as being worth less than \$500, is liable for funeral expenses and ex-

penses of his last sickness.—*Green v. Weaver*, 78 Ind. 494.

[d] (Sup. 1882)

Under Rev. St. 1881, § 2419, providing that where a decedent's estate does not exceed \$500 in value the widow shall be absolutely entitled thereto, whether it consists of real or personal property, a widow to whom her husband's entire estate, consisting in part of lands worth less than \$500, is awarded, takes the land free from the lien of judgments rendered against the husband in his lifetime.—*Quakenbush v. Taylor*, 86 Ind. 270.

[e] (Sup. 1890)

Under Rev. St. 1881, §§ 2410–2422, providing that, where the estate of a deceased person does not exceed \$500 in value, his widow shall be entitled to the whole, and that she "shall not be liable for any of the decedent's debts, except mortgages of real estate, but she shall pay and may be sued for reasonable funeral expenses of the deceased, and expenses of last sickness," a judgment for medicines furnished deceased in his last illness may be satisfied out of the land, and it cannot be claimed as exempt, under section 703, exempting property of a resident householder, to the value of \$300, from sale on execution for any debt founded on contract, express or implied.—*Fleming v. Henderson*, 123 Ind. 234, 24 N. E. 236.

[f] (Sup. 1890)

Under Rev. St. 1881, § 2422, which provides that a widow to whom her husband's estate, being less than \$500, is set off without administration, shall not be liable for her husband's debts, but "shall pay and may be sued for the reasonable funeral expenses of the deceased, and expenses of his last sickness," such widow is not liable for a judgment recovered against her husband upon a note given by him 60 days before his death to his physician for services during his last illness, where such judgment includes interest, costs, and attorney's fees.—*Weir v. Sanders*, 124 Ind. 391, 24 N. E. 980.

[g] (Sup. 1891)

Rev. St. 1881, § 2269, secures to a widow \$500 out of property of which her husband died owner, and which he might, if living, have claimed as exempt. Section 790, Id., provides that the death of a defendant after execution has been placed in the sheriff's hands shall not affect his proceedings thereon, except that property allowed absolutely to the widow shall be exempt from levy and sale thereunder. *Held*, that a widow's right to her \$500 was not cut off by a levy made before the husband's death.—*Dixon v. Aldrich*, 127 Ind. 296, 26 N. E. 843.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 651, 686–693.

See, also, 18 Cyc. pp. 387–389.

**§ 183. Bar, waiver, or relinquishment.**

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. &amp; AD. §§ 694-704.

See, also, 18 Cyc. pp. 390-395.

**§ 184. — In general.**

[a] (Sup. 1887)

Under Rev. St. 1881, § 2269, the widow of a decedent "may, at any time before the sale, select and take articles therein named at the appraisement, not exceeding in the aggregate five hundred dollars"; and this right of the widow is not abridged or impaired by her making a partial selection before the return of the inventory, nor by the fact that the articles selected have increased in value between the time of the return of the inventory and the date of her selection.—*Denny v. Denny*, 113 Ind. 22, 14 N. E. 593.

[b] (Sup. 1898)

The \$500 allowed to the widow of a decedent by Rev. St. 1894, § 2424 (Rev. St. 1881, § 2269), may be waived by her.—*Buffington v. Buffington*, 51 N. E. 328, 151 Ind. 200.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. &amp; AD. §§ 694, 702, 704.

See, also, 18 Cyc. p. 390.

**§ 185. — Antenuptial or postnuptial agreement.**

[a] (Sup. 1881)

A woman waives her right to the statutory allowance by executing an antenuptial contract "relinquishing all right of dower, and all interest of any kind whatsoever, to which she may be entitled in the estate of her intended husband by reason of her marriage."—*Shaffer v. Matthews*, 77 Ind. 83.

[b] (Sup. 1893)

An antenuptial contract, by which, in consideration of the conveyance to the wife of a life estate in certain property, she relinquishes all her interest in other real estate of the husband, cannot be extended so as to prevent the wife from claiming her statutory allowance of \$500, under Rev. St. 1881, § 2269, in the estate of her husband, or from compelling a sale of his real estate in order to pay such allowance.—*Claypool v. Jaqua*, 135 Ind. 499, 35 N. E. 285.

[c] (App. 1896)

A wife is not bound by an oral agreement to relinquish her statutory allowance in the event she survives her husband, in consideration of the payment by him, in his lifetime, of money to and for the use of another.—*Yelton v. Kerns*, 44 N. E. 687, 16 Ind. App. 92.

[d] (Sup. 1898)

A contract in contemplation of marriage reciting that the woman "hereby releases any and all claims" waived the \$500 allowed a widow by Burns' Rev. St. 1894, § 2424.—*Buf-*

*ington v. Buffington*, 51 N. E. 328, 151 Ind. 200.

A provision in an antenuptial contract that the intended wife "hereby relinquishes any and all claims" to the husband's property, where the intention was to adjust rights following the death of the husband, includes the \$500 allowed to the widow from his estate by Rev. St. 1894, § 2424.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. &amp; AD. § 695;

See, also, 18 Cyc. p. 390.

**§ 186. — Testamentary provisions.**

Elections between right to allowance and provision of will, see *WILLS*, § 782.

[a] (Sup. 1861)

The will of one deceased disposed of all his property, containing therein a provision for his widow, which she accepted. *Held*, that she might take, in addition, \$300, under 1 Rev. St. § 21, p. 251.—*Loring v. Craft*, 16 Ind. 110.

[b] (Sup. 1867)

A widow, after receiving \$750 given her by her husband's will, brought an action to set aside the will, and secured a partition of the real estate, without regard to the provisions of the will. She then brought this suit to recover her allowance of \$300. *Held* that, as she had repudiated the will, she had received already more than she was entitled to.—*Ratliff v. Baldwin*, 29 Ind. 16, 92 Am. Dec. 330.

[c] (Sup. 1878)

The widow of a testator is entitled to \$500 in personal property or money out of his estate, as provided by statute, in addition to any devise made in her behalf.—*Nelson v. Wilson*, 61 Ind. 255.

[d] (Sup. 1881)

The right of a widow to claim the \$500 out of her husband's estate given her by section 43 of the act for the settlement of decedents' estates (2 Rev. St. 1876, p. 507) is not waived by the mere acceptance of a legacy under the will of her husband, or upon her mere agreement as to the proper execution of the will.—*Smith v. Smith*, 76 Ind. 236.

[e] (Sup. 1891)

Where testator in his will gives his widow specific land and personalty, and provides that the residue of his estate shall be equally divided between her and his children, she may elect to accept the provision made for her by the will, and still be entitled to the \$500 of personalty allowed by Rev. St. § 2269, as such allowance to her will not defeat any provision of the will.—*Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896.

[f] (Sup. 1891)

Where a widow has elected to accept the provisions of her husband's will, which, after giving to her for life certain real estate and

personal property, gives all the remainder of testator's property to his children, and provides that on her death the property given to her shall be divided among the children, she cannot claim the \$500 allowance to widows, under the provisions of Rev. St. 1881, §§ 2269, 2270; it being the manifest intention of testator that his children should take all his property not specifically given his widow.—*Shafer v. Shafer*, 129 Ind. 394, 28 N. E. 867.

[g] (App. 1895)

Where there is no personal estate, and it is manifestly the purpose of a will that testator's wife shall take a life estate in all his lands, and she fails to reject the provisions of the will, she is not entitled to the benefit of Rev. St. 1894, § 2424 (Rev. St. 1881, § 2269), which gives a widow the right to select articles to the value of \$500, or, if she fails to so select, entitles her to that amount in cash, to be a lien on the real estate in the absence of any personalty.—*Snodgrass v. Meeks*, 12 Ind. App. 70, 38 N. E. 833.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 669, 696.  
See, also, 18 Cyc. p. 391.

§ 188. — Misconduct, separation, or divorce.

[a] (Sup. 1866)

Under 1 Gav. & H. St. p. 298, § 32, providing that if a wife shall leave her husband, and shall be living at his death in adultery, she shall take no part of her husband's estate, in order to bar the widow's interest in her deceased husband's estate it must appear that she had both abandoned her husband and was living in adultery at his death, since each of such facts is alike essential, and the existence of either without the other cannot bar her right.—*Shaffer v. Richardson's Adm'r*, 27 Ind. 122.

[b] (Sup. 1877)

The allowance to the widow should be denied where, at the time of the husband's death, she had abandoned him and was living in adultery.—*Owen v. Owen*, 57 Ind. 291.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 698-700.  
See, also, 18 Cyc. pp. 392, 393.

§ 190. — Delay in making application.

[a] (Sup. 1845)

A widow has no claim on her deceased husband's estate, relative to the \$100 worth of personal property allowed her by the act of 1838, if she fail to select the property before the sale of it by the executor.—*Johnson v. Robertson*, 7 Blackf. 425.

[b] (Sup. 1854)

Property of an intestate, directed by statute to be set apart to a widow, vests eo instante, by operation of law, in the widow on the death of her husband.—*Kellogg v. Graves*, 5 Ind. 509.

[c] (Sup. 1870)

Under statutes providing for an allowance to the widow her right thereto arises immediately on the decease of the husband, and in the event of the death of the widow before assignment the same passes to her legal representative.—*Bratney v. Curry*, 33 Ind. 399.

[d] (App. 1905)

It is not necessary for a widow to demand that the administrator pay to her the allowance secured to her by Burns' Ann. St. 1901, § 2424, in order to render illegal a final settlement made by the administrator without having made such payment.—*Rush v. Kelley*, 73 N. E. 130, 34 Ind. App. 449.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 703.  
See, also, 18 Cyc. p. 394.

§ 191. Selection by persons entitled.

[a] (Sup. 1883)

Rev. St. 1881, § 2492, provides that the surviving wife and minor children shall in all cases be allowed to remain in the ordinary dwelling house of the family, and to occupy the same and the messuage thereunto appertaining and fields adjacent, if any, not exceeding 40 acres, free of rent, for one year from the death of her husband. *Held*, that a sufficient selection of 40 acres by a widow would be indicated by occupying and using the land, or by claiming the annual crops when interfered with by others.—*Hoover v. Agnew*, 91 Ind. 370.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 705.  
See, also, 18 Cyc. p. 395.

§ 192. Setting apart by executors or administrators.

Presentation as claim against estate, see post, § 224.

Statutory provision as to time for demand, see ante, § 174.

[a] (Sup. 1864)

A demand by a widow on the administrator of her deceased husband for the \$300 worth of personal property allowed her by statute (2 Gav. & H. St. p. 295, § 21), in these words, "Squire, I have concluded to take my three hundred dollars in property," is sufficient.—*Hamilton v. Matlock*, 22 Ind. 47.

[b] (Sup. 1865)

A widow entitled to personal property of her deceased husband of the value of \$300 may select such property at the appraised value, but such allowance must be made and the property set off to her before the estate can be distributed.—*Harrell v. Hammond's Adm'r*, 25 Ind. 104.

Under the statute the widow is entitled, before any distribution, to \$300 of personal property, which may be selected by her at the appraisement; but before the property can vest in her there must be an appraisement in

the course of administration, and a selection by her under the appraisal.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 706, 707.

See, also, 18 Cyc. pp. 396, 397.

**§ 194. Allowance by court.**

Appellate jurisdiction as dependent on whether construction of statute is involved, see COURTS, § 220 (9).

[a] (Sup. 1861)

Where an order of court has been made vesting in a widow the estate of her husband and debts due to him under the supposition that they are of less than \$300 in value, it is of no consequence, so long as the order remains not set aside, that such property and claims do in fact exceed the appraised value of \$300.—Downs v. Downs, 17 Ind. 95.

[b] (Sup. 1864)

Under 1 Gav. & H. St. p. 295, § 21, providing that a widow shall be entitled before any distribution to \$300 of personal property, to be selected by her at its appraised value, on refusal of the administrator to deliver the property on request it is not necessary for the widow to make a specific selection of the articles desired in order to maintain an action therefor.—Hamilton v. Matlock, 22 Ind. 47.

[c] (Sup. 1864)

Where a husband dies, leaving property worth less than \$300, his widow cannot bring an action for the conversion of a note which belonged to him until the court of common pleas has ordered the delivery of his property to her.—Noblett v. Dillinger, 23 Ind. 505.

[d] (Sup. 1902)

A complaint by a widow against the administrator to recover her statutory allowance, which alleges that she has demanded the amount of the administrator, and although "said administrator had, as such, sufficient funds with which to comply with said demand, or a part thereof," he refused to pay, sufficiently alleges the existence of funds with which to pay the allowance.—Brown v. Bernhamer, 65 N. E. 580, 159 Ind. 538.

In an action by a widow against an administrator to recover her statutory allowance, it is not necessary that a copy of the will be attached to the complaint, though the will devises to her such part of her husband's estate "as she may be entitled to under the statutes in force at the time of his death, and nothing more"; her action being under the statute, and not on the will.—Id.

Burns' Rev. St. 1901, § 2424 (Rev. St. 1881, § 2269; Horner's Rev. St. 1897, § 2269), allows a widow \$500 worth of articles from her husband's estate, and provides that, if she fails to select them, she shall be entitled to the amount in cash, out of the first moneys received by the personal representative in excess of

the expenses of administration, last sickness, and funeral. *Held*, that interest was properly allowed to a widow suing for her statutory allowance, from the date of the administrator's refusal to pay it, and that she was not remitted for the recovery of interest to a second action on the administrator's bond.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 713-723.

See, also, 18 Cyc. pp. 399-402.

**VI. ALLOWANCE AND PAYMENT OF CLAIMS.**

Claim as civil action within statute relating to change of venue, see VENUE, § 36.

Judgment as *res judicata* in respect to claim, see JUDGMENT, § 590.

Liabilities of executor *de son tort* to creditors, see post, § 541.

Necessity of administration, see ante, § 3.

Remedies against estate of deceased surety, see PRINCIPAL AND SURETY, § 146.

Rights of action against executors or administrators, see post, §§ 428-430.

**(A) LIABILITIES OF ESTATE.**

Action against administrator of deceased surety of original administrator or executor, see post, § 537 (6).

Claims against estate of deceased insane person, see INSANE PERSONS, § 62.

Claims by wife against estate of husband for proceeds of wife's separate estate collected by husband, see HUSBAND AND WIFE, § 144.

Liabilities of devisees and legatees, see WILLS, §§ 827-848.

Liabilities of heirs and distributees, see DESCENT AND DISTRIBUTION, §§ 119-151.

Liability of estate on contract of decedent within statute of frauds, see FRAUDS, STATUTE OF, § 142.

Necessity for presentation of claim, see post, §§ 222-224.

**§ 202. Obligations of decedent in general.**

[a] (Sup. 1859)

An account for boarding and educating the children of an intestate after his death is not a charge against his estate which the administrator can pay.—Sorin v. Olinger, 12 Ind. 29.

[b] (Sup. 1877)

Where one purchases lands at a sheriff's sale acquiring a deed thereto, and subsequently both the sale and the deed are set aside, the amount paid, on the death of the execution defendant, is provable as a claim against his estate.—Westerfield v. Williams, 59 Ind. 221.

In proceedings to prove as a claim against an estate the amount paid at a sheriff's sale under execution in which decedent was the judgment debtor, a deed to the purchaser being afterwards set aside, it is error to admit evi-

dence of the amount expended by the purchaser in the improvements on the property. He should have proceeded under the occupying claimant law when the land was recovered back.—Id.

[c] A decedent's estate is liable for services performed for his family after his death under a contract therefor made with him in his lifetime.—(Sup. 1877) Toland v. Stevenson, 59 Ind. 485; (1877) Toland v. Wells, Id. 529.

[d] (Sup. 1881)

In an action against the estate of a deceased person on a note stipulating for the payment of attorney's fees, such fees may be recovered as a proper claim against the estate.—Bond v. Orndorf, 77 Ind. 583.

[e] (Sup. 1881)

A claim against decedent's estate for money received by decedent in trust for the plaintiff is sustained where it appears that decedent had no authority beyond the possession and duty to keep the money safely, and loaned it on the individual note of the borrower.—Benson v. Liggett, 78 Ind. 452.

L., without authority, received for plaintiff money derived from the sale of real estate by the commissioner in partition, and notified plaintiff, but plaintiff disputed the validity of the same, and refused to accept or have anything to do with the money. Thereupon L. loaned the money to C., taking his note payable to plaintiff. C. afterwards failed. Held, that L.'s administrator was liable to plaintiff for the money so received.—Id.

[f] (Sup. 1882)

A note, payable after the maker's death, and averring a consideration, will support a claim against the estate of the maker.—Hathaway v. Roll, 81 Ind. 567.

[g] (Sup. 1884)

Under Decedent's Act 1881, §§ 86, 97, 101, as amended by Act March 7, 1886, notes made by decedent may be filed as claims, whether they are due or not.—Maddox v. Maddox, 97 Ind. 537.

Under Decedents' Act 1881, §§ 86, 97, 101, as amended by Act March 7, 1883, notes executed by the decedent, whether due or not, may be filed as claims against the estate.—Id.

[h] (Sup. 1890)

A claim for work and labor is presumably due after the person for whom the work is performed is dead, although it is not essential that it should be due in order to constitute a valid cause of action against his estate.—Lockwood v. Robbins, 25 N. E. 455, 125 Ind. 398.

[i] (App. 1897)

An express promise on valuable consideration to pay a certain sum at or before the death of the promisor may be enforced after his death

against his estate.—Woods v. Matlock, 48 N. E. 384, 19 Ind. App. 364.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 730, 738-745, 748, 754, 763.

See, also, 18 Cyc. p. 405.

## § 203. Joint contracts.

[a] (Sup. 1832)

In case of the death of one of two joint debtors, and the insolvency of the survivor, the estate of the deceased may be charged in equity for the debt.—Brown v. Benight, 3 Blackf. 39, 23 Am. Dec. 373.

[b] (Sup. 1877)

Under 2 Rev. St. 1876, p. 518, relative to the settlement of decedents' estates, a person holding a joint claim against a principal and surety may, on the death of the principal, proceed jointly against his estate and the surety, or separately against the estate.—Milam v. Milam, 60 Ind. 58.

[c] (Sup. 1877)

Under 2 Rev. St. 1876, p. 518, § 70, relative to the settlement of decedents' estates, the executor has neither the right nor the power to allow against the estate more than one-half of a joint promissory note made by the decedent and another person, unless the decedent was principal and the other person surety on the note, in which event the whole note may be allowed.—Fiscus v. Robbins, 60 Ind. 100.

[d] (Sup. 1879)

The personal representatives of a surety on a joint note are liable thereon, under 2 Rev. St. 1876, p. 309, § 783.—McCoy v. Payne, 68 Ind. 327.

[e] (Sup. 1884)

Rev. St. 1881, § 2312, expressly provides that, when two or more persons shall be bound on any contract and either shall die, his estate shall be liable therefor as if the contract had been joint and several.—Greathouse v. Kline, 93 Ind. 598.

[f] (Sup. 1886)

Upon the death of one of two joint debtors, the creditor may proceed in accordance with the statute (Rev. St. 1881, §§ 2311, 2312), providing for proving claim, against the estate of the deceased debtor, or he may collect his claim from the survivor by an action at law.—Ralston v. Moore, 105 Ind. 243, 4 N. E. 673.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 731.

See, also, 18 Cyc. p. 409.

## § 204. Services rendered to decedent.

Accrual of right of action on continuing contracts as affecting limitations, see LIMITATION OF ACTIONS, § 50.

Death as terminating employment, see MASTER AND SERVANT, § 26.

Unmatured claim, see ante, § 202.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 732, 733.

See, also, 18 Cyc. pp. 409–415; note, 64 L. R. A. 534.

**§ 206. — Persons in family relation.**

Agreements to make will, see post, § 210.

Estoppel by disclaimer to claim under agreement, see ESTOPPEL, § 71.

[a] (Supp. 1883)

In an action by an infant to recover for domestic services rendered, an answer that the decedent's husband furnished such infant with board and clothing is insufficient, as the law implies no promise on the infant's part to pay the decedent for board, clothing, etc., while she remained a member of the family.—Wright v. McLarinan, 92 Ind. 103.

[b] (App. 1898)

A claim against a decedent's estate for the feed and care of a pony will not be sustained where claimant, who was operating a large farm, gave the pony to decedent, his half-sister, and a member of his family, on account of her kindness to his family, without agreement as to the terms on which it was to be kept, and the pony was used in common by all the family.—Fuller v. Fuller's Estate, 51 N. E. 373, 21 Ind. App. 42.

Decedent, at an early age, after her parents had died, went to live with claimant, a half-brother, and continued to live with him until her death at 28 years of age. Claimant cultivated and lived upon a large farm, and had a large family. Decedent assisted in the work of the household, and acted and was treated as a member of the family, and had no express agreement to receive pay for her services, nor to pay for board or care received by her. Claimant's final report as guardian of decedent showed no charge for her maintenance or care. Held, that there was no implied contract entitling claimant to a recovery against decedent's estate for board and care.—Id.

[c] (App. 1900)

Where a daughter, in an action against the administrator of her father's estate to recover for services as housekeeper, rendered decedent after her arrival at age, fails to show an expressed or implied contract to pay for her services, it was not error for the trial court to direct a verdict for defendant.—Williams v. Resener, 56 N. E. 857, 25 Ind. App. 132.

[d] (App. 1908)

Where claimant resided with her grandmother, since deceased, and the only services claimant performed for her were such as a dutiful child renders to an afflicted and helpless parent, without hope or expectation of pecuni-

ary reward, plaintiff could not maintain a claim against the grandmother's estate therefor.—Shutts v. Franke, 42 Ind. App. 275, 85 N. E. 781.

[e] (App. 1910)

Where one lives from her birth to her marriage with her grandfather, as a member of his family, he furnishing board and clothing, and she rendering services, it is presumed that the necessities and comforts so furnished by him and the services so rendered by her were gratuitously furnished and done; so that his estate is not entitled to money received by him as trustee for her for what he so furnished her.—Lewis v. Hershey, 90 N. E. 332.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 733.

See, also, 18 Cyc. p. 412.

**§ 208. Covenants of decedent.**

Liabilities of devisees on covenants of testator, see WILLS, § 839.

Liabilities of heirs on covenants of ancestor, see DESCENT AND DISTRIBUTION, § 128.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 735.

See, also, 18 Cyc. p. 416.

**§ 210. Agreements by decedent to make will.**

Contracts within statute of frauds, see FRAUDS, STATUTE OF, § 142.

Statement of claim, see post, § 227.

[a] (Supp. 1865)

An action may be maintained against an executor on a parol contract of his testator to bequeath the plaintiff, if he continued to work for him, a certain sum in his will, in addition to the usual wages allowed to work hands.—Bell v. Hewitt's Ex'rs, 24 Ind. 280.

[b] (Supp. 1876)

Where services have been rendered by one under a verbal agreement by which, in consideration of such services, another had promised to insert a provision in his will, whereby he would devise and bequeath certain property to the person by whom such services were to be rendered, an action will lie against the administrator of the estate of the person so agreeing to make such provision in his will, for the breach of such agreement.—Lee v. Carter, 52 Ind. 342.

[c] (Supp. 1876)

In an action for damages for the violation of a promise made by defendant's testator to leave a certain share of his estate to plaintiff in consideration of certain services to be performed by the latter, the measure of damages is the value of the portion promised, and not the value of the services performed.—Frost v. Tarr, 53 Ind. 390.

Where a person promises that, at his death, he will leave a certain share of his estate to another, in consideration of certain service to be performed by the latter, an action for damages will lie, for the violation of such promise, against the personal representative of the former, the plaintiff having performed said service under the contract.—*Id.*

[d] (App. 1891)

In a proceeding to establish a claim against an estate for personal services rendered to the decedent, and for which decedent promised to compensate plaintiff in his will, the measure of damages is the value of the services rendered, and not the amount of the promised bequest.—*Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731.

Where a niece entered the home of her uncle on his promise to educate, clothe, and support her as his own daughter, and to make her an heir to his estate, equal to his sons, such facts rebutted the presumption, which otherwise might have obtained, that the services were to be gratuitously performed, and, on the uncle's failure to make her his heir, she is entitled to recover the value of her services from his estate.—*Id.*

[e] (App. 1894)

A husband's agreement with his wife, that, if she will join in certain deeds, he will allow her one-third of his personality at his death, must be made the basis of a claim to be filed against his estate, and cannot be considered in a proceeding to distribute the residue.—*Carroll v. Swift*, 10 Ind. App. 170, 37 N. E. 1061.

[f] (App. 1896)

Where a person receiving the benefit of another's services promises to pay therefor by a bequest, his estate is liable, on failure to make such bequest, for the value of the services.—*Purviance v. Schultz*, 44 N. E. 766, 16 Ind. App. 94.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 737; 49 CENT. DIG. WILLS, § 177.

§ 211. Torts of decedent.

[a] (Sup. 1873)

The administrator of a county clerk is liable for sheriff's fees collected by the clerk, and not paid over by him, where the claim therefor has been duly presented and filed.—*State ex rel. Arnold v. Givan*, 45 Ind. 267.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 746.  
See, also, 18 Cyc. p. 420.

§ 212. Taxes.

[a] (Sup. 1906)

Municipal assessments for street improvements made against a lot belonging to a decedent's estate constitute no liability against the estate, and his executor has nothing to do with it.—*Hayes v. Shirk*, 167 Ind. 569, 78 N. E. 653.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 747, 762.  
See, also, 18 Cyc. p. 420.

§ 214. Funeral expenses.

Claim for funeral expenses as accounts within statute of limitations, see LIMITATION OF ACTIONS, § 29.

Expenditures allowable, see ante, § 109.

Priority of claims, see post, § 261.

[a] (Sup. 1909)

Funeral expenses, whether the burial was provided by kindred or others, are charges against decedent's estate imposed by law, as distinguished from obligations arising out of contract from some act of decedent, and are in the same category as expenses of administration.—*Hildebrand v. Kinney*, 172 Ind. 447, 87 N. E. 832.

[b] (App. 1900)

Where the father of a minor is insolvent, the expenses of the minor's funeral and last sickness are proper charges against the minor's estate.—*Maitlen v. Maitlen*, 89 N. E. 966.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 755.  
See, also, 18 Cyc. p. 437; note, 33 L. R. A. 660; note, 9 Am. Dec. 652.

§ 215. Tombstones and monuments.

Expenditures allowable, see ante, § 109.

[a] (Sup. 1873)

A monument was placed on the grave of a decedent at the request of his mother, and she gave her own note for the price. The administrator had no agency in the matter, and made no promise to pay. *Held*, that the party furnishing the monument could not maintain an action against the administrator to recover its value.—*Lerch v. Emmett*, 44 Ind. 331.

[b] (Sup. 1902)

The expense of erecting a suitable monument over the grave of a deceased is to be classed among the funeral expenses.—*Pease v. Christman*, 64 N. E. 90, 158 Ind. 642.

[c] (App. 1910)

The court may properly allow a claim against a decedent's estate for the erection of a suitable monument at the grave of deceased as a legitimate part of the funeral expenses.—*In re Gray's Estate*, 91 N. E. 745.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 756.  
See, also, 18 Cyc. p. 439.

§ 216. Services rendered to estate.

Authority of executor or administrator to contract for services, see ante, § 97.

Expenditures allowable, see ante, § 111.

[a] (Sup. 1875)

Where an attorney, under the employment of an executor, rendered professional services



for the estate, but the will was thereafter set aside, and another person appointed to represent the estate as administrator, the attorney was entitled to compensation out of the estate for services rendered to the executor.—*Nave v. Salmon*, 51 Ind. 159.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 757; 5 CENT. DIG. ATT. & C. § 347.

See, also, 18 Cyc. p. 440.

§ 218. Expenses of administration.

Costs and fees in probate proceedings or actions relating to wills or probate, see WILLS, §§ 406-415.

Expenditures allowable, see ante, §§ 108-111. Priority of claims, see post, § 261.

[a] (Sup. 1884)

Costs made by claimants in successfully prosecuting claims against an estate are not expenses of administration.—*Taylor v. Wright*, 93 Ind. 121.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 759.

See, also, 18 Cyc. p. 443.

§ 219. Claims of executors or administrators.

Judgment of allowance as precluding subsequent action for preferment, see JUDGMENT, § 590.

Right to trial by jury where executor's claim is set down in form of suit on the issue docket, see JURY, § 18.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 760.

See, also, 18 Cyc. p. 446.

§ 221. Evidence.

Competency of testimony as to conversations in decedent's presence, see WITNESSES, § 161.

Evidence of similar facts, see EVIDENCE, § 129.

Expert testimony, see EVIDENCE, § 552.

Rebuttal of evidence as to a conversation in the presence of deceased, see WITNESSES, § 177.

Release of heir's interest as affecting his competency as a witness in proceedings to contest a claim against decedent's estate, see WITNESSES, § 112.

Res gestæ, see EVIDENCE, § 121.

Waiver of incompetency to testify, see WITNESSES, § 178.

[a] (Sup. 1871)

Where a claim was filed against an estate for work and labor done for, money had and received by, and services and attendance on, the deceased during his sickness; and the defense was that the work and labor and money and services were performed and paid under a valid contract; and under plea of set-off promissory notes were offered in evidence, given by the person presenting the claim to the decedent at vari-

ous times during the period for which he demanded compensation for labor and attendance, it was duty of the court to instruct the jury that these notes were prima facie evidence of a settlement between the claimant and the deceased.—*Bishop v. Welch*, 35 Ind. 521.

[b] (Sup. 1878)

Evidence held sufficient to support a claim filed against the estate of a decedent for personal services rendered by claimant in decedent's family.—*Wright v. Miller*, 63 Ind. 220.

[c] (Sup. 1881)

Where a claim was presented against a decedent's estate arising out of an agreement with decedent, on a sale to him of certain land at a certain price, to pay an excess of such price if he sold the land within five years for a greater sum, the evidence considered, and held sufficient to fully prove such claim.—*Parker v. Siple*, 76 Ind. 345.

[d] (Sup. 1890)

In an action by an administrator for the burial expense of decedent and his support while living, a written contract between defendant and decedent was produced, whereby defendant agreed to support decedent for life and bury him in consideration of \$500 and his household furniture. The theory of plaintiff was that decedent assigned two notes to defendant's wife, with his consent, and accepted in discharge of the obligation to pay the \$500. Held, that the notes were admissible in evidence.—*Baughan v. Brown*, 23 N. E. 695, 122 Ind. 115.

[e] (App. 1891)

In a proceeding to establish a claim against an estate for personal services rendered to the decedent, where it appears that the claimant was the decedent's niece, and a member of his family, evidence that she went to live with the decedent on account of his promise to make a will in her favor is admissible in order to rebut the presumption that her services were rendered gratuitously, although the promise was not kept, and was void under the statute of frauds.—*Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731.

[f] (App. 1891)

Proof of the signature to a written instrument acknowledging the receipt of money and promising to repay it a certain time after the promisor's death, followed by the introduction of the instrument itself in evidence, is sufficient to justify a judgment against the promisor's estate after his death.—*Wolfe v. Wilsey*, 2 Ind. App. 540, 28 N. E. 1004.

[g] (App. 1892)

A court has no right to disallow a claim against an estate for commissions due claimant in a real-estate transaction, which is fairly established by uncontradicted evidence of a special agreement between decedent and claimant.—*Cunningham v. Packard*, 6 Ind. App. 34, 32 N. E. 333; Id., 6 Ind. App. 36, 32 N. E. 334.

[h] (**APP. 1893**)

On the trial of a claim against a decedent's estate, evidence as to the "mental and physical condition of decedent in the latter part of his life" is properly excluded where defendant does not offer to show in what manner, if any, plaintiff took an undue advantage of such condition.—*Sullivan v. Sullivan*, 6 Ind. App. 65, 32 N. E. 1132.

[i] (**APP. 1893**)

In an action against the estate of a decedent for services, it appeared that plaintiff had been fed, clothed, and sent to school until 12 years old, but from that time was compelled to perform all the menial duties incident to housekeeping, besides caring for decedent's wife, who was sick for many years. Witnesses testified that plaintiff was well treated, and was taken to be one of the decedent's family, while others, though vouching for the good treatment, testified as to the duties imposed and services exacted. *Held* a question for the jury whether the services were rendered under an implied promise to pay, or solely as a member of decedent's family; and for this purpose they might take into consideration decedent's condition in life, his habits and manner of living, as well as his treatment of plaintiff with reference to other members of the family or other hired help.—*Helzler's Estate v. Bossard*, 6 Ind. App. 701, 33 N. E. 217.

[j] (**APP. 1893**)

In an action against an estate for services rendered the intestate, the second count of the complaint alleged that plaintiff lived till he was 26 years old with deceased, who then contracted to convey to plaintiff 80 acres of land if plaintiff would assist him in building a house on the land, and occupy it, and divide the crops with deceased, which contract plaintiff performed on his part, but deceased, dying, failed to convey the land; that plaintiff then sued defendant, as sole heir of deceased, to quiet title to the land, and obtained judgment that two thirds of the land was his, and one third belonged to defendant, as heir, and that, by reason of the failure of deceased to convey the land, he had lost title to one third thereof, valued at \$1,667, which was due to him from the estate. *Held*, that the court properly admitted in evidence the pleadings and judgment in the suit to quiet title, since such evidence showed that defendant was the sole heir of deceased, and that all the debts except the one in suit were paid, and therefore tended to prove the averment in the present suit that plaintiff had been deprived of one third interest in the land.—*Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611.

[k] (**APP. 1896**)

Where a son presented a claim against the estate of his mother, consisting of a note executed by the mother and father, the note being payable after their death, it was proper to admit evidence that the brother had filed a claim for taking care of the mother and father

during a part of the period in which the claimant in question was working for his mother according to some of the testimony; it appearing that the three brothers had claims on notes evidently executed as a part of one system, and that they were acting together.—*Crumrine v. Crumrine's Estate*, 43 N. E. 322, 14 Ind. App. 641.

[l] (**APP. 1896**)

In an action against an administrator on a note alleged to have been executed by decedent for work and labor done by the plaintiff while living with the decedent, evidence is admissible to show that plaintiff did but little, if any, work while he lived with such decedent.—*Campbell v. Conner*, 42 N. E. 688, 43 N. E. 453, 15 Ind. App. 23.

[m] (**APP. 1896**)

In an action against a decedent's estate to recover for work and labor alleged to have been performed for the decedent, it was erroneous to instruct that, if the jury believed that decedent kept plaintiff living with her at her home, and received her work and labor and furnished plaintiff with food and clothing, and that decedent and plaintiff were not related to each other by blood or marriage, then the family relationship is not presumed to exist between them, as the court should have permitted the jury to draw its own inferences from the facts stated.—*Purviance v. Schultz*, 44 N. E. 766, 16 Ind. App. 94.

[n] (**APP. 1897**)

Evidence that plaintiff, a girl 20 years old, went to live with decedent at the latter's request, remaining for 12 years, and until decedent's death; that during this time plaintiff received her board and clothing, did all the household work, and cared for decedent, who was blind for several years before she died; and that decedent at one time declared that she could not get along without plaintiff, and that she intended to do by her whatever was right,—was sufficient to establish the relation of master and servant, and entitled plaintiff to recover from the estate the value of her services.—*Boyd v. Starbuck*, 47 N. E. 1079, 18 Ind. App. 310.

On trial of a claim against an estate for services rendered deceased, claimant need not show that the services were worth more than the board and clothing furnished by deceased, in the absence of any plea of set-off or counterclaim, which are not available unless pleaded. *Burns' Rev. St. 1894, § 2479 (Rev. St. 1881, § 2324).—Id.*

[o] (**APP. 1899**)

Where a part of claimant's account against the estate of a decedent was for renting and looking after certain farms, and it was the theory of the defense that decedent attended to such matters himself, it was not error to admit the leases in evidence, and show that they had been prepared by decedent, though the contents thereof were immaterial.—*Shirts v. Rooker*, 52 N. E. 629, 21 Ind. App. 420.

Under an issue as to whether claimant's account against decedent's estate had been settled by decedent in his lifetime, a letter written by claimant to decedent, some time prior to the latter's death, referring to a statement of his account as inclosed, and requesting a settlement by note, was properly admitted in evidence.—*Id.*

In a proceeding for the enforcement of a claim against the estate of a decedent, a letter written to decedent by the firm of which claimant was a member was admissible in evidence for the purpose of showing that he was in the habit of corresponding with decedent.—*Id.*

A check purporting to have been made in payment of a certain note referred to therein, though not indorsed or receipted, except by the mark of a cancellation stamp thereon, was admissible in evidence, on production of such note, indorsed for collection, with evidence of the payment thereof, as such facts would raise the presumption that such check had been paid.—*Id.*

In a proceeding to enforce a claim for personal services against the estate of a decedent, where the defense was that such services were rendered by a firm of which claimant was a member, and that they had been paid for in the lifetime of decedent, the admission of certain checks drawn by the latter during the period covered by such transactions, and payable to such firm, was not reversible error.—*Id.*

Where it appeared in evidence, in a proceeding for the allowance of a claim against the estate of a decedent, that a law firm of which claimant was a member had been doing the general law business of decedent, and that some of the items in such claim were for services as an attorney, the jury were properly instructed that claimant had the burden of proving that such services were rendered by him in his individual capacity, and not as a member of such firm.—*Id.*

[p] (*App.* 1901)

On trial of plaintiff's claim against the estate of her husband's father for services rendered the father under an alleged promise for payment, it was error to direct judgment against plaintiff, where the evidence showed that the father had remained in plaintiff's home from time to time, and spoke of it as his home, and services were rendered to him by plaintiff in washing for him and attending him while he was ill, and plaintiff's two children testified to distinct promises for payment; the question as to whether he was a member of the family and as to whether there was a promise of payment under such circumstances being for the jury.—*Hamilton v. Hamilton's Estate*, 59 N. E. 344, 26 Ind. App. 114.

In an action against an administrator to recover for board, washing, and services rendered to decedent, a receipt signed by plaintiff's husband found among the papers of decedent after his death, which acknowledged the surrender of a note held by decedent as payment "in

full for board, washing, and services rendered," was admissible as tending to show that a contract existed between plaintiff and decedent that the latter should pay for his board, washing, and services rendered in nursing him during his last illness.—*Id.*

[q] (*App.* 1902)

Plaintiff, a sister-in-law to intestate, went to his home to assist his wife, and, after the wife's death, plaintiff continued to act as housekeeper from 1865 until 1897. In 1883 she received \$400 from intestate. Witnesses testified that intestate had stated that he would do well by plaintiff, and, in explanation of his not having made provision for her in his will, stated that the chances were that she would earn both his farms, and that he said to plaintiff that she should be paid, and that there were two farms to pay her out of, and he thought she could be paid out of them. Two former tax assessors testified that testator stated to them he was indebted to plaintiff, but made no deduction therefor on being told that, if he did, the plaintiff would be assessed. *Held*, that there was evidence from which the jury might find that the services were rendered in expectation of compensation, and that it was reasonable and just that plaintiff should be compensated therefor.—*Crampton v. Logan*, 63 N. E. 51, 28 Ind. App. 405.

[r] (*App.* 1902)

Where an administrator, in an action against him on a note alleged to have been given by decedent, defends without answer, as authorized by *Horner's Rev. St. 1901, § 2324* (*Burns' Rev. St. 1901, § 2479*), in cases where no counterclaim or set-off is relied on, the plaintiff must prove the execution of the note.—*Bowen v. O'Hair*, 64 N. E. 672, 29 Ind. App. 466.

[s] (*App.* 1903)

A claim against the estate of a decedent was on two notes, and claimant's witness testified that he was present when the notes were made; that he filled out the blank forms on which they were written, saw them signed, and saw the money paid. And another witness, a son of the first, testified in part to the same facts. The estate showed that decedent, prior to the date of the notes, had sued the claimant on a note, and that they had quarreled, and were not on speaking terms during the month when the notes in question were given; that decedent was a lender, and not a borrower; and that he left an estate of \$21,000. Fourteen nonexpert witnesses testified that the notes were not signed by decedent. *Held*, that a judgment in favor of the estate was sustained by the evidence.—*Simpson v. Scheutz*, 67 N. E. 457, 31 Ind. App. 151.

[t] (*App.* 1903)

On the trial of a claim against a decedent's estate for services rendered the decedent, a verified claim of the claimant's husband, pending in court against the decedent's estate, for the

same kind of services and rendered at the same time, is properly excluded.—*Ellis v. Baird*, 67 N. E. 960, 31 Ind. App. 295.

It appearing that claimant and her husband were living with decedent as members of his family, and that decedent was furnishing all the provisions, etc., it was error to refuse to receive evidence offered by defendant that claimant, as she was starting for decedent's home, stated that she would have to go there and do the washing and cooking, etc., and that the old gentleman was to furnish the provisions for his family and her family, and that she intended to do that until she got another place.—*Id.*

[u] (Sup. 1904)

Under Burns' Ann. St. 1901, § 2479, providing that, on a claim against a decedent's estate founded on a written instrument, the administrator is entitled, without answer, to every defense, including that of non est factum, except set-off or counterclaim, where a note indorsed by one member of a nontrading partnership was filed as a claim against the estate of the deceased partner, and the administrator filed no answer under such section, the burden was on the plaintiff to prove authority for the execution of the note.—*Schele v. Wagner*, 71 N. E. 127, 163 Ind. 20.

[uu] (App. 1904)

Under Burns' Ann. St. 1901, § 2479, regulating the trial of claims against decedents' estates, one claiming a note made by his agent and payable to claimant, found in the possession of the agent on the latter's decease, has the burden of showing the execution of the note.—*Indiana Trust Co. v. Byram*, 72 N. E. 670, 73 N. E. 1094, 36 Ind. App. 6.

[v] (Sup. 1905)

Where a suit to establish a claim against a decedent's estate, based on a certificate of deposit issued by decedent as a private banker, payable to claimant, was tried on the theory that the estate was entitled to all defenses, except set-off, questions whether any one was associated with decedent in the banking business were immaterial.—*Henderson v. Henderson*, 75 N. E. 269, 165 Ind. 666.

Where, in a suit to establish a claim against the estate of a decedent, based on a certificate of deposit signed by him as private banker, which recited that a third person had deposited a certain sum in decedent's bank payable to claimant, the estate was entitled under the statute to all defenses, except set-off, it was competent to show by tax duplicates that the third person had suffered her taxes to become delinquent, and by certified copies of deeds and mortgages that she suffered a mortgage to remain unpaid during the time she claimed that she possessed the amount of the deposit, as showing that no deposit was made.—*Id.*

[vv] (App. 1905)

In an action by a married woman for services performed for a decedent under an oral contract, the burden of proof of consider-

ation for the contract was upon plaintiff, though defendant had pleaded a want of consideration specially.—*Kennedy v. Swisher*, 34 Ind. App. 676, 73 N. E. 724.

[w] (App. 1907)

In a suit to establish a claim against the estates of decedents, who were foster parents of the claimant, the evidence showed that there was no express agreement to pay claimant for services rendered for the parents, nor any evidence that they agreed with claimant to make any disposition by will in her favor in consideration of her rendering services for them, but showed that the parents made declarations to neighbors and friends, without any design of influencing the action of claimant, indicating a design to will their property to her. *Held* insufficient as a matter of law to establish a contract essential to entitle claimant to recover.—*McClure v. Lenz*, 40 Ind. App. 56, 80 N. E. 988.

[ww] (App. 1907)

In an action on a claim for services rendered, filed against a decedent's estate, the claimant must show by a preponderance of the evidence that the services were rendered at the request of the decedent, who promised to pay for them; and hence an instruction placing on defendant the burden of proving that the services were gratuitously rendered is erroneous.—*Hunt v. Osborn*, 40 Ind. App. 646, 82 N. E. 933.

[x] (Sup. 1908)

On a claim by a husband against the estate of his deceased wife for moneys deposited in a bank in her name designated as "Special" and "Agent," and also for money paid on building and loan stock, evidence *held* sufficient to show claimant's ownership of such funds.—*Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 593.

[xx] (App. 1908)

In an action against an estate for services rendered decedent by a member of her family, evidence examined, and *held* not to show that the services were rendered for hire, or that there was any expectation on plaintiff's part to charge therefor at the time they were rendered, or any expectation on decedent's part that she owed him for any services except perhaps for services rendered by him after he attained his majority.—*Waechter v. Walters*, 41 Ind. App. 408, 84 N. E. 22.

[y] (App. 1909)

Where plaintiff undertook to care for and support decedent under his express promise to pay for the same, whether plaintiff and decedent lived together as a common family was immaterial.—*Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

[yy] (App. 1909)

In a suit to establish a claim of a widow against the estate of her husband, evidence *held* insufficient to sustain a verdict in her favor for

\$479, but should be reduced to \$100 with interest.—*Feathergill v. Dougherty*, 89 N. E. 521.

[z] (App. 1910)

The evidence in support of a claim against a decedent's estate by a daughter of decedent for services held sufficient to support a verdict for the claimant.—*Hill v. Hill*, 90 N. E. 331.

[zz] (App. 1910)

In an action against an estate for services rendered decedent as housekeeper, evidence held to support a judgment for plaintiff.—*Willette v. Miller*, 92 N. E. 6.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876.

**(B) PRESENTATION AND ALLOWANCE.**

As condition precedent to action against executor or administrator, see post, § 431.

As waiver of creditor's right to proceeds of insurance, see INSURANCE, § 590.

Effect of allowance as judgment extinguishing note by merger, see JUDGMENT, § 556.

Failure to file claim against deceased husband's estate, effect on right to enforce covenant against widow, see COVENANTS, § 72.

Necessity of presentation to administrator before suit against heirs, see DESCENT AND DISTRIBUTION, § 140.

Necessity of presentation to executor before suit against devisees, see WILLS, § 847.

Statutory proceedings for submission of controversy on agreed statement, see SUBMISSION OF CONTROVERSY, § 3.

**§ 222. Necessity for presentation in general.**

[a] (Sup. 1877)

Where, in an action by the sole devisee of an estate against an attorney to recover in part for moneys alleged to have been collected by the latter on choses in action devised to the plaintiff, and in part for an alleged personal indebtedness of the defendant to the plaintiff, an answer pleading a set-off for professional services rendered by the defendant in the settlement of the decedent's estate, which did not allege that such claim had been filed as a claim against the estate, or that such estate had been finally settled, is demurrable.—*Tracewell v. Peacock*, 55 Ind. 572.

[b] (Sup. 1884)

Rev. St. 1881, §§ 2310-2312, providing that no action by summons and complaint shall be brought against an executor or administrator, but that the claimant shall file a statement of his claim in the office of the clerk of court, do not apply to an action pending against deceased at the time of his death, as such action can be revived under section 271, providing that no action shall abate by the death of a party, and that, in case of his death, the court,

on motion, may allow the action to be continued against his personal representatives.—*Clodfelter v. Hulett*, 92 Ind. 426.

[c] (Sup. 1906)

Burns' Ann. St. 1901, § 2465 (Acts 1883, p. 151, § 5), prohibiting the bringing of actions against an executor or administrator, and requiring all claims against the estate to be filed in the clerk's office, does not apply to actions pending at the time of the death of the decedent.—*Newman v. Gates*, 165 Ind. 171, 72 N. E. 638. Writ of error dismissed (1907) 204 U. S. 89, 27 S. Ct. 220, 51 L. Ed. 385.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 764-766.

See, also, 18 Cyc. pp. 448, 1353.

**§ 223. Statutory provisions.**

[a] (Sup. 1873)

Under 2 Gav. & H. St. p. 336, § 802, claims in favor of an administrator against the estate in his hands may be filed in the probate court, and in the common pleas since the latter court became the successor of the former.—*Chidester v. Chidester*, 42 Ind. 469.

[b] (Sup. 1874)

By Act March 6, 1873, §§ 79-81 (Acts 1873, pp. 96, 97), the jurisdiction of the court of common pleas, with its mode of procedure under the act in relation to decedents' estates, was transferred to the circuit court. Under the amended section 66 of the act in relation to decedents' estates, the practice of filing special answers to claims against estates was adopted, and also the practice of filing interrogatories with the pleadings according to section 303 of the general practice act; and the same practice in these respects should be followed by the circuit court.—*Alexander v. Alexander*, 48 Ind. 559.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 767.

See, also, 18 Cyc. p. 1353; note, 16 Am. Dec. 718.

**§ 224. Claims which must be presented.**

[a] (Sup. 1868)

Under 2 Gav. & H. St. p. 501, providing that claims against a decedent's estate, except claims secured by mortgage, shall be barred unless presented to the executor within a year from his appointment and notice to file claims, a claim for a deficiency under foreclosure of a mortgage is not barred, though the year for filing claims has expired.—*Cole v. McMickle*, 30 Ind. 94.

[b] (Sup. 1868)

The whole of a decedent's property, both real and personal, as against his heirs, is subject by the laws of Indiana to the payment of his debts and liabilities. Therefore a claim for damages upon a breach of a covenant of warranty in a deed of conveyance of real estate should be prosecuted against his personal representa-

tive, or filed against his estate, as provided in section 62 of the act regulating the settlement of estates (2 Gav. & H. St. p. 501). and, if not so filed, is liable to be barred.—*Hartman v. Lee*, 30 Ind. 281; *Ratcliff v. Leunig*, Id. 289.

[c] (Sup. 1877)

A simple claim against a decedent's estate must be filed, and entered upon the appearance docket by the clerk.—*Noble v. McGinnis*, 55 Ind. 528.

Judgment or mortgage liens upon the estate or property of a decedent cannot be filed nor adjudicated as are simple claims.—Id.

[d] (Sup. 1879)

A mortgagee is not bound to proceed against the administrator of a mortgagor before he sues on his mortgage.—*Bell v. Hobaugh*, 65 Ind. 598.

[e] (Sup. 1880)

The provisions of Acts 1875, p. 59, § 1, are applicable to any claim of an executor or administrator whether held in his personal right, or as administrator or executor of another estate, or as guardian or trustee in any matter wherein ordinarily he might sue in his own name.—*Wright v. Wright*, 72 Ind. 149.

[f] (Sup. 1883)

Acts 1883, p. 153, § 5, amending Decedent's Act, § 86, applies to claims against estates originating after, as well as before, the death of decedent.—*Scott v. Dailey*, 89 Ind. 477.

[g] (Sup. 1884)

A legacy for which the lands of testator are liable need not be filed as a claim, in order to hold the lands for payment.—*Cook v. Cook*, 92 Ind. 398.

[h] (Sup. 1884)

A complaint for the allowance of a legacy may be made to the court having probate jurisdiction, in the form of a claim against the estate.—*Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449.

[i] (Sup. 1884)

Rev. St. 1876, p. 534, did not require a claim secured by mortgage to be filed with the administrator.—*La Plante v. Convery*, 98 Ind. 490.

[j] (Sup. 1894)

Under Rev. St. 1894, §§ 2465-2469 (Rev. St. 1881, §§ 2310-2314), relating to the filing and enforcement of claims against an estate, construed in connection with Rev. St. 1894, §§ 2484, 2491, 2505 (Rev. St. 1881, §§ 2331, 2338, 2350), relating to liens upon the realty of a decedent, the lien created in favor of co-sureties with deceased, by their payment of a judgment rendered against themselves and deceased, as defendants, where the sums paid by them severally are entered as credits upon the docket of said judgment, continues against the realty or deceased until discharged by decree or payment, though such lien is not filed as a claim against the estate.—*Beach v. Bell*, 139 Ind. 167, 38 N. E. 819.

[k] (App. 1898)

Under a will directing the payment of debts, and under Rev. St. 1894, § 2534 (Horner's Rev. St. 1897, § 2378), declaring that mortgage debts have precedence over general debts, an administrator is bound to pay a mortgage assumed by decedent on land belonging to the estate, though no claim therefor is filed against the estate.—*Swift v. Harley*, 49 N. E. 1069, 20 Ind. App. 614.

[l] (Sup. 1899)

There is no duty resting on the state to file claims against a decedent's estate for taxes owing by him to the state, under Burns' Rev. St. 1894, § 8587.—*Graham v. Russell*, 52 N. E. 806, 152 Ind. 186.

[m] (App. 1906)

The right to an allowance accorded to the widow by Burns' Ann. St. 1901, § 2424, is not a claim against the decedent, within section 2465.—*Rush v. Kelley*, 73 N. E. 130, 34 Ind. App. 449.

[n] (App. 1906)

Where a mortgage creditor of a decedent waives his right to participate in the personal assets of the estate by failing to file his claim, he may look to the mortgage security for payment without filing the claim.—*St. Joseph County Sav. Bank v. Randall*, 37 Ind. App. 402, 76 N. E. 1012.

[o] (App. 1909)

Where a wife was induced to sign a satisfaction of a judgment for alimony while of unsound mind, and she continued of unsound mind until her death, which occurred after the death of the husband, it was necessary to file the judgment as a claim against decedent's estate in order to recover the alimony awarded.—*Wilson v. Fahnestock*, 86 N. E. 1037.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 768-788.

See, also, 18 Cyc. pp. 454-467.

§ 225. Time for presentation.

Claim secured by mortgage, see MORTGAGES, § 424.

[a] (Sup. 1878)

Under 2 Rev. St. 1876, p. 121, a claim filed against the estate of a decedent on August 25, 1874, for work performed for the decedent from and after October, 1862, at a weekly wage, is not barred.—*Wright v. Miller*, 63 Ind. 220.

[aa] (Sup. 1884)

Since an administrator is a necessary party to a creditor's action to set aside a fraudulent conveyance, and since Rev. St. 1881, § 2403, provides an estate cannot be reopened after three years, so that an administrator d. b. n. cannot be appointed after such time, a creditor's suit to set aside the conveyance cannot be maintained after three years.—*Vestal v. Allen*, 94 Ind. 268.

[b] (Sup. 1887)

Under Acts 1883, p. 153, § 5, regulating the filing of claims against decedent's estates,

and providing that, if a claim is not filed at least 30 days before final settlement of the estate, it shall be barred, with certain exceptions, exceptions to the final settlement of a report of an executor is properly stricken out on motion where it is alleged as ground for the exception that some 20 days after the final settlement had been filed the claimant had filed a meritorious claim against the estate, which claim was then pending and unpaid.—*Roberts v. Spencer*, 13 N. E. 127, 112 Ind. 81.

[c] (*Sup.* 1887)

The term "final settlement," as used in section 2310, Rev. St. 1881, providing that claims not filed at least 30 days before the final settlement of the estate shall be barred, means the presentation of the account for final settlement at the time fixed by law, and claims not filed 30 days before that time will be barred.—*Roberts v. Spencer*, 112 Ind. 85, 13 N. E. 129.

The provision of the statute (Acts 1883, p. 153, § 5) requiring claims to be filed "at least thirty days before final settlement of the estate" means 30 days before the filing of the account for final settlement by the executor or administrator, where one year has expired from the time of giving notice of his appointment, and not 30 days before the confirmation of such report by the court.—*Id.*

[d] (*Sup.* 1891)

Under Elliott's Rev. St. § 385, requiring that claims against estates of decedents should be filed within 30 days before final settlement, a claim filed 2 days before the time set for making such settlement was not in time, and barred.—*Schrichte v. Stites' Estate*, 127 Ind. 472, 26 N. E. 77, 1009.

[e] (*App.* 1891)

The fact that a claimant kept the note for nearly 20 years in his possession without making any attempt to collect it does not estop him from asserting it against the estate.—*Smith v. McDonald*, 28 N. E. 994, 3 Ind. App. 49.

[f] (*Sup.* 1893)

A claim against the estate of a decedent cannot be filed against the estate after 30 days before final settlement, where the claim does not fall within any of the exceptions authorizing suits against heirs and distributees.—*Stults v. Forst*, 34 N. E. 1125, 135 Ind. 297.

[g] (*App.* 1894)

Rev. St. 1894, § 305 (Rev. St. 1881, § 304), providing that "limitations of actions shall not bar the state, except as to sureties," does not apply to Rev. St. 1894, § 2465 (Rev. St. 1881, § 2310), limiting the time for filing claims against a decedent's estate.—*State ex rel. Slinkard v. Edwards*, 11 Ind. App. 226, 38 N. E. 544.

[h] (*App.* 1909)

Burns' Ann. St. 1908, § 2828, provides that claims against a decedent's estate, filed after the expiration of one year from the giving of

the notice by the executor or administrator of his appointment, shall be prosecuted at the cost of the claimant, and, if not filed at least 30 days before the final settlement of the estate, they shall be barred. *Held*, that a creditor of a decedent's estate has one year from the notice of the appointment of the administrator in which to file his claim.—*Tilson v. Hoosier Tropical Fruit Co.*, 43 Ind. App. 684, 88 N. E. 524.

[i] (*App.* 1910)

Even if the claim of an infant against decedent was subject to the statute of limitations, her claim filed 26 months after she became of age and nine months after his death was reasonable; the two years after she came of age, limited by Burns' Ann. St. 1908, § 298, for bringing her action, being extended by his death, under the provisions of section 300.—*Lewis v. Hershey*, 90 N. E. 332.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 789-803, 805.

See, also, 18 Cyc. pp. 468-472; note, 58 L. R. A. 82.

## § 227. Statement and verification of claim.

Proof of claims in proceedings to sell property of decedent, see post, § 340.

Statement operating as complaint on contest of claim, see post, § 251.

Waiver of objection to statement where some of the items are well stated, see post, § 245.

[a] (*Sup.* 1941)

Under Rev. St. 1838, p. 182, providing that a creditor shall file a statement of his demands against decedent's estate in the clerk's office, and give notice thereof, for the purpose of securing a priority, does not intend that a claim so filed will stand for a declaration to which the administrator shall be compelled to plead.—*Stewart v. Cantrall*, 6 Blackf. 74.

[b] (*Sup.* 1858)

An entry that the action is on a note, giving the amount, is a good succinct statement under 2 Rev. St. p. 260, § 62, requiring a succinct statement of the nature and amount of every claim against an estate to be filed, without naming the payees (they being the plaintiffs).—*Crabb v. Atwood & Co.*, 10 Ind. 322.

[c] A claim filed against an estate need not be a formal complaint conforming to the ordinary rules of pleading, but a statement is sufficient which apprises the party of the nature of the claim, and contains enough substance to bar another action for the same demand.—(*Sup.* 1859) *Hannum v. Curtis*, 13 Ind. 206; (1873) *Ginn v. Collins*, 43 Ind. 271; (1880) *Wright v. Jordan*, 71 Ind. 1; (1882) *Davis v. Huston*, 84 Ind. 272; (1882) *Hileman v. Hileman*, 85 Ind. 1; (1884) *Stapp v. Messeke*, 94 Ind. 423; (*App.* 1891) *Taggart v. Tevanny*, 27 N. E. 511, 1 Ind. App. 339; (1891) *Wolfe v.*

Wilsey, 28 N. E. 1004, 2 Ind. App. 549; (1891) Brown v. Sullivan, 29 N. E. 453, 3 Ind. App. 211; (1892) Sheeks v. Fillion, 29 N. E. 786, 3 Ind. App. 262; (1893) Knight v. Knight, 33 N. E. 456, 6 Ind. App. 268; (1893) Doan v. Dow, 8 Ind. App. 324, 35 N. E. 709; (1893) Parrett v. Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; (1895) Gibbs v. Ely, 41 N. E. 351, 13 Ind. App. 130; (1895) Cooper v. Griffin, 40 N. E. 710, 13 Ind. App. 212; (1897) Woods v. Matlock, 48 N. E. 384, 19 Ind. App. 364; (1898) Hyatt v. Bonham, 40 N. E. 361, 19 Ind. App. 256.

[d] (Sup. 1859)

It is not necessary that the statement of a claim against a decedent's estate for money placed in the decedent's hands to pay a debt of the plaintiff should show that the money had not been so applied. That is matter of defense, presumed to be within the knowledge of the defendant as administratrix.—Hannum v. Curtis, 13 Ind. 206.

[e] (Sup. 1859)

A. filed a claim in the form of an itemized account against the estate of B. for one-half a certain warehouse lot, and half the improvements thereon. There were no other averments or complaint than the claim; and it was *held* that, the inference being that the claim was in favor of a surviving partner or joint owner against the estate of the deceased partner or joint owner, the claim did not amount to a succinct statement, as required by the statute.—Thompson v. Ristine, 13 Ind. 459.

[f] (Sup. 1868)

The omission of the Christian name of the plaintiff in the statement of a claim against a decedent's estate is only matter in abatement, and may be cured by amendment.—Peden's Adm'r v. King, 30 Ind. 181.

[g] (Sup. 1868)

The statement of a claim filed against a decedent's estate, consisting of a copy of a note given by the decedent to the claimant, and accompanied by an affidavit, *held* sufficient.—Pulley v. Perfect, 30 Ind. 379.

[h] (Sup. 1869)

Where a statute requires that an affidavit shall be attached to a claim against a decedent's estate "to the effect that the same is justly due and wholly unpaid," it is not necessary to make the averment in the words of the statute. It is sufficient if the language of the affidavit be to that effect.—Story's Adm'r v. Story, 32 Ind. 137.

[i] (Sup. 1874)

An executor may allow a claim against the estate of his testator, if found to be correct, though the claim be not made out in an itemized form.—Lancaster v. Gould, 46 Ind. 397.

[j] (Sup. 1874)

The affidavit prescribed by Act Feb. 20, 1855 (2 Gav. & H. St. p. 502), to be attached

to a claim presented against an estate, is not a jurisdictional prerequisite, but only a condition to the recovery of any costs in a suit on the demand. And it need not aver in terms that there is no offset to the claim.—Smith v. Denman, 48 Ind. 65.

[k] (Sup. 1876)

To file a claim against a decedent's estate, the statute does not require a regular complaint constructed according to the ordinary rules of pleading, but merely a succinct statement sufficient to apprise the administrator of the nature of the claim, and the amount demanded, and to bar another action for the same demand. Therefore, where the complaint alleged that the claimant had paid to the decedent a certain sum of money, which he had agreed to repay to the claimant in default of conveying to him an interest in certain leases, and that the decedent had conveyed to other persons, *held*, that it was sufficient as an allegation that the decedent had rescinded the contract, and showed a right in the claimant to recover what he had paid.—Post v. Pedrick, 52 Ind. 490.

[kk] (Sup. 1876)

Where a claim against a decedent's estate is based on an agreement in writing, whereby it was agreed that claimant should sell certain lands to the decedent, and that the latter should resell them, and retain the sum received therefor in excess of a certain sum, it is not necessary to file a copy of such agreement with the claim.—Bryson v. Kelley, 53 Ind. 486.

Where a claim against a decedent's estate is for money collected by the decedent during his lifetime on a note belonging to the claimant, and appropriated by the decedent to his own use, such note need not be filed with the claim.—*Id.*

[l] (Sup. 1877)

A testator, dying seised in fee of lands, devised them to his widow during her widowhood, with remainder in fee, in common, to his children, part of whom conveyed their portions of the remainder to a purchaser. The widow having died, such purchaser commenced a joint action in the circuit court against the administrator of her estate and the guardian of another by filing a complaint upon the probate appearance docket, and issuing a summons thereon to the guardian, alleging in his complaint that, after he had received the conveyance, the widow had committed waste upon the inheritance by cutting and selling timber growing thereon, with the proceeds of which she had purchased a tract of land and caused the same to be conveyed to the ward, and then died, leaving an estate insufficient to pay him his damages, judgment for which he demanded against the administrator, and also that the ward's land be subjected to the payment of any deficiency which could not be realized from the estate. *Held*, that all parts of the complaint, as to such guardian or his ward, were properly stricken out, and the action as to him dismissed, on motion, and, thus



eliminated, the complaint constituted a sufficient claim against the estate within the probate jurisdiction of the court.—*Noble v. McGinnis*, 55 Ind. 528.

[ll] (Sup. 1877)

A claim filed in an action on account against the estate of a decedent, stating in a plain and formal manner the items of the account, and duly verified, is sufficient.—*Dodds v. Dodds*, 57 Ind. 293.

[m] (Sup. 1879)

A claim against a decedent's estate in the form of an open account for money paid for decedent is sufficient to authorize a recovery on a note for money so paid, given by deceased to plaintiff for a larger amount, but reduced by credits to the amount of the claim; and an amendment thereof filed after the sustaining of a demurrer thereto by setting out the note and making it a part of the amended complaint, and averring that the consideration was money paid for the deceased, as stated in the original claim, is unnecessary.—*Ramsey v. Fouts*, 67 Ind. 78.

[mm] (Sup. 1882)

That a claim against a decedent's estate is presented by a foreign administrator as claimant is not sufficiently established by a recital in the affidavit attached thereto, made in another state, that the claimant, "one of the administrators of the estate of B., late of said county, deceased," was sworn, etc.—*Davis v. Huston*, 84 Ind. 272.

[n] Under Act June 18, 1852, § 62 (Rev. St. 1881, § 2310), relating to settlement of decedent's estate, and requiring a creditor to file only "a succinct statement of the nature and amount" of his claim against the estate, while the ordinary rules of pleading are not applicable in all their strictness to the statement of a claim, the claimant must nevertheless allege in his complaint, or the statement of his claim, all the facts necessary to constitute *prima facie* a cause of action in his favor against the estate.—(Sup. 1882) *Huston v. First Nat. Bank of Centerville*, 85 Ind. 21; (1885) *Walker v. Heller*, 104 Ind. 327, 3 N. E. 114; (1887) *Culver v. Yundt*, 14 N. E. 91, 112 Ind. 401; (1888) *Thomas v. Merry*, 15 N. E. 244, 113 Ind. 83; (1890) *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455; (App. 1891) *Taggart v. Tevanny*, 27 N. E. 511, 1 Ind. App. 339; (1893) *Knight v. Knight*, 33 N. E. 456, 6 Ind. App. 268; (1895) *Cooper v. Griffin*, 40 N. E. 710, 13 Ind. App. 212; (Sup. 1903) *Stanley's Estate v. Pence*, 100 Ind. 636, 66 N. E. 51, 67 N. E. 441.

[nn] (Sup. 1883)

In the presentation of claims against the estates of decedents, the rules of pleading are not so strict as in ordinary cases, but the nature of the claims must be stated and the proof and judgment must conform thereto.—*Davis v. Watts*, 90 Ind. 372.

[o] (Sup. 1884)

A claim against the estate of H. for the amount allowed claimant by law as the widow of F. alleged that H. when he died had possession of all the personal property of F., and that the administrator of the estate of H. took the personal property, and sold it as a part of the estate of H. Held that, in the absence of a motion to make the claim more certain, it was sufficient.—*Stapp v. Messeke*, 94 Ind. 423.

A claim alleged that the claimant was entitled to one-third of the real estate of her deceased husband F., and that H. was tenant thereof for five years after the death of F. at \$200 a year. Held, that the claim was sufficient, for H. was liable for the rent of the land so that the claim could be enforced against the estate.—Id.

[oo] (Sup. 1884)

A claim of a widow verified by affidavit, stating that the estate of her deceased husband was indebted to her for money had and received by a former administrator, to be by him applied to the payment of debts of the estate, and to be accounted for in final settlement and distribution, and consisting of certain enumerated items, was sufficient as against an objection not made until after verdict.—*Brown v. Forst*, 95 Ind. 248.

[p] (Sup. 1884)

Under Rev. St. 1881, § 2310, requiring that a claim against an estate shall be accompanied by an "affidavit of the claimant, his agent or attorney," that it is just and unpaid, the affidavit need not disclose the relationship of the affiant.—*Hanna v. Fisher*, 95 Ind. 383.

[pp] (Sup. 1884)

Where a claim presented against an estate does not aver that the maker of the instrument was dead at the time the claim was filed, though by its terms it was not payable until his death, nor that at the time it was filed letters testamentary or of administration had been issued on the estate of such person, it was not sufficient to constitute a cause of action against the estate, as enough facts should be stated to show, *prima facie* at least, the liability of the estate for the payment of the claim.—*Moore v. Stephens*, 97 Ind. 271.

[q] (Sup. 1885)

The holder of a claim against the estate of one deceased need not file a formal complaint against the administrator. Rev. St. § 2310. only requires a succinct and definite statement.—*Windell v. Hudson*, 102 Ind. 521, 2 N. E. 303.

A complaint by the holder of a claim against the administrator of a decedent's estate, founded on an oral contract of the decedent, must aver a consideration for the promise, or it will be bad on demurrer.—Id.

[qq] (Sup. 1885)

It being sufficient to file a note executed by a deceased person as a claim against his es-

tate without any formal complaint, where the note stipulates for attorney's fees, they are a part of the contract, and the filing of the note is sufficient, without an express claim of them.—*Price v. Jones*, 105 Ind. 543, 5 N. E. 683, 55 Am. Rep. 230.

[r] (Sup. 1887)

Under section 2310, Rev. St. 1881, providing that the holder of a claim against a decedent "shall file a succinct and definite statement thereof," no formal complaint is necessary, but a statement that decedent was indebted to the claimant "to his proportionate share," to wit, one-seventh, of a certain judgment in favor of claimant against a gravel-road company, without setting out the judgment, or showing that decedent was a party, or otherwise connected therewith, is insufficient on demurrer.—*Culver v. Yundt*, 112 Ind. 401, 14 N. E. 91.

[rr] (Sup. 1888)

A claim for money had and received in trust for claimant's use, by decedent in his lifetime, reciting that all questions as to such trust, and its amount, had been adjudicated and determined in claimant's favor in a suit against the heirs and personal representatives of the decedent, while not so clear and certain as good pleading would require, is sufficient on demurrer.—*Thomas v. Merry*, 113 Ind. 83, 15 N. E. 244.

[s] (Sup. 1890)

A claim filed against the estate of the deceased showed the amount due and unpaid on notes, a copy of which were filed with the claim and marked "Exhibits," and showed the amount due for lumber sold at designated periods at fixed rates. Held a sufficient statement of claimant's claim.—*Stricker v. Barnes*, 23 N. E. 263, 122 Ind. 348.

[ss] (Sup. 1891)

The provision of the statute that in filing claims against a decedent's estate the claim shall be clear and distinct, and the credits to which the estate is entitled shall be set forth, is complied with where the credit is not itemized, but is stated in gross.—*Miller v. Eldridge*, 126 Ind. 461, 27 N. E. 132.

[t] (App. 1891)

If any part of the claim is sufficient, the statement cannot be held bad on appeal, although it contains some items that are not properly stated.—*Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511.

Under Elliott's Supp. § 385, which provides that a statement of a claim against a decedent's estate shall set forth all credits to which the estate is entitled, and shall be accompanied by affidavit that the claim, after deducting all credits, set-offs, and deductions, is justly due, and wholly unpaid, an affidavit which states "that the above account is correct, that no payments have been made thereon except the credits therein given, and that the balance shown in said account is justly due and owing," is sufficient.—Id.

Where a claim has been properly verified, the acceptance of an additional statement of the claim, filed afterwards in open court, with leave first obtained, is no reason for reversing a judgment for the claimant, though the additional statement is not verified.—Id.

Under Rev. St. 1881, § 2310, which provides that the holder of a claim against a decedent "shall file a succinct and definite statement thereof," a statement for work and labor, which states that the services were rendered, for whom and by whom rendered, the nature and extent and value of the services, together with an affidavit that the amount stated is justly due and owing to the claimant is sufficient.—Id.

An administrator need not be formally made a party to a statement of claim, or named therein, especially when he appears, and contests the claim.—Id.

[tt] (App. 1891)

A second statement of a claim against an estate, filed at a later term, may be treated as an amendment to the original statement instead of being put on the appearance docket as if it were a separate claim, especially where the original statement of the claim is sufficient.—*Wolfe v. Wilsey*, 2 Ind. App. 540, 28 N. E. 1004.

Under Elliott's Supp. § 385, which provides that the holder of a claim against the estate of a decedent shall file a succinct and definite statement thereof, which shall set forth all credits and deductions to which the estate is entitled, the holder of a claim based on a written instrument executed less than a year before the decedent's death, which contains an acknowledgment by the decedent of a debt, and a promise to pay it at a certain time after his death, and provides for the indorsement thereon of annual settlements of the account, need not file any more definite or specific statement than a copy of the instrument, together with the claimant's affidavit to the effect that such account is correct after deducting all credits and deductions, and is justly due, and wholly unpaid.—Id.

[u] (App. 1891)

It is sufficient to file a note executed by one deceased against his estate without accompanying it with a formal complaint.—*Garrigus v. Home Frontier & Foreign Missionary Soc.*, 28 N. E. 1000, 3 Ind. App. 91, 50 Am. St. Rep. 262.

[uu] (App. 1892)

Where one item of a claim against a decedent's estate is sufficiently stated, the complaint is not demurrable because of the insufficiency of other items of the claim.—*Sheeks v. Fillion*, 3 Ind. App. 262, 29 N. E. 786.

[v] (App. 1894)

A claim against decedent, reading, "In account with J. M. S. and L. E. S. \* \* \* Dr., for board, washing, sewing, nursing, and expense of last sickness, watching with and

caring for deceased from Nov. 1st, 1888, to Sept. 29th, 1893, total, 256 weeks, \$2,125," is sufficient, under Rev. St. 1894, §§ 2465, 2466 (Rev. St. 1881, §§ 2310, 2311), requiring holders of a claim against a deceased person to file a "succinct and definite" statement thereof with the clerk of the court.—*Stewart v. Small*, 11 Ind. App. 100, 38 N. E. 826.

[vv] (App. 1895)

A claim against an estate, alleging a conveyance for a valuable consideration, breach of covenant for possession, and damages, is sufficient, though not verified.—*Gibbs v. Ely*, 13 Ind. App. 130, 41 N. E. 351.

[w] (App. 1895)

A claim filed against a decedent's estate for services rendered by a physician need not allege that the physician was licensed as required by law.—*Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710.

[ww] (App. 1895)

The rule that a pleading must proceed upon a single definite theory, the trial had and judgment pronounced upon the theory indicated, has but little or no application to claims against estates.—*Thornburg v. Buck*, 41 N. E. 85, 13 Ind. App. 446.

[x] (App. 1898)

The statement of a claim against an estate, with the accompanying affidavit, showed a balance for goods bought as of the date of the original purchase. The evidence showed an agreement by deceased, made some time after the purchase, to assume the payment of such balance. *Held*, that the variance between the statement of the claim and the proof was not fatal.—*Hyatt v. Bonham*, 49 N. E. 361, 19 Ind. App. 250.

A statement of a claim against an estate recited that the estate was indebted to B. & Sons, on a date given, "to balance on opera chairs, \$118.04." Following it was the affidavit of B. that the account was correct; that no payments had been made except as credits thereon were given; that there were no set-offs; that the balance was justly due. *Held* sufficient, under the statute requiring the filing of a "succinct and definite statement," as against objections made on appeal for the first time.—*Id.*

[xx] (App. 1899)

Under Horner's Rev. St. 1897, § 2310 (Burns' Rev. St. 1894, § 2465), requiring that the statement of a claim against a decedent's estate, filed in the clerk's office, shall be accompanied by an affidavit that the claim is justly due and unpaid, where the statement on rejection of the claim by the personal representative has been transferred to the issue docket for trial by the court, an amended complaint, filed by the claimant, need not be accompanied by an affidavit.—*Pence v. Young*, 53 N. E. 1060, 22 Ind. App. 427.

Horner's Rev. St. 1897, § 2324 (Burns' Rev. St. 1894, § 2479), provides that, when any claim against a decedent's estate is transferred for trial, if the personal representative plead any matter of defense the claimant shall reply thereto, and that the sufficiency of the statement of the claim or any subsequent pleading may be tested by demurrer. *Held*, that a statement of a claim against a decedent's estate and an amended complaint thereto were not demurrable, though showing that the period limiting an action on the claim had expired, and setting out facts insufficient to bring the case within one of the exceptions to the statute of limitations, they not showing affirmatively, however, that neither such exception nor any other was applicable.—*Id.*

[y] (App. 1900)

Horner's Rev. St. § 2310, provides that no suit shall be brought against an executor or administrator, but that a claimant shall file with the clerk of the court where the estate is pending a succinct and definite statement of his claim, accompanied, where founded on a written instrument, by the original, or a complete copy thereof. *Held*, that a statement of a claim founded on a note, to which is attached a copy showing decedent's signature, and containing an allegation that since execution the signature has been torn away, and the torn portion lost, so it cannot be found, is demurrable for failure to allege that the holder was innocent of the mutilation.—*McCulloch v. Smith*, 57 N. E. 143, 24 Ind. App. 536, 79 Am. St. Rep. 281; *Same v. Waite*, 24 Ind. App. 702, 57 N. E. 268.

[yy] (Sup. 1902)

Where the evidence in support of a claim filed against the estate of a decedent shows that the claim is founded on an express contract, a recovery will not be precluded because the statement of the claimant proceeds on the theory of an implied contract, as the rule that a complainant is bound by the theory of his pleadings has no application to claims against the estates of decedents.—*Masters v. Jones*, 64 N. E. 213, 158 Ind. 647.

[z] (Sup. 1907)

A claim against a decedent's estate, showing that claimant performed services for decedent at her request, and that there is a specific sum due therefor, and that decedent promised claimant to give her at decedent's death her entire estate, and that decedent failed to do so, states a cause of action.—*Alerding v. Allison*, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. Rep. 363.

[zz] (Sup. 1909)

Under Burns' Ann. St. 1901, § 2465, and Burns' Ann. St. 1908, § 2828, relating to claims against decedents' estates, and providing that the claimant shall file a succinct and definite statement thereof, in the clerk's office, a formal complaint is not necessary, and a statement is sufficient which shows that the claim is within

the statute of limitations, and exhibits the net amount of the sums claimed, and alleges that the same are unpaid.—*Leimgruber v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 593.

A statement of a claim against a decedent's estate for money had and received, which sets out the nature of the demand, the dates and amounts of the several sums paid for the use of decedent, and the character of the claim, consisting of deposits made in a local bank and in a building and loan association as proceeds from a business running through a period of several years, is sufficient.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 811-818, 842.

See, also, 18 Cyc. pp. 480-491; note, 130 Am. St. Rep. 311.

**§ 228. Presentation and filing.**

Devise of rents and profits as entitling devisee to possession, see ante, § 727.

[a] (Sup. 1850)

When a claim is filed against an estate, the administrator must have actual or constructive notice.—*Foley v. Wallace*, 2 Ind. 174.

[b] (Sup. 1857)

The mode prescribed by statute for filing claims against a decedent's estate, entering them on the appearance docket, and afterwards, if necessary, on the issue docket, is a mode of getting them into court to receive final adjudication, as in a suit at law.—*Morgan v. Squier*, 8 Ind. 511; *Same v. Jones*, Id. 513, note; *Same v. Sefton*, Id.

[c] (Sup. 1858)

Where the clerk fails to present a claim to the administrator according to the express provisions of 2 Rev. St. p. 261, § 65, and the claim is not spread on the appearance docket, according to the express provisions of section 66, there is no notice to the administrator essential to give the court jurisdiction of the person of the administrator in an action against him on the claim.—*Crabb v. Atwood & Co.*, 10 Ind. 322.

[d] (Sup. 1879)

There is no rule for the joinder of third persons as parties defendant in claims filed against decedents' estates.—*Niblack v. Goodman*, 67 Ind. 174.

[e] (App. 1897)

An administrator, by appearing and filing a demurrer to a claim, waives the objection that it was not filed, placed on the appearance docket, and transferred to the issue docket for trial, pursuant to statute.—*Sanders v. Hartge*, 46 N. E. 604, 17 Ind. App. 243.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 819-826, 827½.

See, also, 18 Cyc. pp. 470-491.

**§ 229. Effect of presentation.**

On time for accounting and settlement, see post, § 459.

[a] (Sup. 1862)

Entry of a claim by a clerk on the appearance docket is all the notice required by law to be given of its pendency against the estate.—*Campbell's Ex'r v. Lindley*, 18 Ind. 234.

[b] (Sup. 1877)

A summons upon a simple claim against a decedent's estate is not contemplated by the statute; the filing and entry of such claim being sufficient notice to the administrator.—*Noble v. McGinnis*, 55 Ind. 528.

[c] The filing of a claim against an estate constitutes a sufficient demand against the executor.—(Sup. 1880) *Wright v. Jordan*, 71 Ind. 1; (1884) *Stapp v. Messeke*, 94 Ind. 423; (App. 1897) *Woods v. Matlock*, 48 N. E. 384, 19 Ind. App. 364.

[d] (Sup. 1885)

The filing of a claim is a sufficient demand; hence a cross complaint in a proceeding growing out of the refusal of the administrator to allow another claim against the estate is not bad for a failure to aver a demand, though the claim may have been of such nature that an averment of demand would have been necessary had the suit been brought against the testator.—*Walker v. Heller*, 104 Ind. 327, 3 N. E. 114.

[e] (App. 1891)

Where a claim against the estate of a decedent has been filed and entered on the docket, it is a commencement of the action.—*Taggart v. Tevanny*, 27 N. E. 511, 1 Ind. App. 339.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 822, 827; 1 CENT. DIG. ACTION, § 64.

**§ 230. Failure to present.**

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 804, 828-831.

See, also, 18 Cyc. pp. 493-498.

**§ 232. — Excuses.**

[a] (Sup. 1887)

Where the answer to a claim filed against a decedent's estate alleges that it was filed after the time limited by law, a reply alleging that the cause of action was concealed by the personal representatives until shortly before the time fixed by statute had expired; that, at the instance of the attorneys for the estate, the attorneys for the claimant agreed to visit the personal representatives for the purpose of seeking an amicable adjustment, and thus postponed the filing of the claim; that, at the time of making such agreement, the claimant's attorneys were otherwise professionally engaged, and so continued for several weeks; and that, in the meantime, they received notice of the

filing of the account for final settlement, and at once proceeded to file the claim,—is bad on demurrer.—*Roberts v. Spencer*, 112 Ind. 85, 13 N. E. 129.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 830.

See, also, 18 Cyc. pp. 494-498.

**§ 233. — Relief.**

Extension of time for presentation, see ante, § 225.

**[a] (Sup. 1883)**

Where the administrator of a solvent estate by false statements deceived a creditor, who was sick, and had no friends but the family of the debtor, so that she did not file her claim, and made final settlement without notice, she was entitled to have the final settlement vacated.—*Chase v. Beeson*, 92 Ind. 61.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 831.

See, also, 17 Cyc. p. 1253, 18 Cyc. pp. 494-498.

**§ 234. Allowance by executors or administrators.**

Allowance as having force and effect of judgment, see JUDGMENT, § 545.

Authority of special administrator, see ante, § 122.

**[a] (Sup. 1864)**

Under the Revised Statutes of 1843, an administrator was authorized to admit the justice of claims against the estate.—*Lasure v. Carter*, 5 Ind. 498.

**[b] (Sup. 1861)**

An executor cannot enforce his own claims against the estate by simply entering the case on the appearance docket, and then noting his own allowance of it; but it must pass upon the issue docket, must be set down and tried as any other adversary case, and an adversary party must be named either by the claimant or by the court, though by which this case does not decide.—*Hubbard v. Hubbard*, 16 Ind. 25.

**[c] (Sup. 1891)**

Claims may be allowed without inquiring whether there are assets sufficient to pay them, or whether they are or are not members of a preferred class.—*Goodbub v. Hornung's Estate*, 26 N. E. 770, 127 Ind. 181.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 832-

836½, 842, 842½.

See, also, 18 Cyc. pp. 502-504.

**§ 236. Approval or allowance by court.**

Payment before allowance, see post, § 278.

**[a] (Sup. 1873)**

The same person cannot act in the double capacity of plaintiff, urging his own claim

against an estate, and of defendant, making a defense to the same. In such case the court should appoint some person to defend for the estate.—*Stanford v. Stanford*, 42 Ind. 485.

**[b] (App. 1892)**

It is the duty of courts to scrutinize very carefully evidence in support of claims against decedents' estates for the purpose of preventing fraud.—*Cunningham v. Packard*, 32 N. E. 333, 6 Ind. App. 34.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 841-842½.

See, also, 18 Cyc. p. 506.

**§ 237. Order or decree.**

Effect of allowance of note against principal as barring action against sureties, see JUDGMENT, § 629.

Res judicata, see JUDGMENT, § 590.

**[a] (Sup. 1884)**

Under Acts 1883, p. 157, § 14, amending Rev. St. 1881, § 2328, the judgment on allowance of claims against the estate should be against the executor or administrator for the amount thereof, and for costs, in proper cases, to be paid out of the assets of the estate.—*Maddox v. Maddox*, 97 Ind. 537.

**[b] (App. 1894)**

A claim on a note was made against the estate of a decedent, and it was found that the decedent was surety, and that the claimant was entitled to the face value of the note. Meanwhile the claimant proceeded on the note against the principal and obtained judgment for a lesser sum, and, after this judgment was discharged, he applied to the court having charge of the estate for the payment of the difference by the administrator of the decedent. *Held*, that the order of the court directing the administrator to pay the "balance due" on the claim did not operate as an adjudication thereof, as it did not purport to ascertain and determine the "balance due," and was too indefinite to be effectual.—*Dick v. Dumbauld*, 38 N. E. 78, 10 Ind. App. 508.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 843.

See, also, 18 Cyc. p. 506.

**§ 238. Setting aside allowance or disallowance.**

**[a] (Sup. 1855)**

A., as administrator of B., filed his account for final settlement, which contained an item on the credit side of an account paid to one C. The item was supported by the account, verified by the oath of C., and his receipt to the administrator was on the back thereof. The heirs of B. objected to the allowance of the item. *Held*, that the burden of proof was on the heirs to show that the claim had been improperly or fraudulently paid.—*Stout v. Morgan*, 6 Ind. 369.

## [b] (Sup. 1865)

A legatee may bring an action against the administrator and a creditor of the deceased to set aside the allowance of a claim of the creditor against the estate fraudulently admitted by the administrator, in consequence of which allowance the assets will be so reduced in amount as to render the estate unable to pay the legacy; and to be allowed to contest such claim.—*Bell's Adm'r v. Ayres*, 24 Ind. 92.

## [c] (Sup. 1868)

A complaint by an administrator against S.'s administrator alleged that M. filed against the estate of the plaintiff's decedent a false claim, and fraudulently and without consideration assigned it to S., and that on the oaths of M. and S. it was allowed; the plaintiff being not then, but now, able to controvert it. Prayer, not for a review or new trial, but that the judgment of the probate court be vacated. *Held*, that the complaint did not present a case justifying the intervention of a court of equity.—*Statelar's Adm'r v. Sample's Adm'r*, 29 Ind. 315.

## [d] (Sup. 1874)

A legatee and the heirs of a testator may sustain an action against the executor and a creditor of the estate for the fraudulent allowance and payment of the creditor's claim by the executor, thereby reducing the assets of the estate, to have the allowance set aside, and to permit the legatee and heirs to contest the claim.—*Lancaster v. Gould*, 46 Ind. 397.

## [e] (Sup. 1889)

In an action to set aside the allowance of a claim against an estate, evidence that the claimant, the decedent, and others made a parol partition of certain land, that the claimant sold part of the land to the decedent, and that the claim in question was for the purchase price of such land, is admissible.—*Brown v. Marshall*, 120 Ind. 323, 22 N. E. 312.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 844-848.

See, also, 18 Cyc. pp. 507-509.

## § 239. Review.

## [a] (App. 1891)

Under Laws 1883, p. 153, § 5, requiring an affidavit filed with a claim against a decedent's estate "to set forth all credits and deductions to which the estate is entitled," and that the claim, after making such deductions, "is justly due and wholly unpaid," a sworn statement that the amount set out "is now justly due and owing to affiant after making all proper deductions," will be held sufficient on appeal, where it was not demurred to in the lower court, whose finding allowed the claim.—*Brown v. Sullivan*, 3 Ind. App. 211, 29 N. E. 453.

## [b] (App. 1906)

Where a city treasurer files his verified claim for the taxes due from a decedent's es-

tate, if the court does not issue a rule against the representative thereof to show cause why the tax should not be paid, the error is not prejudicial if a correct result is reached.—*Cullop v. City of Vincennes*, 34 Ind. App. 667, 72 N. E. 166.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 850-863.

See, also, 18 Cyc. pp. 511-513.

## § 240. Costs.

## [a] (Sup. 1864)

A judgment for claimant on the trial of a petition for the allowance of a claim against a decedent's estate, the validity of which was denied by the executors, should require the costs to be levied out of testator's assets in the executors' hands, if sufficient, otherwise out of the executors' own goods.—*Crane v. Hopkins*, 6 Ind. 44.

## [b] (Sup. 1867)

No costs can be recovered by the plaintiff after a verdict in his favor, under 2 Gav. & H. St. p. 503, in a suit upon a claim against an intestate's estate, when an affidavit is not attached to the claim that it is justly due and wholly unpaid; but in such case the administrator is not entitled to costs.—*Walters v. Hutchins' Adm'r*, 29 Ind. 136.

## [c] (Sup. 1874)

After an unverified claim filed against a decedent's estate has been amended, and an affidavit appended thereto as to the correctness of the claim, a motion by the executor, after trial, that all the costs of the case should be taxed against the plaintiff, because of the amendment, and lack of an affidavit as originally filed, is properly denied.—*Anderson v. Greensburgh, K. & C. Turnpike Co.*, 48 Ind. 467.

## [d] (Sup. 1878)

A court cannot, under 2 Rev. St. 1876, p. 512, § 62 (the act in relation to the settlement of decedents' estates), tax against the claimant the cost of enforcing a claim against a decedent's estate, unless such claim was filed more than one year after not merely the issuing of letters of administration, but the giving due notice thereof.—*Floyd v. Miller*, 61 Ind. 224.

## [e] (App. 1908)

Under Burns' Ann. St. 1901, § 2465, providing that no action shall be brought by complaint and summons against an administrator on a claim against the decedent, but the holder, whether the claim be due or not, shall file a statement thereof in the office of the clerk of the court in which the estate is pending, the payee of a note of a decedent which provides for the payment of attorney's fees is not entitled to attorney's fees where a claim on the note is filed before it is due or there has been any breach of condition.—*St. Joseph County Sav. Bank v. Randall*, 76 N. E. 1012, 37 Ind. App. 402.

FOR CASES FROM OTHER STATES,  
SEE 22 CENT. DIG. EX. & AD. § 864.  
See, also, 18 Cyc. p. 514.

**§ 241. Effect of allowance or disallowance.**

Admissions as evidence, see EVIDENCE, § 251.  
Conclusiveness on application for sale of property to pay debts, see post, § 340.

[a] (Sup. 1884)

Allowance of a note has the effect of a judgment, extinguishing it, and its subsequent assignment passes no title.—*Brown v. Darrah*, 95 Ind. 86.

[b] (Sup. 1884)

A creditor who holds a policy of insurance as collateral does not waive his security by an allowance of his claim against the estate, nor by assignment of such policy to the administrator for collection.—*Hight v. Taylor*, 97 Ind. 392.

An allowance of a claim against a decedent's estate does not create a lien on the estate.—*Id.*

[c] (App. 1892)

An allowance or rejection of a claim against an estate, though not a judgment in the strict sense of the term, operates as an adjudication.—*City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342.

[d] (Sup. 1895)

Allowance of notes does not bar foreclosure of the mortgage after a year from death of decedent.—*Kohli v. Hall*, 141 Ind. 411, 40 N. E. 1060.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 827, 849;  
30 CENT. DIG. JUDGM. § 1069.  
See, also, 18 Cyc. pp. 509, 510; note, 65 Am. Dec. 121.

**(C) DISPUTED CLAIMS.**

Competency as witnesses of persons interested in estate as to transactions with person since deceased, see WITNESSES, § 133.

Contest of claims in proceedings to sell property of decedent, see post, § 340.

Pleading matters of fact and conclusion, see PLEADING, § 8.

Right to trial by jury, see JURY, § 19.

Transfer of claims from claim docket to issue docket, see TRIAL, § 11.

**§ 242. Contest of claims in general.**

[a] (Sup. 1885)

Rev. St. 1881, § 6443, providing that, in case of neglect of an administrator or executor to pay taxes, the county treasurer shall present at the next term of court a brief statement in writing, setting forth the facts and amount of delinquency, does not deprive the administrator, even by implication, of the right to test the sufficiency of such facts by filing a demurrer.—*Lang v. Clapp*, 2 N. E. 197, 103 Ind. 17.

FOR CASES FROM OTHER STATES,

See 18 Cyc. pp. 514-516.

**§ 244. Persons who may contest claims.**

[a] (Sup. 1887)

An administrator presented a claim against the estate for costs which had been adjudged against him personally, the claim was allowed, and a vendee of the real estate filed a complaint setting forth that the administrator had wrongfully and unlawfully taken possession of the personal estate of the decedent, with the pretense of administering it, and that the decedent had devised his real estate, and that the personal estate had been conveyed and transferred by the decedent to the plaintiffs in the action under which the costs in question had been adjudged, and that there were no means out of which the claim, if allowed to stand as a charge upon the estate, could be paid, except the real estate, which had been sold, and that it was the purpose of such administrator to institute proceedings to subject this real estate to payment of the said allowance. *Held*, the complaint showing sufficiently that there was no personalty that could be subjected to the payment of the allowance, the complainant had such an interest as to entitle him to contest the validity of the claim.—*Mackey v. Ballou*, 112 Ind. 198, 13 N. E. 715.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 866.  
See, also, 18 Cyc. p. 514.

**§ 245. Objections and exceptions to claims.**

Sufficiency of statement of claim when some of the items are well stated, see ante, § 227.

[a] (Sup. 1879)

Where the circuit court of a county had jurisdiction of the subject-matter, an executor by appearing and filing his demurrer to a paragraph of a claim which had never been placed on the appearance docket for rejection or allowance by the executor waived the objection that the claim had not been filed.—*Frazer v. Boss*, 66 Ind. 1.

[b] (Sup. 1884)

Where an executor or administrator waives his statutory right to require that a claimant shall bring his claim against the estate before the court in the mode prescribed by the decedent's act, his demurrer to an entire claim consisting of several distinct items will not be sustained if any one of such items states a good cause of action.—*Stapp v. Messeke*, 94 Ind. 423.

[c] (App. 1892)

Where, after a claim against a decedent's estate has been transferred to the issue docket, the claimant without objection on the part of the administrator is permitted to amend the statement by introducing therein an item of claim based on facts which accrued after the claim was filed in the clerk's office and was placed on the docket on which it is the administrator's duty to allow or reject claims, the defendant could not by answer in bar of such part of the claim raise an objection which he

had so waived to the making of such amendment.—*Sheeks v. Fillion*, 29 N. E. 786, 3 Ind. App. 262.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 867-869.  
See, also, 18 Cyc. pp. 515, 516.

**§ 246. Arbitration or reference.**

[a] (Sup. 1863)

In proceedings under Rev. St. 1843, c. 80, § 207, to establish a claim against an estate, a bill of particulars was filed, and the administrator answered. A submission in writing was filed under the statute, signed by the attorneys, stating that it was agreed to make an amicable suit, and to submit the matter in dispute in the account filed. On this submission the plaintiff recovered judgment. *Held*, that it would not be reversed on the ground that there was a trial without an issue.—*Swift v. Hetfield*, 4 Ind. 623.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 870-889.  
See, also, 18 Cyc. pp. 516-522.

**§ 248. Trial by probate court.**

Grounds for new trial, see NEW TRIAL, §§ 2, 28, 54, 89, 102.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 891-906.  
See, also, 18 Cyc. pp. 523-535.

**§ 249. — Nature and form of proceeding.**

[a] (Sup. 1883)

By the express provisions of the act concerning decedents' estates (section 188) prior to September 19, 1881, an issue of fact as to settlement of an estate of a decedent was triable by a jury at the request of either party.—*Clouser v. Ruckman*, 89 Ind. 65.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 891, 892.  
See, also, 18 Cyc. pp. 523-526.

**§ 250. — Jurisdiction.**

[a] (Sup. 1877)

Under 2 Rev. St. 1876, pp. 512, 515, §§ 62, 65, providing for the summary adjudication of claims filed against the estates of decedents, the circuit court, as a court of probate, has no jurisdiction of a claim filed against the estate of a decedent and that of a minor, jointly, although the administrator and guardian might have been sued jointly on such claim by ordinary civil proceedings.—*Noble v. McGinnis*, 55 Ind. 528.

[b] (Sup. 1891)

Where a claim is presented to an administrator, a separate action cannot be maintained to try the question as to the sufficiency of its averments relating to a preference, as that question may be tried and determined in connection with the trial of the question as to the allow-

ance of the claim.—*Goodbub v. Hornung's Estate*, 26 N. E. 770, 127 Ind. 181.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 893-895.  
See, also, 18 Cyc. p. 525.

**§ 251. — Proceedings.**

Parol evidence to vary terms of receipt, see EVIDENCE, § 441.

[a] (Sup. 1867)

A claim filed against a deceased person's estate, if contested by his representative, stands as the plaintiff's complaint, and is a pleading subject to the same rules of construction as other pleadings.—*Johnson v. Kent*, 9 Ind. 252.

[b] (Sup. 1867)

Where a promissory note purporting to have been made by a decedent is filed as a claim against his estate, the answer of the administrator denying the execution of the instrument need not be sworn to in order to put the plaintiff to proof of its execution.—*Barnett's Adm'r v. Cabinet Makers' Union*, 28 Ind. 254.

[c] (Sup. 1873)

To an ordinary claim against an estate, neither the heirs nor the guardians of the heirs are necessary parties defendants.—*Stanford v. Stanford*, 42 Ind. 485.

[d] (Sup. 1874)

2 Gav. & H. St. p. 503, providing that if a claim against a decedent's estate is not admitted at the appearance term of the common pleas it "shall stand for trial at the next term thereof, as other civil actions pending therein," justifies the practice of filing special answers to contested claims against decedents' estates, and of propounding interrogatories with the pleadings, according to 2 Gav. & H. St. p. 189, § 303, authorizing such practice in the common pleas "in other civil actions."—*Alexander v. Alexander*, 48 Ind. 559.

[e] (Sup. 1876)

On the trial of an action against an administrator for the enforcement of a claim against the estate represented by him, where no answer has been filed, the complaint is deemed to be controverted as if a denial were filed, and evidence of affirmative matter of defense, such as a settlement of the matter in controversy, is inadmissible; and where such evidence, foreign to the issue, has been introduced, it should be disregarded, though admitted without objection or exception.—*Denbo v. Wright*, 53 Ind. 226.

[f] (Sup. 1881)

Under Act Feb. 14, 1881, concerning the allowance of claims against the decedent's estate, where a claim was filed founded on a note of decedent, payable to a third person, and by him assigned to the claimant, where the execution of the note was not put in issue by a pleading under oath, the assignment was admissible in evidence, without proof being first



made of its execution.—*Jennings v. McFadden*, 80 Ind. 531.

[e] (Sup. 1883)

Decedent's Act, § 95 (as amended by Acts 1883, p. 155, § 7), requires that a claim against an estate shall be filed and placed on the appearance docket of the court ten days before the first day of a term, and, if not admitted by the executor or administrator before the last day of the term, it shall be transferred to the issue docket for trial at the following term. *Held*, that claims filed against estates and not admitted by the executor or administrator cannot be tried without his consent until the provisions of the act have been complied with.—*Scott v. Dailey*, 89 Ind. 477.

[h] (Sup. 1884)

In an action by a widow against an estate the complaint alleged that decedent had personal property of plaintiff's husband, which the administrator had converted into assets of the estate, and that she was entitled to \$500 as widow,—the amount allowed by law; that she was entitled to one-third of the property, and damages for conversion; and that decedent had occupied her husband's land since his death, and she was entitled to rent of one-third,—*held*, that each item stated a separate and sufficient cause of action.—*Stapp v. Messeke*, 94 Ind. 423.

[i] (Sup. 1884)

Where a claim against a decedent's estate consists of a note providing for the payment of attorney's fees, the claimant may introduce evidence of the value of the attorney's fees, though in his claim he made no formal demand for judgment.—*Hanna v. Fisher*, 95 Ind. 383.

[j] (Sup. 1889)

Where, in the case of a claim against an estate, the only pleadings consisted of the claim and a denial thereto, all matters of defense, except set-off and counterclaim might be given in evidence under Rev. St. 1881, § 2324.—*Griffin v. Hodshire*, 21 N. E. 741, 119 Ind. 235.

[k] (Sup. 1890)

Where a claim filed against an estate is disallowed by an executor, and is thereupon transferred to the issue docket, it is not necessary that a formal complaint be filed, but the claim and affidavits accompanying it are a sufficient statement of the claim.—*Stricker v. Barnes*, 122 Ind. 348, 23 N. E. 263.

[l] (App. 1892)

Where, in a proceeding on a claim filed against an estate, an answer alleging the filing and pendency of the final settlement account before the filing of such claim, but not showing that the final settlement was filed after one year had expired from the time of giving notice by the administratrix of her appointment, is insufficient; and it is error to sustain a demurrer to a reply containing a general denial, and render judgment for defendant on failure of claimant to plead further.—*Jackson v. Butts' Estate*, 5 Ind. App. 384, 32 N. E. 96.

[m] (App. 1893)

Where a claim filed against the estate of a decedent was not allowed, and was transferred to the issue docket for trial, it was not necessary for the administrator to plead any matter by way of answer, except set-off or counterclaim; the law putting in a general denial for the executor or administrator of an estate and under the general denial thus put in the execution of the note being put in issue and the burden of establishing its execution being on the claimant.—*Kennedy v. Graham*, 35 N. E. 925, 37 N. E. 25, 9 Ind. App. 624.

[n] (App. 1894)

On trial of a claim against a decedent's estate on a promissory note, no special plea is necessary to raise the issue that decedent was a surety; Rev. St. 1881, § 2324 (Rev. St. 1894, § 2479), not requiring an administrator to plead anything by way of answer except a set-off or counterclaim.—*Dick v. Dumbauld* (Ind. App.) 38 N. E. 78, 10 Ind. App. 508.

[o] (App. 1896)

Under Rev. St. 1894, § 2479 (Rev. St. 1881, § 2324), providing that, when a claim against an estate is transferred for trial, the executor or administrator need not plead any matter by way of answer, except a set-off or counterclaim, the defense of full or partial payment is available without special plea.—*Simons v. Beaver*, 15 Ind. App. 510, 43 N. E. 478.

[p] (App. 1907)

In a proceeding for the allowance of a claim against the estate of a decedent for services rendered, an instruction was erroneous which charged the jury that they could infer that the indebtedness was paid, if decedent from time to time during the rendition of the services transferred to claimants money or property without disclosing his purpose in making the transfer, since the value of the services rendered or the amount of money or value of property transferred were not to be regarded.—*Atkinson v. Maris*, 40 Ind. App. 718, 81 N. E. 745.

[q] (App. 1908)

Under the express provisions of Burns' Ann. St. 1908, § 2842, where a claim against a decedent's estate is transferred for trial, it is not necessary for the personal representative to plead any matter by way of answer, except a set-off or counterclaim.—*Trees v. Millikin*, 43 Ind. App. 256, 85 N. E. 123.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 896-900.

See, also, 18 Cyc. p. 527.

§ 252. — Evidence.

Discretion of court to require claimant to testify, see WITNESSES, § 183.

Evidence to establish claim, see ante, § 221.

Hearsay evidence, see EVIDENCE, § 317.

In actions on claims, see post, § 450.

Parol evidence to construe instrument, see EVIDENCE, § 448.

Proof and effect of admission, see EVIDENCE, § 256.

Self-serving declarations, see EVIDENCE, § 271.

[a] (Sup. 1884)

Where a claim against a testator's estate for goods furnished the widow during her last sickness depends upon the fact that the widow elected to take and did take under the will, the party asserting the claim must prove such election.—Hopkins v. Quinn, 93 Ind. 223.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 901-903½.

See, also, 18 Cyc. pp. 528-532.

§ 253. — Hearing.

[a] (Sup. 1873)

As a general rule, a party may introduce his evidence in the order in which he prefers. Therefore, on the trial of a proceeding to enforce a claim against a decedent's estate, it was not error to admit evidence of the value of personal service rendered by the plaintiff to the decedent (his father) before any proof was given of an express promise by the decedent to pay for such services.—Ginn v. Collins, 43 Ind. 271.

[b] (Sup. 1883)

It is error, under Acts 1883, p. 155, § 7, to permit a claim against a decedent's estate to be brought to trial, over the administrator's objection, two days after it is filed.—Scott v. Dailley, 89 Ind. 477.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 904, 905.

See, also, 18 Cyc. p. 334.

§ 254. — Findings and decision.

[a] (App. 1896)

On the trial of a claim against an estate for money collected by decedent on a note in his hands for collection, there was a general verdict in plaintiff's favor for \$138.46, and the special answers recited that deceased collected the note in January, 1884, and received thereon \$138.46. Held, that the judgment should have been for the amount of the general verdict, and not for that sum with interest from the date of filing the claim, since any conflict between the general verdict and the special answers might have been removed by evidence of partial payment.—Simons v. Beaver, 15 Ind. App. 510, 43 N. E. 478.

[b] (App. 1901)

Where, in proceedings to establish a claim against an estate for boarding and caring for the decedent, there was a general verdict for the plaintiff, but in answer to special interrogatories the jury found that the claimant had no contract with the decedent, and that no amount was promised, and that the decedent for a number of years prior to her death lived among her children, of whom the claimant was one, such findings are not in irreconcilable con-

flict with the general verdict, and it was error to enter a judgment for defendant non obstante veredicto.—Vaught v. Barnes' Estate, 62 N. E. 93, 63 N. E. 864, 64 N. E. 623, 29 Ind. App. 387.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. § 906; 46 CENT. DIG. TRIAL, § 859.

§ 255. Judgment.

Decision as final adjudication, see JUDGMENT, § 564.

Res judicata, see JUDGMENT, § 622.

[a] (Sup. 1864)

When a claim against the estate of a decedent is passed upon by a jury, a judgment, which is in form that the plaintiff recover the amount found by the jury of and from the assets of the estate of B., deceased, is equivalent to a formal order of allowance.—Boyl's Adm'r v. Simpson, 23 Ind. 303.

[b] (Sup. 1890)

On filing a claim by an administrator against the estate, the record showed that the court appointed an attorney to represent the interests of the estate, who appeared and filed an answer; and that the parties reported to the court an amount agreed upon as a compromise which the court approved and allowed. Held, in an action by a subsequent administrator to set aside the judgment against the estate, evidence offered by him to show the taking of a judgment without any person representing the estate was properly excluded, as an attempt to contradict the record.—Bentley v. Brown, 123 Ind. 552, 24 N. E. 507.

Under Elliott's Supp. Rev. St. 1889, §§ 388, 389, providing for the filing of claims of executors and administrators against the estates represented by them, and that the allowance of the claim shall be an adjudication of its validity and amount, where the record shows that upon the filing of a claim by administrator the court appointed an attorney to represent the interests of the estate, who appeared and filed an answer; that the parties reported to the court an amount agreed upon as a compromise, which the court approved and allowed,—there is an adjudication as to the validity and amount of the claim binding upon the administrator and subsequent administrators.—Id.

[c] (App. 1891)

Upon proof of a claim against an estate for money payable in installments, some of which are not yet due, judgment may be rendered for its payment at different times as the installments fall due.—Wolfe v. Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 907-909.

See, also, 18 Cyc. p. 534.

**§ 256. Review.**

Appellate jurisdiction as between particular courts, see *COURTS*, § 220 (1, 2).

Review of allowance or disallowance on presentation of claim, see *ante*, § 239.

**[a] (Sup. 1876)**

Where the objection is made for the first time in the Supreme Court that the circuit court had no jurisdiction of a claim against a decedent's estate, because the record does not affirmatively show that such claim had been entered on the appearance docket, there refused, and thence transferred to the issue docket, but the record does show its filing in the clerk's office in time to have been thus disposed of, it will be presumed that such steps were duly taken.—*Rodman v. Rodman*, 54 Ind. 444.

**[b] (Sup. 1880)**

An appeal to the supreme court in proceedings on a claim against a decedent's estate must be taken within 30 days after the decision complained of.—*Bell v. Mousset*, 71 Ind. 347.

**[c] (Sup. 1882)**

Where an affidavit attached to a claim filed by administrators against another estate appeared to have been made in Ohio and recited that one of the administrators of the "estate of B., late of said county, deceased," was sworn, etc., it did not establish the fact that the administrators filing the claim were foreign administrators, and therefore required to take an appeal from a disallowance within 30 days thereafter.—*Davis v. Huston*, 84 Ind. 272.

**[d] (Sup. 1884)**

Rev. St. § 2455, giving 10 days for an appeal from a decision on a claim against an administrator, applies as well where the appeal is taken by the administrator as where it is taken by the claimant. The statute applies to "any person considering himself aggrieved."—*Miller v. Carmichael*, 98 Ind. 236.

**[e] (Sup. 1885)**

An appeal by an administratrix, taken in September, 1883, from the allowance of a demand, if valid by the interpretation given at that time to the laws, will not be dismissed for failure to comply with interpretations announced in June, 1884, although argued subsequent to that date.—*Walker v. Heller*, 104 Ind. 327, 3 N. E. 114.

**[f] (Sup. 1886)**

Before a party can be required to answer to a claim filed against the estate of a deceased person, it must be made to appear that he and the decedent were jointly liable by virtue of a contract which furnishes the basis of the pending claim; and the right of such party to appeal under the Code of Civil Procedure cannot be taken away by attempting to make him a party defendant to a claim against a decedent's estate, so as to subject him to the rules of the Indiana statutes regarding appeals in matters connected with the settlement of decedents' estates, where there is no joint contract liability with the de-

cedent.—*Claypool v. Gish*, 108 Ind. 424, 9 N. E. 382.

**[g] (Sup. 1887)**

Where there was no demurrer to the complaint or claim filed against a decedent's estate in the trial court, and its sufficiency is not questioned by the assignment of error in the supreme court, there can be no reversal merely because the claim as filed contained only the initial letters of the given names of the claimants, instead of the names in full.—*Cummins v. Peed*, 109 Ind. 71, 9 N. E. 603.

**[h] (App. 1891)**

The appellate court will not review a ruling denying a motion to dismiss a claim against a decedent's estate, when the grounds of motion the not presented by the bill of exceptions.—*Smith v. McDonald*, 3 Ind. App. 49, 28 N. E. 994.

**[i] (App. 1893)**

In an action against an estate to recover the value of the services rendered deceased, as housekeeper and nurse, the complaint stated in the first paragraph a general account for the services, and in the second paragraph alleged a special promise by deceased to give plaintiff one third of his estate for her services. The evidence showed that plaintiff was the widow of decedent's son, and that decedent was afflicted with palsy for many years, and unable to care for his person, or assist himself in any way. His children being unwilling to assist him, plaintiff attended to all his wants for 17 years, on decedent's promise to give her that portion of the estate to which her husband, if living, would be entitled. The court ruled that the evidence of the value of decedent's estate applied only to the second count, and, in substance, charged that the measure of damages was the value of the services rendered. *Held* that, where the jury found there was no evidence of the special contract, the admission of the inventory of decedent's estate, and the value of it, was not, under the instruction of the court, available error.—*Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456.

**[j] (App. 1893)**

A finding of a jury that a note executed by a person since deceased is not a valid claim against his estate will not be disturbed on appeal, where there is evidence that deceased was not in his right mind at or about the time the note was executed, and that the only consideration therefor arose out of services rendered by the sons in caring for him during his last sickness.—*Kibby v. Kibby*, 8 Ind. App. 698, 35 N. E. 840.

**[k] (App. 1899)**

Where there was no evidence to support some of the items of a claim against the estate of a decedent, and the evidence as to the other items thereof was conflicting, and there was also some proof that claimant and decedent, several years prior to the latter's death, had a settlement of their mutual accounts, and that

nothing was due claimant from such estate, a verdict disallowing such claim must be permitted to stand.—*Shirts v. Rooker*, 52 N. E. 626, 21 Ind. App. 420.

[I] (App. 1904)

An appeal from an order rejecting a claim against a decedent's estate will not lie under the general statute providing for appeals, but must be prosecuted under the statute providing for appeals by a party aggrieved by a matter connected with a decedent's estate; and hence, on the failure of a claimant to file a bond with the clerk of the trial court, conditioned for the diligent prosecution of his appeal, and payment of costs, if costs be adjudged against him, as required by Burns' Ann. St. 1901, §§ 2609, 2610, the appeal will be dismissed.—*Dallam v. Stockwell's Estate*, 71 N. E. 911, 33 Ind. App. 620.

[m] (App. 1909)

Burns' Ann. St. 1908, § 2977, authorizing a person aggrieved by a decision of the circuit court as to any matter connected with a decedent's estate to appeal, and section 2978, requiring a bond within 10 days after the decision complained of, unless the court to which the appeal is prayed shall direct such appeal to be granted on the filing of a bond within a year and that the transcript shall be filed in the appellate court 90 days after the filing of the bond, are exclusive of any other mode of appeal; and an appeal from a judgment of the circuit court rejecting a claim against a decedent's estate will be dismissed, where no bond was filed within 10 days after the decision, nor application made, on good cause, to the Appellate Court for leave to appeal after that time.—*W. R. Mumford Co. v. Terry*, 43 Ind. App. 339, 87 N. E. 253.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 850-856, 860-863, 910-919.

See, also, 18 Cyc. pp. 535-539.

(D) PRIORITIES AND PAYMENT.

By surviving partner, see PARTNERSHIP, § 245. Change of venue on proceedings to compel payment, see VENUE, § 36.

Claims against insolvent estates of decedents, see post, § 416.

Duty to pay claim on sale of note against claimant, see ante, § 166.

Priority of allowance to surviving wife, husband, or children, see ante, § 182.

Priority of debts to legacies or distributive shares, see post, § 289.

Sales of property under order of court for payment of debts, see post, §§ 322-323.

Set-off in action by personal representative, see post, § 434.

Subrogation of persons interested in administration making payment of claims to rights of creditors, see SUBROGATION, § 19.

§ 258. Authority and duty to make payment.

[a] (Sup. 1885)

The duty of an administrator of a deceased township trustee with respect to delivering over money belonging to the township is analogous to that which would have devolved upon the trustee if he had lived until the expiration of his term, but, when the money received by the deceased trustee has been so far converted by him in his lifetime as to render its identification as the property of the township, impracticable, the administrator is not required to deliver over to the successor of such trustee money which may have been derived from other sources or make good the money so converted, except in payment of the allowance regularly made against the estate.—*Rowley v. Fair*, 3 N. E. 860, 104 Ind. 189.

[b] (App. 1909)

An executor who qualifies as such becomes the personal representative of testator in all matters connected with the settlement of the estate, including the payment of debts, and what he in good faith does in the line of his duty is binding on the estate and parties interested, including creditors and heirs.—*Owen Creek Presbyterian Church v. Taggart*, 89 N. E. 406.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 923-926.

See, also, 18 Cyc. p. 541.

§ 259. Statutory classification and order of payment.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 927-940, 942-974.

See, also, 18 Cyc. pp. 546-563.

§ 260. — In general.

[a] (Sup. 1878)

The order of payment of claims against a decedent's estate cannot be determined by a court, otherwise than as prescribed in 2 Rev. St. p. 534, § 109. In an action by the administrator personally against the estate, a judgment giving priority to his claim does not bind creditors who have no notice of the action.—*Jenkins v. Jenkins*, 63 Ind. 120.

[b] (Sup. 1891)

The preference which the act of March 9, 1889, gives if the debtor is in failing circumstances will not entitle the holder of the preferred claim to payment in full out of the general assets of the estate, but it is a specific preference reaching only the specific fund derived from the property to which the lien would attach. If such fund is sufficient in amount to pay the preferred claims in full, they should be paid, but, if such fund is insufficient for the purpose, the holders of preferred claims are entitled to their pro rata in the fund, and as to any unpaid balance due them would stand on the footing of the general creditors.—*Goodhub*

v. Hornung's Estate, 26 N. E. 770, 127 Ind. 181.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 927, 928, 930-940, 942, 943.

See, also, 18 Cyc. p. 548.

**§ 261. — Particular classes of claims.**

[a] (Sup. 1854)

By 2 Rev. St. 1852, p. 273, § 109, providing the order of payment of claims against a decedent's estate, it was not intended to give a mortgage creditor a general lien against the estate, but to continue the mortgage as to the property, after the mortgagor's decease.—*Rogers v. State*, 6 Ind. 31.

In cases where a deceased mortgagor is not seised of the mortgaged property at the time of his death, the mortgagee has his choice of following the property or resorting to the decedent's estate for payment; but, if he seek payment from the estate, his claim will be classed with the "general debts."—*Id.*

[b] (Sup. 1868)

Judgments which are liens upon a decedent's real estate and mortgages thereon may in every case be paid at once, and must be paid before general debts, which may not be paid until a year has expired from the first granting of letters of administration.—*Newcomer v. Wallace*, 30 Ind. 216.

[c] (Sup. 1882)

A vendor's lien for unpaid purchase money is not a preferred claim against a decedent's estate.—*Kimmell v. Burns*, 84 Ind. 370.

[d] (Sup. 1884)

Costs incurred by claimants in a successful prosecution of their claims against a decedent's estate are not expenses of administration, within Rev. St. 1881, §§ 2378, 2434, and are therefore not entitled to priority over other claims, but should be classed and paid in the same order as the claims in which they are recovered.—*Taylor v. Wright*, 93 Ind. 121.

Costs incurred by an administrator of an estate in prosecuting claims in favor of the estate, and in defending actions brought against the estate, are expenses of administration, within Rev. St. 1881, §§ 2378, 2434, and as such are entitled to priority of payment over other claims.—*Id.*

[e] (App. 1904)

2 Rev. St. 1852, § 89, p. 269, c. 10, provided that the court might order a sale of any real estate of a decedent for the payment of purchase money. Section 17 (1 Rev. St. 1852, pp. 250, 251, c. 27) provided that on the death of a husband one-third of his real estate should descend to the widow, free from demands of creditors. *Held*, that it was the duty of an administrator to apply all the personal assets to pay liens on the land, to the exclusion of the general creditors, and to apply the proceeds of

the sale of two-thirds of the husband's real estate, if necessary, to that purpose.—*Fry v. Lawson*, 69 N. E. 1038, 32 Ind. App. 364.

[f] (App. 1904)

*Burns' Ann. St.* 1901, § 2743, provides that in the absence of direction in a will for the payment of a mortgage on land devised, the mortgage shall be discharged out of the part of the estate charged with the payment of debts if any, otherwise, out of any personal property undisposed of. Section 2739 provides that if the personal estate is insufficient to pay the debts, the undevisee real estate shall be first charged in exoneration of the real estate devised. *Held* that these sections apply where testator directed the payment of all his debts without specifying any part of his estate that should be applied to that purpose.—*Hunt v. Hinshaw*, 33 Ind. App. 75, 70 N. E. 825.

[g] (Sup. 1908)

Society and the public health require the decent disposition of bodies of the dead, and the statute in recognition thereof requires funeral expenses to be paid before other classes of claims.—*Hildebrand v. Kinney*, 172 Ind. 447, 87 N. E. 832.

The statutory classification of claims against estates applies alike to solvent and insolvent estates, unless specific liens absorb the property, and the classification as to expenses of administration and funeral expenses is an arbitrary one, applicable to those charges which are not debts in the general sense.—*Id.*

[h] (Sup. 1910)

*Burns' Ann. St.* 1908, § 2901, makes the debts of a decedent, unless otherwise provided, payable: First, expenses of administration; second, funeral expenses; third, expenses of decedent's last sickness; fifth, debt secured by liens created by decedent; seventh, general debts. Section 2957 provides that if all the estate liable as assets has been converted into money, and there is no claim pending against it unallowed, the court shall order the money applied to the expenses of administration, and distribute it in the order provided among the claimants of each class, subject to the next section. Section 2958 provides that if any part of the moneys is the proceeds of the sale of realty, sold subject to liens, the lienors shall not share in the distribution, but if the sale was made to discharge liens on the real estate the proceeds shall be first applied to the payment of such liens, leaving any residue of the lien debts to share in the distribution as general debts. Section 2955 provides that, if the estate be declared insolvent before the expiration of a year, no claim shall be paid until the expiration of such year, except expenses of administration and of the funeral and last sickness. Section 2786 provides that, if the personalty is not sufficient to pay the statutory allowance of \$500 to the widow, the deficit shall be a lien on the realty, superior to judgments against decedent. Section 2945 provides that when the estate does

not exceed \$500 in value, after deducting the expenses of administration, the court shall enter a decree vesting the whole estate in the widow, and section 2946 provides that such widow shall not be liable for decedent's debts, except realty mortgages, but shall pay the reasonable funeral expenses and expenses of the last sickness. *Held* that, since the widow takes realty turned over to her free from judgment and other liens, except mortgages, but subject to liability for expenses of the funeral and the last sickness, under section 2901, construed with the other sections, expenses of administration, last sickness, and funeral were payable in full out of the proceeds of the mortgaged realty sold under section 2867, before payment of judgments against decedent.—*Snyder v. Thieme & Wagner Brewing Co.*, 90 N. E. 314.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 944-974.  
See, also, 18 Cyc. pp. 549-563.

**§ 263. Rights of creditors to priority.**

[a] (Sup. 1867)

The claim of the surviving partner against the estate of the deceased partner for a moiety of the amount he has been compelled to pay upon the partnership debts out of his own means after exhausting the partnership assets is not a joint or partnership debt, which, in the distribution of the estate of the deceased partner, can be postponed till other debts are paid, but is an individual debt, and entitled to share pro rata.—*Olleman v. Reagan's Adm'r*, 28 Ind. 109.

[b] (Sup. 1882)

A vendor's lien for unpaid purchase money is not a preferred claim against a decedent's estate.—*Kimmell v. Burns*, 84 Ind. 370.

[c] (Sup. 1886)

Where money paid by a purchaser at an unauthorized sale of a decedent's real estate was applied to the payment of claims against the estate by an agreement between the executor and the widow, the purchaser, though entitled to be subrogated to all the rights of the original holders of the claims, was not entitled to a prior lien therefor over other debts of the same class.—*Duncan v. Gainey*, 108 Ind. 579, 9 N. E. 470.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 975-1000;  
48 CENT. DIG. VEN. & PUR. § 666.  
See, also, 18 Cyc. pp. 548-563.

**§ 264. Secured claims.**

Necessity for presentation, see ante, § 224.

Right to payment from general assets for protection of person entitled to property subject to lien, see ante, § 133.

Statutory classification and order of payment, see ante, § 261.

[a] (Sup. 1855)

Where the holder of a note, the amount of which is a lien on land of a decedent, agrees with part of the heirs to receive the land in satisfaction of the note, which he delivers up to the administrator to be canceled, and a bond for title is given him by the heirs, the lien is extinguished.—*Kenton v. Robbins*, 7 Ind. 102.

[b] (Sup. 1868)

After foreclosure, by proceeding in rem, and sale of land mortgaged by a decedent in his lifetime to secure his promissory note, the residue of the debt does not cease to be a mortgage debt within the meaning of the exception in that section, and payment thereof may be claimed out of the other assets of the estate.—*Cole v. McMickle*, 30 Ind. 94.

[c] (Sup. 1868)

The filing by a creditor of a decedent's estate, whose claim is secured by a mortgage on land belonging to the decedent, of a claim against the decedent's estate, and the acceptance of dividends on his claim, which are paid out of the proceeds of the sale by the administrator of the mortgaged premises, do not defeat the lien of his mortgage; and, where his claim is not fully paid, he is entitled to enforce the same by foreclosure of the mortgage.—*Clarke v. Henshaw*, 30 Ind. 144.

[d] (Sup. 1869)

An administrator of an insolvent sold certain realty having no knowledge of an unrecorded mortgage. The purchaser, who was ignorant thereof, paid the whole purchase money, and took a conveyance. *Held*, that the mortgagee was entitled to payment out of the proceeds in preference to the general creditors.—*Kirkpatrick v. Caldwell's Adm'rs*, 32 Ind. 299.

[e] (Sup. 1882)

Where a decedent died pending a suit in which she recovered a large judgment, and her administrator was made a party, and on motion of her attorneys they were allowed \$5,000 for attorney's fees, and decreed entitled to a lien therefor on the judgment, the attorneys were entitled to an order directing the administrator to pay such sum out of the proceeds of the judgment, as a preferred claim.—*Blankenbaker v. Bank of Commerce*, 85 Ind. 459.

Where, under Code 1881, § 553, in a proceeding by creditors of an estate to obtain an order to pay an allowance in the nature of a decree standing in petitioners' favor against the estate as a preferred claim, the agreed statement of facts showed that decedent had retained petitioners as attorneys in her divorce action under an agreement to pay for their services out of the alimony awarded, that in an action against her administrator, brought in as sole defendant on decedent's death, judgment was rendered in petitioners' favor, the court finding the rendition of the services, their

value, etc., and the agreement between decedent and petitioners that such recovery for alimony should constitute a fund for the payment of such attorney's fees, and ordering and adjudging the collection of the same from the proceeds of such decree for alimony, the rights of petitioners to preference in payment over the general creditors was adjudicated and settled.—Id.

[f] (Sup. 1889)

Under Rev. St. 1881, § 2435, providing, that, where land of an insolvent decedent is sold subject to liens, the lienors shall not share in the proceeds, but, if sold to discharge liens, the proceeds shall first be applied to the satisfaction of the liens in the order of their priority, and any portion of the debts secured not thereby discharged shall be entitled to share in the distribution of the estate as general debts, the proceeds of land sold to discharge a lien should be applied to the lien in preference to the general expenses of administration; section 2378, providing that the expenses of administration shall be first paid out of a decedent's estate, applying only to the general fund in the hands of the administrator.—*Ryker v. Vawter*, 117 Ind. 425, 20 N. E. 294.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 997, 1001-1011.

See, also, 18 Cyc. p. 570.

#### § 265. Claims of executor or administrator.

Allowance by executor, see ante, § 234.

Judgment of allowance as precluding subsequent action for preferment, see JUDGMENT, § 590.

Necessity for presentation, see ante, § 224.

[a] (Sup. 1883)

Where an administrator loaned the money of the estate and took a mortgage on lands on which he, as an individual, already held a mortgage, the mortgagee of the estate being entitled to priority on account of the malfeasance, such right was not affected by the extension of time of payment of the mortgage held by him as administrator.—*Shuey v. Latta*, 90 Ind. 136.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1012-1022.

See, also, 18 Cyc. pp. 563-570.

#### § 266. Advances to pay claims.

[a] (App. 1898)

An administrator having funds of the estate, and paying a debt of the estate, is presumed to pay the debt out of such funds, in the absence of evidence to the contrary.—*Swift v. Harley*, 49 N. E. 1069, 20 Ind. App. 614.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1023-1031.

See, also, 18 Cyc. pp. 570-573.

#### § 270. Property available for payment.

Effect of delivery of land to heirs, see post, § 307.

Necessity of application of realty to payment of debts as affecting title of executor or administrator, see EXECUTORS AND ADMINISTRATORS, § 129.

Necessity of application of realty to payment of debts as making it assets of estate, see ante, § 39.

Property subject to sale under order of court, see post, § 329.

Rights and liabilities of devisees and legatees, see WILLS, §§ 827-848.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1044-1073.

See, also, 18 Cyc. pp. 590-594.

#### § 271. — In general.

[a] (Sup. 1884)

An administrator should pay off liens on real estate in preference to debts not preferred by statute, so that the widow's share of the real estate may go to her without incumbrance.—*Sparrow v. Kelso*, 92 Ind. 514.

[b] (Sup. 1884)

It is the widow's right to have her interest in the lands of her deceased husband discharged from a mortgage existing at the time of his death before the payment of general debts.—*Cunningham v. Cunningham*, 94 Ind. 557.

[c] (Sup. 1897)

Under the statute the right of a widow to one-third of the real estate of her deceased husband is absolute and she is entitled to the same free from all demand of creditors except mortgages in the execution of which she has joined, and to protect her in this right she is entitled to have the personal assets not required for payment of claims expressly preferred by statute applied to the payment of mortgages or other liens necessary to protect her one-third of the real estate and clear the same of incumbrance.—*Shobe v. Brinson*, 47 N. E. 625, 148 Ind. 285.

[d] (Sup. 1898)

Under Burns' Rev. St. 1894, § 2504 (*Horner's Rev. St. 1897*, § 2349), providing that, when the widow's interest in the husband's realty is liable to sale to satisfy a lien, the court may direct the sale of the whole of the land, including her interest, to discharge such lien, and order payment to her of her share, or such part of her share of the gross proceeds as remain after satisfying such lien, the court cannot subject any portion of the widow's share of the proceeds to the payment of decedent's debts or expenses of administration.—*Lewis v. Watkins*, 49 N. E. 944, 150 Ind. 108.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1044-1051.

See, also, 18 Cyc. p. 590.

**§ 272. — Personal and real property.**

[a] The personal estate of a decedent is the primary fund for the payment of debts, unless a different provision be made by the will of the decedent.—(Sup. 1854) *Scott v. Morrison*, 5 Ind. 551; (1868) *Clarke v. Henshaw*, 30 Ind. 144; (1874) *Hunsucker v. Smith*, 40 Ind. 114; (App. 1909) *In re Roberts' Estate*, 89 N. E. 496; *Roberts v. Dimmett*, Id.

[b] (Sup. 1854)

Though personal estate is the primary fund for the payment of the testator's debts, it may be exonerated, and payment of debts charged upon the realty; but the testator will not be deemed to have intended the payment of debts out of the realty unless a clear expression to that effect be gathered from the whole will.—*Scott v. Morrison*, 5 Ind. 551.

[c] (Sup. 1865)

A decedent's real estate was incumbered by a mortgage made by his grantor, who conveyed subject to the mortgage. *Held*, that the personal estate was the primary fund for the discharge of the incumbrance.—*Newcomer v. Wallace*, 30 Ind. 216.

The act concerning the settlement of decedent's estates (2 Gav. & H. Rev. St. 483) makes the personal estate the primary fund for the discharge of all liabilities whether for debts contracted by the intestate which might in his lifetime be made by execution against his general property, or liabilities which are primarily incumbent on his real estate only (having been contracted by his grantor), with a personal liability over to indemnify his grantor if the debt should fall upon the latter.—Id.

[d] (Sup. 1869)

The administrator of an insolvent estate, having no knowledge of an unrecorded mortgage executed by decedent, sold the land under order of court, and executed conveyance to a bona fide purchaser. Subsequently the administrator paid the mortgagee a part of his claim out of the personal estate. *Held*, that the personal estate should be reimbursed out of such profits of the land to the extent of the payment made out of it on the mortgage.—*Kirkpatrick v. Caldwell's Adm'rs*, 32 Ind. 299.

[e] (Sup. 1870)

The will of a testator, who was a farmer, provided that his stock should first be sold for the payment of his debts, and if insufficient so much of his land as was necessary. *Held*, that the word "stock" referred to live stock only, and did not include other personalty, and that the land constituted the second fund from which debts should be paid.—*Heagy v. Cheesman*, 33 Ind. 96.

[f] (Sup. 1882)

The lands of a decedent remain subject to the claims of creditors of decedent, if the personalty should prove insufficient, no matter

by whom the lands are held.—*Baker v. Griffitt*, 83 Ind. 411.

[g] (App. 1895)

An administrator has no control of the real estate unless it becomes necessary to pay the debts, and he cannot apply the rents to the payment of debts, unless acting under special order of court in renting the property.—*First Nat. Bank of Indianapolis*, No. 2,556, *v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054.

[h] (App. 1908)

The sums collected by the administrator on contracts for the sale of real estate executed by decedent, which contracts were perfected, were a part of the estate, and were properly applied by the administrator to the payment of debts, and were primarily liable to be so applied.—*Moore v. State ex rel. Ferguson*, 43 Ind. App. 387, 84 N. E. 161.

In a contest between the sureties on the general bond of an administrator and the sureties on a bond given on procuring an order for the sale of real estate, the sureties on the general bond are entitled to insist that payments of debts by the administrator shall first be credited to his liability before any part can be applied as credits to the fund arising from the sale of real estate, the personal estate being the primary fund for the payment of debts.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1052-1057, 1059, 1065, 1068.

See, also, 18 Cyc. p. 591.

**§ 277. Time for making payment in general.**

[a] (Sup. 1845)

A petition in the probate court against an administrator for payment of a judgment against his intestate, alleging waste, etc., was filed in 1842, and before the expiration of a year from the time of the defendant's appointment as administrator. *Held* that, without evidence of waste, the action could not be sustained.—*Lewis v. Houston*, 7 Blackf. 335.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1074, 1075, 1124.

See, also, 18 Cyc. p. 577.

**§ 278. Payment before allowance or order.**

[a] (App. 1895)

Where an executor's decedent conveyed certain real estate, with covenants of seisin, and, before final settlement, a judgment was rendered against a subsequent grantee, requiring him to pay a certain amount to one who was adjudged to be the owner of an undivided interest therein, and the decedent was the first grantor dating from the infirmity of the title, the executor is justified in paying the amount of said judgment, and is entitled to credit therefor, though the claim was not formally filed and al-



lowed.—*Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1099-1101.  
See, also, 18 Cyc. p. 580.

**§ 279. Payment by mistake.**

Liability to refund, see post, § 287.

[a] (App. 1900)

An objection that there was no finding that the claim of a creditor of an estate was paid under a mutual mistake of facts is not maintainable where the court expressly found that, when payment was made by the executor, both the creditor and the executor believed the estate to be solvent, while in truth it was insolvent.—*Tarplee v. Capp*, 56 N. E. 270, 25 Ind. App. 56.

**FOR CASES FROM OTHER STATES,**

See 18 Cyc. pp. 629-636.

**§ 281. Improper payments.**

[a] (Sup. 1883)

Where, because of an administrator's improper application of funds of the estate to payment of claims over which another claim was entitled to preference, there were not enough funds remaining to satisfy such preferred claim, the administrator is liable for the deficiency.—*Cunningham v. Cunningham*, 94 Ind. 537.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1102-1104, 1106-1115.  
See, also, 18 Cyc. pp. 581-584.

**§ 283. Proceedings to enforce payment.**

[a] (Sup. 1885)

An order that an administrator should pay over to complainant a certain sum, which was opposed by defendant on the ground that it was needed to pay decedent's partnership debts, is a decision growing out of a matter connected with a decedent's estate, and must be appealed from within 10 days, as provided in Rev. St. 1881, §§ 2454-2457.—*Bennett v. Bennett*, 102 Ind. 86, 1 N. E. 199.

[b] (Sup. 1891)

Where a petition reciting the filing of a claim and its allowance by the administrator as a general claim and asking for an order directing its payment as a preferred claim is presented, or exceptions are filed to a report of an administrator, their sufficiency may be tested by a demurrer or by a motion to strike out.—*Goodbub v. Hornung's Estate*, 26 N. E. 770, 127 Ind. 181.

The court may, on its own motion, pass on and determine the sufficiency of the petition or of the exceptions without any demurrer or motion being filed.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1120-1131.  
See, also, 18 Cyc. pp. 585-587.

**§ 287. Liability to refund.**

[a] (Sup. 1861)

Where, owing to an erroneous computation, executors have made an overpayment from the estate of the deceased, they may maintain an action in their representative capacity to recover the amount thus overpaid.—*Grimes v. Blake*, 16 Ind. 160.

[b] (Sup. 1877)

Where a settlement is had between an estate and one of its creditors, whereby his claim was allowed in full under a mistaken idea that the estate was solvent, the mistake will afterwards be relieved against, if his claim was not a preferred one.—*East v. Ferguson*, 59 Ind. 169.

[c] (Sup. 1880)

Where a claim against a decedent's estate is paid in full on the promise that, in case the estate should prove to be insolvent, a refund would be made accordingly, the promise is founded on a good consideration and is enforceable.—*Wright v. Jordan*, 71 Ind. 1.

Where one of several creditors holding a joint claim against a decedent's estate at the time of receiving payments on the claim from the administrator on condition that, in case of insolvency of the estate, a refund would be made to the administrator accordingly was acting for himself as well as the other creditors, the administrator on the subsequent ascertainment that the estate was insolvent had the option of proceeding against the creditors either separately or jointly, and a contention in an action by the administrator to recover a portion of the sum paid on account of the insolvency of the estate that the complaint against the creditor to whom payment was made was insufficient because the other creditors were not made parties defendant was without merit.—*Id.*

An administrator alleged in his complaint against the administrator of another decedent's estate that defendant's decedent while living held a claim in a certain sum in the name of, and which was originally due to, defendant's decedent and another, under the firm name of F. & H., against the estate of plaintiff's decedent which defendant's decedent induced plaintiff to pay to him with the express understanding and in consideration of promise made at the time that F. would, in case of insolvency of the estate of plaintiff's decedent, refund to plaintiff any and all amounts in excess of the distributive share to which F. would be entitled on account of the claim of F. & H., should the estate of plaintiff's decedent prove to be insolvent and be required to be settled as an insolvent estate, and that since payment it had been ascertained that the estate of plaintiff's decedent was insolvent and had been so declared by the proper court and that the estate would only pay 70 cents on each dollar on

the general debts due from and held against it, and concluded with a prayer for judgment for the difference between the amount paid and amount payable on account of the insolvency of the estate. *Held*, that a fair inference from the allegations of the complaint was that the claim against the estate belonged to F. at the time it was paid, and a contention that it showed on its face that H. ought to have been made a party defendant was without merit.—*Id.*

[d] (Sup. 1889)

An agreement by a creditor of an estate, on being paid in full by the administrator, to refund in case the estate proves to be insolvent, is valid.—*Beardsley v. Marsteller*, 120 Ind. 319, 22 N. E. 315.

[e] (App. 1900)

A complaint, in an action by an administrator, to recover the excess paid a creditor under a mutual mistake that the estate was solvent, alleging that the assets of the estate had been reduced to cash, and there was in plaintiff's hands, to be applied on the general debts, a sufficient amount to pay only 77½ cents on the dollar of the debts, and also stating the amount of the excess payment to defendant, is sufficient without alleging that a final dividend had been ascertained and declared by the court.—*Tarplee v. Capp*, 56 N. E. 270, 25 Ind. App. 56; *Meek v. Same*, 57 N. E. 269, 25 Ind. App. 699.

[f] (App. 1900)

Where an unpreferred creditor's claim was paid in full long before final settlement of the estate, under the impression that such estate was solvent, it was not necessary, on discovering the estate to be insolvent, to aver, in a complaint to recover the excess paid over such creditor's distributive share, that the estate was insolvent when the debt was paid; hence it was not necessary to prove such fact, or the court to find it to entitle the administrator to recover.—*Tarplee v. Capp*, 56 N. E. 270, 25 Ind. App. 56.

Where an executor and a creditor of the estate believed the estate to be solvent, and such executor paid the creditor's unpreferred claim in full, and it afterwards appeared that the estate was insolvent, an administrator *de bonis non* may recover from such creditor the excess above the per cent. allowed on unpreferred claims.—*Id.*

Where an unpreferred creditor's claim had been paid in full, under the impression that the estate was solvent, while in fact it was insolvent, his defense, to a recovery for the excess above his pro rata distributive share, that when his claim was paid the claims of various creditors which afterwards reduced the estate to insolvency had not been filed until more than 15 months subsequent to payment of his claim, but before final settlement of the estate, is demurrable; since, under Elliott's Supp. § 385, an administrator is bound to take notice of all

claims filed within 30 days before final settlement of the estate.—*Id.*

Since, under Elliott's Supp. § 385, an administrator is bound to take notice of all claims against the estate filed within 30 days before final settlement, where, long before final settlement, he paid the claim of an unpreferred creditor in full, under the impression that the estate was solvent, it was not necessary to prove, or the court to find, in an action to recover the excess above such creditor's distributive share of the insolvent estate, that the administrator, in making such payment, was diligent in ascertaining the condition of the estate.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1134.

See, also, 18 Cyc. p. 588.

## VII. DISTRIBUTION OF ESTATE.

Damages recovered for causing death, see DEATH, § 101.

Decisions reviewable, see APPEAL AND ERROR, § 77.

Disbursements for benefit of legatees or distributees as credit in account, see post, § 484.

Distribution of proceeds of sale of property, see post, §§ 400-406.

Duty to pay legacy charged on estate, see WILLS, § 820.

Insolvent estates, see post, § 418.

Partition of property of estate, see PARTITION.

Presumptions in aid of pleading relating to, see PLEADING, § 34.

Rights of action for legacies or distributive shares, see post, §§ 428-430.

Sale of property under order of court for payment of legacies or distribution, see post, § 326.

Selection and setting apart of allowance to surviving wife, husband, or children, see ante, §§ 191, 192, 194.

### § 288. Authority and duty to make in general.

[a] (Sup. 1858)

2 Rev. St. p. 280, §§ 138, 139, relating to the distribution of the surplus on a final settlement of an estate, apply to cases where distribution is to be made to heirs, and not to a case where it is to be made to residuary legatees.—*Camper v. Hayeth*, 10 Ind. 528.

[b] (Sup. 1874)

A testator bequeathed to his two daughters \$8,000 each, the will providing that they, or either of them, might take the whole or any part thereof in undivided real estate; and that, if not taken in real estate, it should be paid in money; and the executor was authorized to sell the real estate, if necessary, in order to pay such bequests. *Held*, that as the title to the undivided real estate vested, upon the death of the testator, in his heirs at law, the executor had no power to convey to the devisees the

real estate by them, or either of them, selected; but that a commissioner should be appointed to convey the land selected after appraisal by suitable and competent persons appointed for the purpose.—*Smith v. McCormick*, 46 Ind. 135.

[c] (Sup. 1881)

The proper person to pay a legacy is the executor or the administrator with the will annexed.—*Gould v. Steyer*, 75 Ind. 50.

[d] (App. 1906)

An administrator must distribute the residue of the estate among those entitled to it under the direction of the court and according to law.—*Mefford v. Lamkin*, 76 N. E. 1024, 77 N. E. 960, 38 Ind. App. 33.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1136-1148.  
See, also, 18 Cyc. p. 594.

### § 289. Priority of debts to legacies or distributive shares.

[a] (Sup. 1881)

Where an executor is guilty of a devastavit, the loss must as between an heir or devisee and creditors fall on the former and not on the latter. A creditor cannot be driven to an action against the executor and his sureties for devastavit to collect his debt.—*Moncrief v. Moncrief*, 73 Ind. 587.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1150-1152.  
See, also, 18 Cyc. p. 597.

### § 291. Assent to legacy or devise.

[a] (Sup. 1849)

A legatee, whether general or specific, must obtain executor's consent to the legacy before his title becomes perfect.—*Crist v. Crist*, 1 Ind. 570, *Smith*, 370, 50 Am. Dec. 481.

Where an executor refuses assent to a legacy without cause, the legatee is entitled to relief in equity.—*Id.*

[b] (Sup. 1896)

The rule that a legatee cannot recover possession of his legacy against the consent of the executor applies only to legacies of specific personal property.—*Jennings v. Sturdevant*, 40 N. E. 61, 140 Ind. 641.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1153-1163.  
See, also, 18 Cyc. pp. 598-601; note, 69 L. R. A. 33.

### § 294. Liabilities of legatee or distributee to estate.

Deduction from surplus proceeds of sale, see post, § 404.

Right of administrator to sue heir for debt due estate, see ante, § 86.

Rights and liabilities of devisees and legatees indebted to estate, see WILLS, § 731.

Rights and liabilities of heirs and distributees indebted to estate, see DESCENT AND DISTRIBUTION, § 80.

Rights of creditors of heirs as affected by indebtedness of heir to estate, see DESCENT AND DISTRIBUTION, § 156.

[a] (Sup. 1891)

If an administrator has the right to apply an heir's share of the surplus proceeds of a sale for the payment of debts of decedent to a debt due from the heir to the estate, he has the right in equity, in case no sale is made, to have the interest of the heir in the real estate applied to the payment of the debt.—*New v. New*, 27 N. E. 154, 127 Ind. 576.

[b] (App. 1906)

An administrator may retain out of the funds in his hands belonging to an heir or legatee against whom he holds an unsatisfied claim or judgment an amount equal to such claim or judgment.—*Weaver v. Gray*, 37 Ind. App. 35, 76 N. E. 795.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1169-1184.

### § 295. Time for delivery or payment of legacy.

Right to possession of personalty until settlement of estate, see ante, § 154.

Time of accrual of right to devise or legacy under provisions of will, see WILLS, § 733.

[a] (Sup. 1884)

Where a will fixes the right to a legacy and makes it the duty of the administrator to pay it, he is not bound to pay it until all the debts of the estate have been paid, and he may therefore rightly delay payment, and in doing so does no wrong, and is not liable to an action.—*Fickle v. Snepp*, 97 Ind. 289, 49 Am. Rep. 449.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1185-1197.  
See, also, 18 Cyc. p. 601.

### § 296. Time for making distribution.

Proceedings to compel partial distribution in advance of time, see post, § 314.

[a] (Sup. 1864)

Rev. St. 1843, c. 30, § 351, does not require a postponement of the petition for distribution therein authorized till the administrator shall voluntarily proceed to finally settle the estate.—*Lilly v. Stahl*, 5 Ind. 447.

[b] (Sup. 1866)

Unless the assets of the estate exceed by one-third the known debts and legacies, the court ought not to require the administrator to pay the funds in advance to the distributees.—*Hayes' Adm'r v. Matlock*, 27 Ind. 49.

[c] (Sup. 1880)

An administrator cannot be compelled to make distribution of the intestate estate until

after the expiration of one year from the grant of letters of administration.—*Fleece v. Jones*, 71 Ind. 340.

[d] (Sup. 1889)

Under Rev. St. 1881, §§ 2379, 2380, as amended by Acts 1883, p. 158, § 18, authorizing a court to direct the payment of a distributive share before final settlement of an estate on the application of a distributee, when it appears that there are one-third more assets than are required to pay the then known claims, on the filing of a refunding bond by the distributee, such payment may be directed, whether the year allowed after the granting of letters of administration for the settlement has expired or not, and though there are suits pending against the administrator and assets uncollected.—*Chapell v. Shuee*, 117 Ind. 481, 20 N. E. 417.

Under Rev. St. 1881, §§ 2379, 2380, amended by Acts 1883, p. 158, § 18, in proceedings to secure payment of distributive shares before final settlement, the value of advancements made the different distributees may be ascertained if necessary to a determination of the amount due.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1185-1198.  
See, also, 18 Cyc. pp. 604-608.

#### § 299. Refunding bond or other indemnity.

Liability of legatee to refund in absence of bond, see post, § 318.

Liability on bond, see post, § 318.

[a] (Sup. 1854)

It is the duty of a probate court, under Rev. St. 1843, p. 550, § 360, when granting an order to administrators to pay over to distributees their shares in an intestate's estate before final settlement thereof, to direct such administrators to require a bond, with sufficient surety, for the return of the money paid over to the distributees, "whenever necessary for the payment of debts," etc., "or to equalize the shares among those entitled thereto."—*Tapley v. McGee*, 6 Ind. 56.

[b] (Sup. 1866)

It is error to decree partial distribution or payment of legacies without requiring the execution of a refunding bond.—*Hayes' Adm'r v. Matlock*, 27 Ind. 49.

[c] (App. 1893)

On a partial distribution of the assets of a decedent's estate, the court may require a refunding bond by the distributee, under the express provision of Rev. St. 1881, § 2380.—*Mazelin v. Rouyer*, 8 Ind. App. 27, 35 N. E. 303.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1205-1216, 1218.  
See, also, 18 Cyc. pp. 611-614.

#### § 302. Mode and sufficiency of payment.

##### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1229-1245.  
See, also, 18 Cyc. pp. 618-626.

#### § 303. — In general.

[a] (Sup. 1880)

In an action by a surviving husband for his deceased wife's distributive share of the estate of her father, paid to the clerk of the court by the administrator at the time of making his report, evidence that such share was paid to the clerk by the administrator for plaintiff subject to a question of advancement to be thereafter settled, and that he was directed by the administrator not to pay the same until the question was settled, and that the report was approved without determining the question of advancements, does not entitle plaintiff to recover, as it fails to show an absolute payment for the use of plaintiff.—*Bryant v. Householder*, 71 Ind. 349.

[b] (Sup. 1882)

Under Rev. St. 1881, § 2415, providing that at final settlement, or within two years thereafter, where proof of heirship or title by will is made as to the surplus of the estate, the clerk shall be ordered to pay such surplus to the persons entitled thereto, the court is not required to direct the payment of such money into the county treasury, and no action will lie to compel the clerk to pay such surplus to any persons other than those proved to be entitled to it.—*State ex rel. Baldwin v. Taggart*, 88 Ind. 269.

[c] (App. 1906)

Since Burns' Ann. St. 1901, § 2557, authorizing the payment by an administrator of money to the clerk for distribution, was enacted for the convenience of the administrator, he cannot relieve himself from the obligation imposed by the acceptance of his trust by making the payment to the clerk, and the validity of a subsequent order for distribution is unaffected by such payment. Judgment, 76 N. E. 1024, 38 Ind. App. 33, affirmed on petition for rehearing.—*Mefford v. Lamkin*, 76 N. E. 1024, 77 N. E. 960, 38 Ind. App. 33.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1229-1242, 1245.  
See, also, 18 Cyc. p. 618.

#### § 304. — Legatees or distributees under disability.

[a] (Sup. 1854)

An order of a probate court directing an administrator to pay the shares of infant distributees in an intestate's estate to a third person as their agent or attorney is erroneous.—*Tapley v. McGee*, 6 Ind. 56.

[b] (Sup. 1860)

Where the minor heirs are made residuary legatees, and the executor is directed to pay

them their shares when of age, the executor, and not the guardian, holds their shares during their minority. It is not the case of a surplus remaining for distribution after the payment of all legacies.—*Branch v. Holcraft*, 14 Ind. 237.

[c] (Sup. 1878)

2 Rev. St. 1876, p. 536, § 114, provides that if, upon the final settlement of an estate, any claim due the estate shall remain uncollected, and any heir or legatee whose share does not exceed the amount will accept it in part payment of his share, it may be assigned to him by the executor or administrator, and the estate finally settled. *Held*, that such provision authorizes only an adult legatee or heir to accept such claim, and not the guardian of a minor.—*Bescher v. State ex rel. Hammann*, 63 Ind. 302.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1243, 1244.  
See, also, 18 Cyc. pp. 625, 626.

#### § 307. Effect of payment or distribution.

[a] (Sup. 1882)

The "delivery" of land of a decedent by his administrators to the guardian of decedent's heirs has no effect on the rights of creditors of the decedent's estate, even though the delivery is with the assent and concurrence of the creditors.—*Baker v. Griffith*, 83 Ind. 411.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1251-1256.  
See, also, 18 Cyc. pp. 627-629.

#### § 308. Improper payment in general.

Liability of administrator for acts of coadministrator, see ante, § 125.

[a] (Sup. 1880)

An administrator who makes distribution of the assets of the estate before the expiration of one year from the date of the first letters of administration on the estate misapplies the money of the estate in his hands, and to that extent commits a devastavit thereof.—*Fleece v. Jones*, 71 Ind. 340.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1257, 1258, 1263, 1263½.  
See, also, 18 Cyc. pp. 629-631.

#### § 309. Payment before order or decree.

[a] (Sup. 1864)

The order of the court of common pleas directing the delivery of property to a widow is necessary to give her title thereto.—*Noblett v. Dillinger*, 23 Ind. 505.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1259, 1260.  
See, also, 18 Cyc. p. 631.

#### § 310. Overpayment.

[a] (Sup. 1891)

Where an administrator pays to an heir more than his share of the estate because he is misled as to the amount of the assets on account of an excessive valuation of the deceased's share of the property of a firm, as shown by the inventory made by the surviving partner, he may recover the overpayment from the heir by suit, since the mistake is one of fact.—*Stokes v. Goodykoontz*, 126 Ind. 535, 26 N. E. 391.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1264-1266.

#### § 313. Interest on legacies and distributive shares.

Rights of legatees as to interest, see WILLS, § 734.

[a] (App. 1910)

Where a distributee of an estate failed to obtain his share at once because of his own negligence in failing to communicate with members of his family, and the administrator advertised for him in various newspapers without success, the distributee was not entitled to interest on his share.—*Fletcher v. Nicholson*, 90 N. E. 910.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1271-1273½.  
See, also, 18 Cyc. pp. 637-640.

#### § 314. Proceedings for payment or distribution.

Aider of pleading by verdict or judgment, see PLEADING, § 433.

Distribution of proceeds of sale under order of court, see post, § 406.

Exclusive or concurrent jurisdiction of court, see COURTS, § 472.

Necessity for presentation as claim against estate, see ante, § 224.

Proceedings for accounting, see post, §§ 468-474.

Right to trial by jury in action by widow to receive distributive share, see JURY, § 14.

Sufficiency of findings by court, see TRIAL, § 395.

[a] (Sup. 1846)

It is no answer or plea to a petition by heirs for distribution that the defendant administrator does not know who the heirs of the intestate are.—*Conner v. Hawkins*, 8 Blackf. 236.

The heirs of an intestate may, under the act of 1843, file a petition in the probate court against the administrator for distribution.—*Id.*

On overruling objections to an answer or plea to a petition by heirs in the probate court for distribution, the suit should not be dismissed, but the petitioners should be permitted to reply.—*Id.*

[b] (Sup. 1886)

On a petition under Rev. St. 1843, c. 30, art. 14, to require an administrator to pay to plaintiff his distributive share of the personal estate of the intestate, in which the right of the plaintiff to the portion claimed turned upon the construction of the statute, other persons interested in a construction of the statute adverse to that claimed by the plaintiff were not necessary parties.—Henson v. Ott, 7 Ind. 512.

[c] (Sup. 1886)

An application on behalf of an infant by his guardian to obtain an order of court requiring the administrator of the estate before final settlement to advance to a distributee a portion of his share for his support is summary, to be granted in the discretion of the court and only in a clear case, and the statute relating thereto does contemplate formal proceedings thereunder.—Hayes' Adm'r v. Matlock, 27 Ind. 49.

[d] (Sup. 1884)

A petition for money paid into court for distribution on the settlement of an estate, which shows that the claimant is entitled thereto, should not be stricken out.—Roberts v. Huddleston, 93 Ind. 173.

[e] (Sup. 1887)

It is the duty of an administrator to appeal when he has reasonable ground to believe that the court has erred in its judgment and order of distribution; nor will the fact that certain heirs were unnecessarily made parties appellant authorize a dismissal of the appeal as against the administrator.—Ruch v. Biery, 110 Ind. 444, 11 N. E. 312.

[f] (Sup. 1888)

Jurisdiction of the court over the subject of the distribution of the surplus in the hands of an administrator on his final settlement is acquired without a petition or pleading as an incident to the final settlement of the account.—Jones v. Jones, 18 N. E. 20, 115 Ind. 504.

[g] (Sup. 1889)

Though a complaint by the administrator and distributees of an intestate for a distribution of assets does not aver that the latter was domiciled or died possessed of property in, or was an inhabitant of, the state, or that administration was granted in the state, judgment for plaintiffs will not be arrested for that reason, as the circuit court has general jurisdiction of the subject-matter and facts depriving it of that jurisdiction not appearing will be presumed not to exist.—Chapell v. Shuee, 117 Ind. 481, 20 N. E. 417.

[h] (Sup. 1895)

An order, made on the hearing of a partial account, for distribution, or for an allowance of a credit for payment, to an heir or legatee, is not binding upon the other heirs or legatees, so far as it determines the right of any one to the money as heir or legatee, when the only notice of the hearing is by publication and

posting, as provided by Rev. St. 1881, § 2390 (Rev. St. 1894, § 2545).—Glessner v. Clark, 140 Ind. 427, 39 N. E. 544.

[i] (Sup. 1904)

Under Burns' Ann. St. 1901, § 2562, which provides that when a final settlement account shall have been filed by executors or administrators, and notice given to heirs, devisees, and legatees to prove their claims to the surplus, they shall appear before the court and make proof of their heirship or other title to the surplus, a petition filed by a legatee to establish his claim to the legacy need not show that there are assets in the hands of the executors applicable to its payment.—Coulter v. Bradley, 71 N. E. 903, 163 Ind. 311.

[j] (Sup. 1905)

The report of an administrator, and an exception thereto challenging the distribution on the basis of charging exceptors with advancements, and as a reason for the objection alleging a contract claimed to make consideration of the advancements improper, raise an issue, putting exceptors to proof of existence of the contract, without any plea of non est factum by the administrator.—Spray v. Bertram, 74 N. E. 502, 165 Ind. 13.

The overruling of an exception to the report of an administrator cannot be disturbed on appeal, in the absence of the evidence as to the existence of the contract asserted by the exception to make the distribution improper, though the alleged contract is in the transcript, where the ruling may have been on the insufficiency of the evidence to establish the contract, and not on its effect.—Id.

[k] (App. 1909)

An executor may appeal from an alleged erroneous order of distribution.—Keener v. Grubb, 89 N. E. 896.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1274-1297.

See, also, 18 Cyc. pp. 640-658.

### § 315. Order or decree for distribution.

Appealability of judgment setting aside order, see APPEAL AND ERROR, § 77.

Payment of legacy before order or decree, see ante, § 309.

[a] (Sup. 1895)

An order, made on the hearing of a partial account, for distribution, may be set aside on the application of one appointed administrator as successor to the administrator, on the hearing of whose account the order was granted.—Glessner v. Clark, 140 Ind. 427, 39 N. E. 544.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1298-1314; 30 CENT. DIG. JUDGM. § 1067.

See, also, 18 Cyc. pp. 659-668.

**§ 318. Liability to refund on deficiency of assets.**

On payment in excess of distributive share, see ante, § 310.

[a] (Sup. 1856)

The administrators of an estate, without order of the court, before the estate was settled, voluntarily paid the widow and heirs certain sums from the assets. The estate proved insufficient to pay debts and a compensation to the administrators, and they brought an action against the widow and heirs to recover a sufficient amount of the sum advanced to meet the unpaid debts and compensate themselves. *Held*, that the action could not be maintained.—*Egbert v. Rush*, 7 Ind. 706.

[b] (Sup. 1881)

The fact that an executor, on paying a legacy, fails to take a bond to refund, as required by 1 Rev. St. 1876, pp. 538, 544, §§ 120, 140, does not release the legatee or distributee from liability to refund, when necessary for the payment of debts, legacies, or claims.—*Smith v. Smith*, 76 Ind. 236.

[c] (Sup. 1890)

A complaint averred that plaintiff, as administrator, paid into court money belonging to the estate; that he reported no creditors found; that M., as attorney for certain heirs, received said sum, and paid it over to the guardian of the heirs, taking from him a bond conditioned that, in case of suit by any creditors of the estate, said guardian would repay the amount thus received; that suit was instituted, and all former proceedings set aside, and said attorney was directed to deliver all money and collaterals to the administrator for the benefit of the creditors; that the bond given by the guardian was turned over; and that the amount for which it was given had been demanded, but was unpaid, and was necessary to discharge the indebtedness of the estate. *Held*, that the complaint stated facts showing a cause of action on the bond.—*Chandler v. Morrison*, 123 Ind. 254, 23 N. E. 160.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1319-1326, 1328-1331.

See, also, 18 Cyc. pp. 670-673.

**VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.**

Application of administrator as prerequisite to sell a specified mortgage, see MORTGAGES, § 414.

By foreign or ancillary executor or administrator, see post, § 520.

Property of insolvent estates, see post, § 414. Sales without order of court, see ante, §§ 136-148, 157-168.

**(A) WHEN AUTHORIZED.****§ 319. Nature of remedy.**

[a] (Sup. 1891)

Since the common-law right of an administrator to sell and dispose of the personal property of his decedent does not exist in Indiana, such sales must be made in the manner prescribed by statutes on the subject.—*Citizens' St. Ry. Co. v. Robbins*, 26 N. E. 116, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1332.

**§ 320. Statutory provisions.**

[a] (Sup. 1883)

Rev. St. 1843, c. 29, § 27, relating to sales by administrators, etc., is prospective in its operation only.—*Babbitt v. Doe ex dem. Brush*, 4 Ind. 355.

[b] (App. 1907)

*Burns' Ann. St. 1901, § 2485* (Rev. St. 1881, § 2332), authorizing an administrator to sell decedent's real estate for the payment of debts when necessary, and *Burns' Ann. St. 1901, § 2489* (Rev. St. 1881, § 2336), making it necessary for the administrator before selling the real estate to obtain an order from the court, are in derogation of the common law and must be strictly followed.—*Tippecanoe Loan & Trust Co. v. Carr*, 40 Ind. App. 125, 78 N. E. 1043.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1332½.

See, also, 18 Cyc. p. 674.

**§ 321. For purposes of administration in general.**

[a] (Sup. 1882)

An administrator has no right to sell real estate, except where it becomes necessary to restore to it for the payment of debts due from the decedent.—*Cole v. Lafontaine*, 84 Ind. 446.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1333.

See, also, 18 Cyc. p. 675.

**§ 322. For payment of debts.**

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1334-1342.

See, also, 18 Cyc. pp. 676-684.

**§ 323. — Necessity in general.**

[a] (App. 1904)

On proper application, the court may authorize an administrator to sell any of the real estate of the decedent for the payment of the purchase money or any valid lien thereon.—*Fry v. Lawson*, 69 N. E. 1038, 32 Ind. App. 364.

[b] (App. 1909)

Where a minor died seised of certain real estate which descended to her insolvent father, her administrator was required by *Burns' Ann.*

St. 1908, § 2852 et seq., to sell as much of the real estate as was necessary to discharge all valid claims allowed against her estate.—*Maitlen v. Maitlen*, 89 N. E. 966.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1334-1336, 1342.

See, also, 18 Cyc. p. 676.

**§ 324. — Existence and validity of debts.**

[a] (Sup. 1882)

It is a sufficient objection to an administrator's petition for leave to sell land to pay debts that the debts to be paid from the proceeds of the sale are fraudulent.—*Hunter v. French*, 86 Ind. 320.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1337, 1338, 1342.

See, also, 18 Cyc. p. 680.

**§ 325. — Insufficiency of personalty.**

[a] (Sup. 1850)

Where the administrator wastes the personalty, and he and his sureties are insolvent, real estate may be sold for the payment of debts.—*Nettleton v. Dixon*, 2 Ind. 446.

[b] (Sup. 1868)

Real estate cannot be sold by an administrator unless the personal estate is insufficient to pay the liabilities, and ordinarily only so much as is necessary for that purpose.—*Newcomer v. Wallace*, 30 Ind. 216.

[c] A license to sell real estate will be granted if the personalty is insufficient for the payment of the debts.—(Sup. 1874) *Hunsucker v. Smith*, 49 Ind. 114; (1881) *Bennett v. Gaddis*, 79 Ind. 347; (1891) *Falley v. Gribbling*, 128 Ind. 110, 26 N. E. 794.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1339-1341.

See, also, 18 Cyc. p. 681.

**§ 326. For payment of legacies or distribution.**

Property subject to sale for payment, see post, § 327.

[a] (Sup. 1892)

Where legacies are made a charge on the real estate of the testator, it is the duty of testator's personal representative to sell the real estate to pay them when the personal property is insufficient.—*American Cannel Coal Co. v. Clemens*, 31 N. E. 786, 132 Ind. 163.

[b] (App. 1905)

Under *Burns' Ann. St. 1901*, § 2424, entitling the widow to select articles named in the appraisement, not exceeding \$500 in value, and providing that, if she fails to select any part of such articles, she shall be paid the amount of the deficiency in cash, and that, if

the personal estate is insufficient to pay that amount, the deficit shall constitute a lien upon the real estate, to be enforced by sale upon petition of the administrator, it was the duty of an administrator who knew of the selection of inventoried articles by the widow amounting to much less than \$500, and that the personal property was not sufficient to pay her the balance, to petition for a sale of the real estate before seeking final settlement of the estate.—*Rush v. Kelley*, 73 N. E. 130, 34 Ind. App. 449.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 1343.

See, also, 18 Cyc. pp. 684, 685.

**§ 327. Effect of testamentary provisions.**

[a] (Sup. 1877)

Testator, who left no parent or child, gave to his wife absolutely all his personalty, and also certain real estate during her life, and directed that after her death his executors should sell the realty and divide the proceeds in specified portions among certain legatees named. *Held*, that during her life no part of such real estate could be sold by the executor for the payment of such legacies, though the personalty was insufficient to pay them.—*Dale v. Bartley*, 58 Ind. 101.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 1344.

See, also, 18 Cyc. pp. 685, 1352.

**§ 328. Persons entitled to apply.**

[a] Acts of an executor which might estop him personally to procure the sale of his testator's land to pay debts will not estop him to maintain a petition for that purpose where the rights of creditors are concerned, and they could maintain such a petition. *Rev. St. 1876*, p. 523, § 78.—(Sup. 1881) *Moncrief v. Moncrief*, 73 Ind. 587; (1900) *Moore v. Moore*, 155 Ind. 261, 57 N. E. 242.

[b] (Sup. 1881)

It is the duty of an executor to apply of his own motion for an order for the sale of land to pay debts when necessary, and the court may order such a sale on the executor's petition whenever it would be ordered on petition of creditors.—*Moncrief v. Moncrief*, 73 Ind. 587.

[c] (Sup. 1881)

The right to subject the lands of a decedent to sale for the payment of debts is properly asserted through the medium of an administrator.—*Bennett v. Gaddis*, 79 Ind. 347.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1345-1349.

See, also, 18 Cyc. pp. 686-689.

**§ 329. Property or interests subject to disposal.**

Assets for payment of debts, see ante, §§ 38-72. Effect of election by widow to take under will, see WILLS, § 800.



Effect of testamentary provisions, see ante, § 327.

Property available for payment of debts in general, see ante, §§ 270-272.

[a] Land which the heir was conveyed may be sold to pay debts.—(Sup. 1877) Weakley v. Conradt, 56 Ind. 430; (1889) Smith v. Gorham, 119 Ind. 436, 21 N. E. 1000.

[b] An administrator cannot, by consenting to the sale of land by the heir, divest the creditor of his right to have his debt made out of such land, though it might create an estoppel against him, if the right of creditors were not affected.—(Sup. 1881) Moncrief v. Moncrief, 73 Ind. 587, overruling Pell v. Farquar (1834) 3 Blackf. 331; (1882) Cole v. Lafontaine, 84 Ind. 446; (1900) Moore v. Moore, 57 N. E. 242, 155 Ind. 261.

[c] (Sup. 1882)

An administrator had assets sufficient to pay the debts of his intestate. With the assent of the creditors, the administrator conveyed the real estate to an heir, whose guardian sold it under an order of court, and it came to the hands of a purchaser for value. Held, that it was liable to be sold for the payment of the intestate's debts at the instance of an administrator de bonis non.—Baker v. Griffith, 83 Ind. 411.

[d] (Sup. 1882)

An action by an administrator to sell lands bought with decedent's money, and, for the purpose of defrauding decedent's creditors, deeded to another, is within Rev. St. §§ 2333, 2334, providing that an administrator may, within five years, apply to sell land transferred by decedent with intent to defraud his creditors.—Bushnell v. Bushnell, 88 Ind. 403.

[e] (Sup. 1883)

Since a purchaser of a decedent's real estate, sold under order of the orphans' court, takes only such title as the decedent had at the time of death, a petition for the sale of lands fraudulently conveyed by decedent will not be allowed.—Bottorff v. Covert, 90 Ind. 508.

[f] (Sup. 1884)

A widow's one-third interest in the real estate of her husband descends to her free from the claims of creditors, and is not liable to be made assets for the payment of his debts, and hence his administrator has no authority or power, and can acquire none, to make a conveyance or sale of such interest.—Nutter v. Hawkins, 93 Ind. 260.

[g] (Sup. 1884)

The interest of a widow in the land of her deceased husband cannot be ordered sold to pay the debts of the estate.—Pepper v. Zahnsinger, 94 Ind. 88.

[h] (Sup. 1886)

In no case can the court for the purpose of paying debts against a decedent's estate order

the sale of the portion of the real estate which the widow owns by reason of her marital rights.—Hutchinson v. Lemcke, 8 N. E. 71, 107 Ind. 121.

[i] (Sup. 1891)

Under Act March 11, 1889 (Elliot, Supp. § 423), amending Rev. St. 1881, § 2487, providing that if a man marry a second wife and has by her no children, but has children alive by a former wife, the interest of such second wife in the lands of the decedent shall only be a life estate, and the fee shall, at the death of the husband, vest in the children subject only to the life estate of the widow, the fee simple to the portion in which the widow took a life estate was not subject to sale by the administrator to make assets for the payment of debts, but belong to the children of the deceased by the prior marriage.—Windell v. Trotter, 26 N. E. 823, 127 Ind. 332.

[j] (Sup. 1893)

Where, after the order and before the sale, the widow had married a second husband, and all power of alienation of her interest in the lands was thereby suspended under Rev. St. 1881, § 2484, providing that a widow who shall marry a second time holding real estate by a previous marriage, with issue alive by such marriage, cannot, during such second coverture, with or without the consent of her husband, alienate such real estate, the court had no jurisdiction, though she was a party to the proceeding to order the sale of the widow's interest for the payment of debts.—Irey v. Mater, 33 N. E. 1018, 134 Ind. 238.

[k] (App. 1895)

Personal property which came to the intestate by gift, devise, or descent under the statute may be taken to pay debts in order to save ancestral real estate for another line of heirs, or to save nonancestral real estate.—Rountree v. Pursell, 39 N. E. 747, 11 Ind. App. 522.

[l] (Sup. 1899)

The failure of an administrator to redeem property sold under execution sale, and the redemption thereof by one who had no power to redeem, does not preclude said administrator from obtaining an order to sell such property to pay the debts of his decedent.—Jarrell v. Brubaker, 49 N. E. 1050, 150 Ind. 260.

[m] (Sup. 1909)

A mother, who had inherited from her husband an undivided one-third of a farm in fee simple, contracted with her children and grandchildren, who had inherited an undivided two-thirds of the farm, the children to give the mother their interest during her life, or as long as she remained a widow, she to have the profits for her support and the improvement of the farm, and to pay all demands that might come against the estate, taxes, etc., and at her death or remarriage, the farm, together with its appurtenances, was to "revert" to the legal heirs equally. Held, that inasmuch as the two-thirds

interest of the children and grandchildren was theirs in fee simple, subject to the mother's life interest under the contract, the word "revert," if used solely in connection with that portion, would be unnecessary, and the parties' intention was that the farm as a whole should revert to the legal heirs equally, the word "revert" being used in the sense of "go" or "pass," and hence the mother's one-third interest could not after her death be sold to pay debts of her estate.—*Warrum v. White*, 171 Ind. 574, 86 N. E. 959.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1052, 1059, 1342, 1350-1364; 25 CENT. DIG. HOME, §§ 255, 256.

See, also, 18 Cyc. pp. 690-696.

**§ 330. Amount to be sold or otherwise disposed of.**

**[a] (Sup. 1848)**

A decree on an administrator's application to sell real estate to pay debts should be limited to so much as will satisfy the valid debts.—*Black v. Meek*, 1 Ind. 180, Smith, 131.

On the petition of an administrator for the sale of real estate for the payment of debts, the court should not order the sale of more than is sufficient for the payment of the debts, unless the residue of the land would be greatly injured by said sale.—Id.

By Rev. St. c. 30, in case a sale of a part of the real estate of a decedent becomes necessary for the payment of debts, it is provided that the probate court may order a sale of the whole of the real estate, where it appears that a sale of a part would greatly injure the residue.—Id.

**[b] (Sup. 1868)**

Only so much land as is necessary for payment of debts should, ordinarily, be sold.—*Newcomer v. Wallace*, 30 Ind. 216.

**[c] (Sup. 1890)**

An administrator has no right to an order for the sale of an account of the decedent's property in excess of the necessary amount to pay decedent's debts.—*Fralich v. Moore*, 24 N. E. 232, 123 Ind. 75.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1365, 1366.

See, also, 18 Cyc. p. 697.

**§ 331. Payment or security to prevent disposal of property.**

**[a] (Sup. 1903)**

The requirements of Burns' Rev. St. 1901, § 2527 (Rev. St. 1881, § 2371; Horner's Rev. St. 1901, § 2371), providing that an order for sale of a decedent's real estate shall not be granted if any person interested in the estate shall give bond for all liabilities of the estate, are not met by an offer, in a pleading, of judg-

ment that the pleader give such a bond.—*Davis v. Kendall*, 68 N. E. 894, 161 Ind. 412.

An offer in a pleading to pay the personal debts of a decedent is not equivalent to the payment of all the debts and cost of administration of the estate, and is insufficient to prevent a sale of the real estate to pay the debts.—Id.

An offer in a pleading to pay the debts of a decedent's estate, made before the time for filing claims has expired or the total indebtedness determined, is insufficient to prevent the sale of the real estate to pay the debts.—Id.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1367, 1368.

See, also, 18 Cyc. p. 698.

**(B) APPLICATION AND ORDER.**

Appealability of order, see **APPEAL AND ERROR**, § 69.

Records as notice to subsequent purchasers, see **VENDOR AND PURCHASER**, § 231.

**§ 332. Form of proceeding.**

**[a] (Sup. 1869)**

An application to sell lands in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction.—*Spaulding v. Baldwin*, 31 Ind. 376.

**[b] (Sup. 1879)**

A proceeding by an administrator to sell real estate to pay debts is not a civil action, but is governed throughout the entire proceeding, as to the procedure in instituting and prosecuting it to final decree and appealing therefrom, by the statutory provisions exclusively applicable thereto.—*Seward v. Clark*, 67 Ind. 289.

**[c] (App. 1905)**

A sale of real estate by an administrator under an order and decree of court is a judicial sale.—*Pierce v. Vansell*, 74 N. E. 554, 35 Ind. App. 525.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1369-1371.

See, also, 18 Cyc. pp. 699, 700.

**§ 333. Jurisdiction.**

Exclusive or concurrent jurisdiction, see **COURTS**, § 475.

[a] The court issuing letters of administration upon the estate of a decedent has exclusive jurisdiction of a petition for the sale of the decedent's real estate to pay debts, no matter in what county the same may be situated.—(Sup. 1860) *Ex parte Shockley*, 14 Ind. 413; (1886) *Vail v. Rinehart*, 105 Ind. 6, 4 N. E. 218.

[b] (Sup. 1865)

The jurisdiction of the court of common pleas of the county where letters of administration have been granted of an application by the administrator to sell real estate situated in another county is not exclusive.—*Williamson v. Miles*, 25 Ind. 55.

Proceedings by an administrator for the sale of real estate were instituted in the court of common pleas of the county in which the land was situated, the heirs of the deceased being residents of that county. *Held*, that the court had jurisdiction of the subject-matter of the suit and of the persons of the heirs, though administration had been granted in another county.—*Id.*

[c] (Sup. 1885)

In a proceeding to subject lands of a decedent to the payment of his debts, the court of common pleas had jurisdiction to try the question of title.—*Lantz v. Maffett*, 26 N. E. 195, 102 Ind. 23.

[d] (Sup. 1885)

The sale of real estate by an administrator is provided for and regulated exclusively by the act for the settlement of decedent's estates. The Civil Code makes no provision for such proceedings, and they are not within the ordinary common-law jurisdiction of the circuit court.—*Rinehart v. Vail*, 2 N. E. 330, 103 Ind. 159.

[e] (Sup. 1887)

Where the record of a proceeding for the sale of land and for the payment of debts of a testator was silent as to whether notice was given to testator's daughter thereof, it would be presumed in support of the jurisdiction of the court that notice was given, and that she was therefore bound by the proceedings.—*Sims v. Gay*, 9 N. E. 120, 109 Ind. 501.

[f] (Sup. 1889)

A husband and wife joined in a mortgage conveying certain real estate owned by the husband to secure debts. The husband subsequently died, leaving his widow and children as surviving heirs, and leaving the debts secured by such mortgage unpaid. The administrators of the estate applied to the proper probate court for an order to sell the mortgaged real estate for the purpose of having assets to pay debts secured by the mortgage. The widow appeared, waived the publication, and posting notice required by statute, and assented to the sale of the whole real estate on an alleged agreement that two-thirds of the proceeds should be applied to the payment of the mortgage debt and one-third paid to her. The land was sold in pursuance of the order, and the administrators conveyed the whole of the several tracts to the purchaser who went into possession under his deed. *Held*, that the order of sale made by the probate court was beyond its jurisdiction and void, as merely signing a paper in which she manifested her assent to an order, for the sale of the whole of the several tracts,

including her interest, would not confer jurisdiction over the subject-matter on the court, nor would that without more constitute the administrators her agents to convey her title.—*Roberts v. Lindley*, 22 N. E. 967, 121 Ind. 56.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1372-1375.  
See, also, 18 Cyc. p. 700.

### § 334. Time for application.

[a] (Sup. 1850)

A petition by A., as administrator de bonis non of B., alleged that not more than \$100 could be obtained from the personal estate, and gave a statement of the debts. It also alleged that the intestate died seised of certain real estate, leaving C. his only heir at law, and prayed that C. should show cause why said real estate should not be sold to pay the debts. Defendant pleaded that, as to the accounts of certain creditors mentioned in the petition, the land ought not to be sold, because said accounts accrued more than six years before the filing of the petition. *Held*, the fact that the accounts accrued more than six years before the filing of the petition did not show laches on the part of the creditors.—*Nettleton v. Dixon*, 2 Ind. 446.

[b] (Sup. 1882)

The allowance of a claim against a decedent's estate creates a *prima facie* case against the heirs; and hence, in a proceeding to sell land for satisfaction of such a claim, an answer by the heirs alleging that the claim did not accrue within six years next preceding its filing was insufficient because failing to show that the claim did not arise upon some cause of action, not barred in six years.—*Cole v. Lafontaine*, 84 Ind. 446.

[c] (Sup. 1887)

Rev. St. 1881, § 294, relating to limitations of actions, applies to a proceeding by an administrator de bonis non for the sale of the decedent's real estate to pay debts, and bars it after the expiration of 15 years from the time the cause of action accrued; but where the claim, to pay which the property has to be sold, is litigated, and there are no other claims unpaid, so that it cannot be known that any real estate will have to be sold, the statute will not begin to run until the final allowance of such claim.—*Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304.

A claim against the estate of a decedent was filed in 1868, and allowed by the judgment of the court in 1869. The judgment was reversed by the Supreme Court and the claim again allowed by the court below in 1872. *Held*, that the cause of action did not accrue until the final allowance of the claim in 1872 and hence an application filed in 1896, asking for the sale of real estate to make assets with which to pay the claim was not barred by limitations.—*Id.*

[d] (Sup. 1897)

Under Burns' Rev. St. 1894, § 2487 (Rev. St. 1881, § 2334), providing that no proceeding by an executor or administrator to sell any lands fraudulently conveyed shall be maintained unless it is instituted within five years after the death of the testator, where it appeared from the complaint that the intestate had been dead eight years when the remedy was sought and there being no exception to the requirement that it should have been sought within five years, the administrator could not attack the conveyance.—*Galentine v. Brubaker*, 46 N. E. 903, 147 Ind. 458.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1376-1378.  
See, also, 18 Cyc. pp. 704-707; note, 26 Am. St. Rep. 22.

**§ 335. Parties.**

[a] (Sup. 1847)

In a proceeding in a probate court to sell the land of a deceased person for the payment of the debts of his estate, the heirs are necessary parties.—*Sherry v. Denn* ex dem. State Bank of Indiana, 8 Blackf. 542.

[b] (Sup. 1854)

It is error to decree a sale of the land of a decedent without the previous appointment of a guardian ad litem for the infant heirs.—*Timmons v. Timmons*, 6 Ind. 8.

[c] (Sup. 1879)

A sale of the whole of the decedent's real estate to pay his debts, made under order of a court, to the proceedings in which decedent's widow was not a party, passes to the purchaser no interest in her one-third.—*Kent v. Taggart*, 68 Ind. 163.

[d] (Sup. 1881)

Where a special act authorized the probate court of a certain county, on petition by certain heirs, to order a sale of the real estate of a decedent, the children of such heirs, in the absence of any statutory requirement, were neither proper nor necessary parties to the proceedings for the sale of the land.—*Davidson v. Koehler*, 76 Ind. 398.

[e] (Sup. 1892)

Where the court having jurisdiction of an administrator had ordered the sale of his intestate's land, and the administrator's interest in the land as heir of his intestate having descended to his minor heirs on his death, they took subject to the order to sell it; and the judgment confirming the sale, thereafter made, was not void as to them, though they were not made parties.—*Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874.

[f] (Sup. 1898)

Under Burns' Rev. St. 1894, § 2491 (Rev. St. 1881, § 2338), declaring who are necessary parties to an administrator's sale to pay debts, the widow and heirs of the deceased are neces-

sary defendants; and in a proceeding to sell the land of an intestate to pay debts, where the widow of a deceased son and heir is made a party, it is unnecessary, to the validity of the sale, that she should also be made a party as administratrix of her husband's estate.—*Wood v. Wood*, 50 N. E. 573, 150 Ind. 600.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1379-1384.  
See, also, 18 Cyc. pp. 708-712.

**§ 336. Petition or other application.**

Waiver of notice and consent to sale, see post, § 337.

[a] (Sup. 1848)

The petition of an administrator to the probate court for an order to sell real estate of the intestate to pay debts need not contain a particular description of each of the debts; a statement in such case of the aggregate amount of the debts being sufficient.—*Collins v. Farnsworth*, 8 Blackf. 575.

[b] (Sup. 1853)

The petition of an administrator to sell lands for the payment of debts, described the land as follows: "Southeast quarter of sect. 19, T. 12: 9"—and did not state the county or state in which the land was situated. *Held*, that the description was insufficient.—*Weed v. Edmonds*, 4 Ind. 468.

The rule in equity that the case made must be consistent with the bill applies to a petition by an administrator to sell lands for the payment of debts.—*Id.*

The verification by an administrator of a petition to sell land for the payment of debts, as required by Rev. St. 1843, will be presumed to be waived by a party who appears and contests the petition.—*Id.*

[c] (Sup. 1861)

Under Rev. St. 1843, p. 527, requiring that an administrator's petition for leave to sell real estate shall be presented to the court, and that the court shall make the order of sale while in session, a petition may be filed in vacation.—*Shepherd v. Fisher*, 17 Ind. 229.

[d] (Sup. 1863)

Rev. St. 1843, p. 458, §§ 27, 28, provide that an administrator's sale shall not be avoided on account of irregularity, where it appears that it was directed by a court of competent jurisdiction, that the administrator took oath and gave bond, that notice was given, and that the premises were sold, and held by the purchaser in good faith. *Held*, that a sale would not be avoided where the petition for the sale of the land was filed by the administrator before his appointment.—*Rice v. Cleghorn*, 21 Ind. 80.

[e] (Sup. 1871)

Under 2 Gav. & H. St. p. 506, § 75, requiring that an executor's petition for leave to sell real estate shall show the amount of per-

sonal property in his hands, the known debts of the estate, the insufficiency of personalty to pay them, the description of the lands necessary to be sold to pay the debts, the title of decedent in such lands, the value thereof, and the names and age of the heirs, devisees, and legatees, a petition which does not show the names and ages of the heirs, legatees, and devisees is defective.—*Rapp v. Matthias*, 35 Ind. 332.

Under 2 Gav. & H. St. p. 506, § 75, requiring that an executor's petition for leave to sell real estate shall show the amount of personal property in his hands, the known debts of the estate, the insufficiency of personalty to pay them, the description of the lands necessary to be sold to pay the debts, the title of decedent in such lands, the value thereof, and the names and age of the heirs, legatees, and devisees, a petition which does not show the amount of the personal property in the executor's hands, the amount of debts against the estate, and the insufficiency of personalty is defective.—*Id.*

Under 2 Gav. & H. St. p. 506, § 75, requiring that an executor's petition for leave to sell real estate shall show the amount of personal property in his hands, the known debts of the estate, the insufficiency of personalty to pay them, the description of the lands necessary to be sold to pay the debts, the title of decedent in such lands, and the value thereof, and the names and age of the heirs, legatees, and devisees, a petition which does not give the description of the real estate necessary to be sold is defective.—*Id.*

[f] (*Sup.* 1878)

Under 2 Rev. St. 1876, p. 523, it is not necessary that the petition by a creditor for the sale of the real estate of a deceased person to pay debts should allege that the executor or administrator has refused to act in the matter.—*Whisnand v. Small*, 65 Ind. 120.

[g] (*Sup.* 1880)

Where real estate belonging in fee to a decedent was situated in the county in which he died in 1861, and in which letters of administration on his estate and letters of guardianship were issued to the widow, the court of common pleas of such county had original jurisdiction under the laws then in force, both of the administration of the estate and of the guardianship of the children, and when the widow, whether as administratrix of the estate or as guardian of the persons and estates of his minor children, presented her petition to the court, praying for an order authorizing the sale of two-thirds of the estate which was liable to be converted into money for the payment of decedent's debts, and subject to such liability, descended to the infant children and heirs at law of the decedent, the court had jurisdiction of the subject-matter of the petition, and on proper proceeding had was authorized to order and direct the sale of the real estate, notwithstanding the petition was defective and

informal, but from the allegations of which it appeared to be a guardian's petition, in view of Act May 14, 1852 (2 Gav. & H. Rev. St. p. 20), § 4, providing that the court of common pleas of the proper county shall have original and exclusive jurisdiction to authorize guardians to sell and convey the real estate of their wards.—*McKeever v. Ball*, 71 Ind. 398.

[h] (*Sup.* 1881)

Where, in a proceeding under a special act for the sale of the lands of a decedent, the written consent of the parties was entitled and filed in the cause, it was sufficient, though it was asserted that it bore date prior to the filing of the petition, and was in no way attached to the petition nor made a part of it, as it operated from the time it was filed, and it was not necessary that the consent should be attached to or made a part of the petition.—*Davidson v. Koehler*, 76 Ind. 398.

Where a special act authorizing the sale of the land of a decedent's estate required that the parties named should consent that the probate court of Marion county might make an order for the sale of the real estate described in the act, it was sufficient that the parties filed in the court a writing signed by each of them, signifying their consent that the court might make such an order for the sale of the real estate.—*Id.*

Where the special act under which a petition for the sale of land of a decedent did not require that it should be verified in any manner, it modified Rev. St. 1843, c. 35, art. 4, § 111, providing that a guardian's petition for the sale of the real estate shall be verified by the oath of the guardian, and it was not necessary that such petition be verified by the affidavit of the petitioner.—*Id.*

[i] (*Sup.* 1882)

Where, in a proceeding by an administrator for the sale of realty to redeem from a sheriff's sale under a judgment lien, the defendants appeared and consented, they thereby waived all defects in the petition.—*Mitchell v. Hodges*, 87 Ind. 491.

[j] (*Sup.* 1882)

2 Rev. St. 1876, p. 519, § 75, requiring that proceedings for the sale of land of a decedent shall be by petition which shall contain a description of the real estate liable to be made assets or so much thereof as the executor may deem it necessary to sell, a petition stating that the decedent died seised of lands leaving a widow is equivalent to a statement that only two-thirds of it is liable to be made assets.—*Compton v. Pruitt*, 88 Ind. 171.

[k] (*Sup.* 1884)

An administrator's petition to sell lands for the payment of debts is sufficiently specific as to the title of deceased where it avers that he was the owner in fee simple.—*Jackson v. Weaver*, 98 Ind. 307.

The finding cures an omission to state in a petition for an administrator's sale of land whether the debt on which the petition was based was incurred as principal or as surety.—*Id.*

[l] (Sup. 1887)

The petition must affirmatively show a necessity for resorting to the real estate; and where it appears that the only claim against the estate is that of the widow for the statutory allowance, and that a will was executed by the decedent, it must be shown whether the widow elected to take under the will or under the law.—*Renner v. Ross*, 111 Ind. 269, 12 N. E. 508.

[m] (Sup. 1889)

Under the statutory provisions relating to guardianship, the guardian of an insane widow may file his written assent when a petition has been filed by the executor of her deceased husband to sell real estate for the payment of debts, consenting that her interest may be sold if in his judgment it would be to her advantage that he do so.—*Smock v. Reichwine*, 19 N. E. 776, 117 Ind. 194.

[n] (Sup. 1896)

A creditor seeking to subject the real estate to the payment of testator's debts must allege and prove failure of the widow to elect to take under the law, in order to take advantage thereof.—*Archibald v. Long*, 144 Ind. 451, 43 N. E. 439.

[o] (App. 1904)

2 Rev. St. 1852, § 89, p. 269, c. 10, provided that the court might order the sale of any lands of a decedent for the payment of purchase money. Section 17 (1 Rev. St. 1852, p. 250, c. 27) gave the widow one-third of her deceased husband's real estate in fee simple, free from all demands of creditors, and section 24 (*Id.* p. 251, c. 27) provided that if a man marry a subsequent wife and has no children by her, but has children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children. At the time a petition for a sale of lands was presented there was a second childless wife of a deceased husband living, and children by a former wife, and the statute had been construed as meaning that when a man left a second childless wife, but children by a previous one, the widow, as against creditors, took the same share as the first wife. The petition stated that at his death deceased "owed nearly all the purchase money"; that the administrator had paid \$900 of the purchase money and paid \$3,000 of debts, and that the real estate was appraised at \$1,300. *Held*, that the petition was insufficient to warrant an order for the sale of all the real estate, including the widow's third interest, inasmuch as the petition did not show what amount was owing on the purchase money, and did show that more than sufficient assets had come into the hands of the administrator to pay the purchase money.

—*Fry v. Lawson*, 69 N. E. 1038, 32 Ind. App. 364.

[p] (Sup. 1905)

Burns' Ann. St. 1901, § 2491, provides that a petition to sell real estate to pay debts of a decedent must set forth, among other things, the title of the decedent at the time of his death. *Held* that, where a petition not only contained the general averment "that the decedent died the owner in fee simple of the land sought to be sold," but also an allegation as to the source of his title, and the facts relied on to show a fee simple in decedent, the general allegation did not render the petition invulnerable as against a demurrer for want of facts, where the specific facts showed no fee-simple title.—*Taylor v. Stephens*, 74 N. E. 980, 165 Ind. 200.

[q] (App. 1908)

A petition by an administrator for leave to sell real estate *held* to aver facts sufficient to authorize the sale under Burns' Ann. St. 1908, § 2854, prescribing the contents of a petition to sell real estate.—*Hampton v. Murphy*, 80 N. E. 436.

[r] (Sup. 1909)

An amended petition by an administratrix to sell land to pay decedent's debts was demurrable, where it did not contain the allegations required by Burns' Ann. St. 1908, § 2854, prescribing certain allegations as to decedent's real and personal property, amount of claims against the estate, etc.—*Warrum v. White*, 171 Ind. 574, 86 N. E. 959.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1385-1390.  
See, also, 18 Cyc. pp. 713-724.

§ 337. Citation or notice.

Consent to sale in general, see ante, § 336.

[a] (Sup. 1853)

An order of sale by a probate court is void as to all the parties in interest if any one of them has received no notice of the sale.—*Babbitt v. Doe ex dem. Brush*, 4 Ind. 355.

[b] Where the statute required that the heirs of an intestate should have personal notice of the filing of a petition by an administrator for leave to sell real estate, the guardian of minor heirs could not waive such notice.—(Sup. 1854) *Doe ex dem. Platter v. Anderson*, 5 Ind. 33; (1855) *Martin v. Starr*, 7 Ind. 224.

[c] (Sup. 1854)

In a proceeding by an administrator under Rev. St. 1843, to sell land of an intestate, the record showed that the petition was filed in open court, and that thereupon the guardian of the defendants, who were infants, and residents of the county, appeared and "waived the necessity of notice" to them, etc., whereupon the court proceeded to order a sale, etc. *Held*, that the record disclosed that the court had no jurisdiction of the defendants.—*Doe ex dem. Platter v. Anderson*, 5 Ind. 33.

[d] The ancestor's real estate vests in the heir, and his rights are not to be taken away by a probate sale without the citation and notice required by the statute.—(Sup. 1855) *Martin v. Starr*, 7 Ind. 224; (1856) *Doe ex dem. Mitchell v. Bowen*, 8 Ind. 197, 65 Am. Dec. 758; (1867) *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66; (1896) *Edwards v. Baker*, 145 Ind. 281, 44 N. E. 467.

[e] (Sup. 1856)

Where the record is silent as to notice to an heir on a sale of land of decedent's estate, even if the application for the sale had stated the name of the heir, still the sale was void where the order was made on the same day the application was filed, the statutory notice of 30 days by service or 60 days by publication after the filing of the application could not have been given, and no motion was made in behalf of the heir indicating an actual presence in court whereby formal notice might be rendered unnecessary.—*Doe ex dem. Mitchell v. Bowen*, 8 Ind. 197, 65 Am. Dec. 758.

[f] (Sup. 1858)

To the validity of an administrator's lease by order of court under St. 1843, notice, etc., to those interested in the land, is essential.—*Piatt v. Dawes*, 10 Ind. 60.

[g] (Sup. 1861)

Under Rev. St. 1843, p. 527, requiring that an administrator's petition for leave to sell real estate shall be presented to the court, and that the court should make the order of sale while in session, a petition having been filed in vacation, notice to the heirs of the filing of such petition was properly issued by the clerk without special order of the court.—*Shepherd v. Fisher*, 17 Ind. 229.

[h] (Sup. 1872)

Real estate of decedent was sold by the administrator under an order of court, for the purpose of paying debts, without notice of the pendency of the petition for sale being given. A writing containing a waiver of notice and consent to the sale was signed by the widow as guardian of minor heirs, but not in her own right as widow. *Held*, in an action for partition brought by the widow, that a record of the proceedings and order of sale were inadmissible in evidence to show the sale of her one-third of the land.—*Helms v. Love*, 41 Ind. 210.

Where real estate of a decedent was sold by the administrator under an order of court for the purpose of paying debts of the deceased, and no notice was given of the pendency of the petition for the sale, but a writing containing a waiver of notice and consent to the sale was signed by the widow as guardian of minor heirs, but not in her own right as widow, *held*, in an action for partition brought by the widow, that the sale did not pass the widow's one-third of the real estate to the purchaser.—*Id.*

[i] (Sup. 1873)

Where lands were situated in Ripley county, and were sold in the course of administra-

tion, on petition of administrator, in Decatur county to sell other lands lying in such county with the lands situated in Ripley county, it was not necessary that the notice of the petition to sell should be published in Ripley county; the administration being in Decatur county where the publication was made.—*Gavin v. Graydon*, 41 Ind. 559.

[j] (Sup. 1879)

Where a widow, appointed executrix by her former husband's will, devising lands in equal shares to herself and children, to pay debts and support the devisees until the children arrive at majority, obtains an order from the court under which she mortgages the lands to pay the debts of the estate, without the knowledge or consent of her second husband or of the children, who are minors, such mortgage is void as against the children, who cannot ratify it after coming of age, and are not bound by an appearance by them by an attorney to resist a master commissioner's report recommending a confirmation of the mortgage.—*Wetherill v. Harris*, 67 Ind. 452.

[k] (Sup. 1880)

A. died intestate, leaving a widow and children. The widow died, leaving a will, by which she devised her entire estate to B. and C., children of herself and A. Afterwards, on petition of A.'s administrator to sell real estate to pay debts, all the children and heirs of A., including B. and C., were notified and appeared, and sale was ordered. *Held*, that the order of sale, as far as the widow's interest in the real estate sold was concerned, was void, and that B. and C. were not concluded by such order as devisees of the widow, as they had appeared to the petition as heirs of A. only.—*Elliott v. Frakes*, 71 Ind. 412.

[l] (Sup. 1881)

Under Loc. Laws 1850, p. 435, providing for the relief of the estate of Noah Noble, deceased, and authorizing the probate court of Marion county, on petition of a minor heir by his guardian, with the consent of the other heirs, to order a sale of land belonging to the decedent's estate, such minor heir, by filing his petition in the probate court of that county, and the other heirs, by filing their written waiver of process and their written consent that the court might make the order of sale prayed for in the petition, submitted themselves to the jurisdiction of the court and authorized it to order such sale.—*Davidson v. Koehler*, 76 Ind. 398.

Where the proceedings for the sale of the land of a decedent under a special act showed that the parties filed a written waiver of the process against them and their written consent to the order prayed for in the guardian's petition, such proceedings were not inadmissible in evidence on the ground that it appeared therefrom that no process was issued against defendants, and that they did not appear either in person or by attorney.—*Id.*

[m] (Sup. 1890)

Real estate descends to the widow and the heirs of the ancestor, and notice must be given to those interested in the estate in proceedings to sell the same, so that they may be heard and offer evidence controverting the justice or policy of ordering a sale. The same rule must apply in reference to mortgaging or leasing the real estate.—*Martin v. Neal*, 25 N. E. 813, 125 Ind. 547.

[n] (Sup. 1896)

Notice to the widow of an application for the sale of the real estate of a decedent by the administrator is required.—*Edwards v. Baker*, 145 Ind. 281, 44 N. E. 467.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1397-1409.  
See, also, 18 Cyc. pp. 724-733.

**§ 338. Objections and exceptions.**

Invalidity of appointment of administrator, see ante, § 29.

[a] (Sup. 1885)

Petition by an administrator for the sale of real estate to pay certain debts and legacies and the costs of administration. The petition alleged that there was no personal estate. Answer: that the cause of action, except the costs, did not accrue within six years, etc. Reply: That the person to whom said debts and legacies were owing had been ever since the death of the testator a married woman. Demurrer to the reply. *Held*, that the answer pleaded in bar of the petition did not constitute a bar, as the costs were a proper charge against the estate, and no reason was shown why the real estate should not be sold to pay them.—*Dunning v. Driver*, 25 Ind. 269.

[b] (Sup. 1882)

On petition by an administrator for the sale of real estate to pay certain debts allowed by the court, *held*, that an answer pleading that "no cause of action to have the land sold had accrued within 15 years next preceding the filing of the petition," was good under Code 1852, § 212, requiring such petition to be filed within 15 years, but that an answer that "the cause of action mentioned in the petition did not occur within 6 years" was bad, as not showing whether the cause of action was one to which the 6-year limitation applies.—*Cole v. Lafontaine*, 84 Ind. 446.

[c] (Sup. 1905)

*Burns' Ann. St.* 1901, § 2491, provides that a petition for sale of lands of a decedent for the payment of debts must set forth, among other things, a description of the real estate liable to be made assets for the payment of the debts, and the title of the decedent therein at his death, and section 2498 provides for the admission of persons not parties to such petition, and authorizes them to set up their interest. *Held*, that a petition to sell real estate to pay debts

of a decedent may be tested by demurrer for want of facts, though the procedure under the decedents' act does not provide for a demurrer.—*Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1410-1416.  
See, also, 18 Cyc. p. 735.

**§ 339. Hearing of application in general.**

[a] (Sup. 1855)

On petition by the administrator for the sale of decedent's land, it is error to enter a decree against infant defendants without proof of the allegations of the petition.—*Martin v. Starr*, 7 Ind. 224.

[b] (Sup. 1898)

The circuit court may, in connection with application of an administrator to sell intestate's property to pay debts, consider a cross-complaint showing reason why the interest of one heir should be sold first, and may mold its order accordingly.—*Galvin v. Britton*, 49 N. E. 1064, 151 Ind. 1.

[c] (App. 1907)

In a proceeding against heirs by an administrator for an order to sell decedent's realty for payment of debts, the trial court on application should make a special finding of facts.—*Henry v. Central Trust Co.*, 40 Ind. App. 369, 82 N. E. 120.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1417-1424.  
See, also, 18 Cyc. p. 737.

**§ 340. Proof and contest of claims.**

[a] (Sup. 1856)

If an administrator petition to sell real estate of an intestate for payment of debts, the heirs may plead that the debts are barred by the statute of limitations.—*Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740.

On a petition by an administrator for the sale of real estate for the payment of notes purporting to have been executed by the intestate, it was incumbent on the administrator to prove the execution of the notes.—*Id.*

[b] On the hearing of a petition by the administrator for the sale of lands for the payment of debts, the heir may contest the validity of a claim which has been allowed against the estate.—(Sup. 1882) *Cole v. Lafontaine*, 84 Ind. 446; (1887) *Scherer v. Ingerman*, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; (1888) *O'Haleran v. O'Haleran*, 115 Ind. 493, 17 N. E. 917.

[c] (Sup. 1884)

An allowance by an administrator of a claim against the decedent's estate establishes a prima facie right in the administrator to resort to the real estate for payment, in the absence of personal property.—*Jackson v. Weaver*, 98 Ind. 307.



[d] (Sup. 1887)

The judgment against an administrator is only prima facie evidence, as against the heir, of the existence of a debt of the estate; but, when the administrator applies for leave to sell real estate to pay such judgment, the heir, being neither a party nor a privy to it, is not concluded from contesting such application.—*Scherer v. Ingeman*, 110 Ind. 423, 11 N. E. 8, 12 N. E. 304.

In a proceeding by an administrator to procure a sale of land to pay claims allowed against the estate the heirs may contest such claims and have a trial upon the merits, notwithstanding the statute of 1875, providing that on a proper petition filed within six months subsequent to the allowance of the claim against the estate by the administrator the heirs may be allowed to defend against it, and Rev. St. 1881, § 2326, providing that, where a claim is pending or has been allowed against the estate, the heirs, creditors, etc., on a verified petition showing a meritorious defense, etc., shall be entitled to an order setting the claim for trial as in case of claims not allowed.—Id.

[e] (Sup. 1887)

An administrator presented a claim against the estate for costs which had been adjudged against him personally. The claim was allowed, and the vendee of the real estate filed a complaint, setting forth that the administrator had wrongfully taken possession of the personal estate of the decedent under pretense of administering it; that decedent had devised his realty, and that the personalty had been conveyed by decedent to the plaintiffs in the action in which the costs in question had been adjudged; that there were no moneys out of which the claim, if allowed to stand as a charge against the estate, could be paid, except the real estate, which had been sold; and that it was the purpose of the administrator to institute proceedings to subject this real estate to payment of the allowance. *Held*, that complainant was entitled to contest the validity of the claim, and was not bound to pay it, or suffer his land to be sold, and afterwards prosecute an action against his grantors on their warranty, or to rely on the express agreement of his vendors to pay the costs.—*Mackey v. Ballou*, 112 Ind. 198, 13 N. E. 715.

[f] (Sup. 1889)

Upon the hearing of an application for the sale of a decedent's real estate for the payment of debts, the record of the adjudication of the indebtedness is competent evidence under Acts 1883, p. 155, § 8, and Id. p. 156, § 12.—*Smith v. Gorham*, 119 Ind. 436, 21 N. E. 1096.

Where an application by an administrator to sell land is resisted by persons claiming to own the same, it is a sufficient reply to the denial in their answer of the indebtedness for which the sale is asked to allege that such indebtedness was adjudged against the estate in a proceeding which the administrator resisted to the best of his ability, and in which the persons

resisting the present application appeared by attorney.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1425-1433.  
See, also, 18 Cyc. pp. 739-743.

§ 343. Determination as to necessity for sale, mortgage, or lease.

[a] (App. 1904)

A finding on a petition for the sale of lands of a decedent that the allegations were true, and that the lands were liable as assets for the payment of debts of the estate, could not be construed as a finding that the lands were liable for the payment of purchase money.—*Fry v. Lawson*, 69 N. E. 1038, 32 Ind. App. 364.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1439-1441.

§ 344. Claims to property.

[a] (Sup. 1873)

The power conferred by 2 Gav. & H. St. p. 20, § 4, upon courts of common pleas to order a sale or distribution of decedent's real estate, carries with it the right to determine the title.—*Gavin v. Graydon*, 41 Ind. 559.

[b] (Sup. 1899)

To a petition by an administrator for the sale of land to pay decedent's debts the widow filed a cross complaint alleging that she was the owner of part of the land, which had been devised to her by her father, and that she and her husband had conveyed it to a trustee, who reconveyed it to her husband, in whom the title remained until his death; and she asked that the deeds be set aside, and the title quieted in her as against the heirs and the administrator, to which complaint he filed a general denial. As to such land, the court decreed that it was liable for decedent's debts, and should be sold to pay debts remaining unpaid after the other assets had been exhausted, and that she was the owner thereof in fee simple, subject only to the payment of such remaining debts. *Held*, under *Burns' Rev. St. 1894, § 1067* (*Horner's Rev. St. 1897, § 1055*), permitting all defenses, legal and equitable, to be proved under a general denial, that such part of the decree was within issues made by the pleadings.—*Watkins v. Lewis*, 55 N. E. 83, 153 Ind. 648.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1442, 1443.  
See, also, 18 Cyc. p. 745.

§ 345. Order or decree.

Conclusiveness, see JUDGMENT, §§ 735, 743.

Decisions reviewable, see APPEAL AND ERROR, § 73.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1444-1455.  
See, also, 18 Cyc. pp. 746-752; note, 37 Am. Dec. 65.

**§ 346. — Requisites in general.**

[a] (Sup. 1847)

At the May term, 1838, of the probate court, an administrator filed a petition for an order of sale of real estate of the intestate for the payment of debts. Afterwards, at the same term, an inventory, etc., having been filed by the administrators, the court, on motion, appointed a guardian ad litem for the heirs of the intestate; they being infants. The guardian filed an answer for the infants, admitting the allegations in the petition. Afterwards, at the same term, the court, on petition of the administrator, authorized him to sell the premises at private sale. At the August term, 1838, the administrator made a report, stating that he had sold the premises, and the court confirmed the sale. In March, 1840, the administrator executed a conveyance of the premises to the purchaser. *Held*, that the order of sale was erroneous, but that it was not a nullity, and that the purchase under it was valid.—*Thompson v. Doe ex dem. Hare*, 8 Blackf. 336.

[b] (Sup. 1896)

On the petition of an administrator the court ordered the sale of deceased's estate, which was subject to a mortgage. The mortgagees were not made parties nor was the estate ordered to be sold free of liens nor to pay liens. Afterwards, in an action to foreclose the mortgage, the real estate was ordered to be sold to pay the mortgage. The administrator then filed an amended petition, making the widows, heirs, and mortgagees parties, and asking for an order to sell the real estate free from the mortgage, and to pay the mortgage. Such an order was made, and the real estate was sold, the sale confirmed, and part of the first payment thereon paid to the mortgagees. *Held*, that the first order of sale was interlocutory merely, and subject to modification or vacation, and hence the mortgagees were bound by the second order of sale, and the foreclosure proceedings should be stayed.—*Hall v. Price*, 141 Ind. 576, 40 N. E. 1084.

[c] (App. 1907)

Upon a petition by an administrator to sell real estate to pay the debts, the court found finding of facts that decedent died leaving a widow and children and grandchild, that he died seised of certain real estate, including that involved in this controversy, all of which was liable to be sold to pay debts, except certain lands, which were subject to the rights of the widow under an antenuptial contract; that the personal estate was insufficient to satisfy the debts; that the claims of two heirs at law to a certain lot of the land in controversy were false and unfounded, since they had purchased and improved it with money borrowed from decedent, and conveyed it to him in satisfaction of a part of this indebtedness, the remainder of which was unpaid; that they were insolvent and had no property subject to execution, except as heirs in the estate; and that the lot ought to be sold to pay debts. *Held*, that conclusions of law that the real estate described in the petition

ought to be sold at private sale for not less than the appraised value thereof to pay liabilities, and that the petitioner ought to recover costs of the two heirs, were justified.—*Henry v. Central Trust Co.*, 40 Ind. App. 369, 82 N. E. 120.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1444, 1447.

See, also, 18 Cyc. p. 746.

**§ 348. — Modification, amendment, or vacation.**

[a] (Sup. 1833)

Judgment may be set aside for fraud, and the same rule applies to orders made on petition of administrators to sell land for the payment of debts of the decedent.—*Jones v. French*, 92 Ind. 138.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. § 1448.

See, also, 18 Cyc. p. 732.

**§ 349. — Operation and effect.**

[a] An order of court for the sale of real estate is not open to collateral attack, where the court has jurisdiction.—(Sup. 1850) *Williams v. Sharp*, 2 Ind. 101; (1869) *Spaulding v. Baldwin*, 31 Ind. 376; (1884) *Pepper v. Zahnsinger*, 94 Ind. 88.

[b] (Sup. 1854)

A sale of land belonging to minor heirs, made under the Revised Statutes of 1843, by an administrator, without personal service on the heirs, may be impeached collaterally, as it will not be presumed that the minors had such notice as would give the court jurisdiction, where it is admitted upon the record that no service was made upon them.—*Doe ex dem. Platter v. Anderson*, 5 Ind. 33.

[c] (Sup. 1863)

In a proceeding by an administrator for an order to sell lands, if the record fail to name the heirs otherwise than by the general designation "heirs," the proceeding will be void as to them, and there can arise no presumption that the court has acquired jurisdiction over any other persons than those named.—*Guy v. Pierson*, 21 Ind. 18.

[d] (Sup. 1873)

An application to sell land in the course of administration stands on the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction, and, where jurisdiction has once been acquired, subsequent errors will not subject the proceeding to collateral attack.—*Gavin v. Graydon*, 41 Ind. 559.

[e] (Sup. 1880)

On petition by an administrator for an order to sell real estate, such administrator, who was also the guardian of the minor heirs of the deceased, filed his written assent on their behalf, and the order was granted, without fur-

ther notice to the heirs. *Held*, that the order of sale could not be collaterally attacked.—*Jones v. Levi*, 72 Ind. 586.

[f] (Sup. 1881)

Where a decedent left surviving a second wife and children of a previous marriage, her share in the real estate not being liable to be made assets for the payment of debts, the court could not acquire jurisdiction thereof on a petition by the administrator to sell such real estate for the payment of debts, and the order authorizing such sale could not preclude the children from claiming an interest in such realty by inheritance on the death of such wife.—*Armstrong v. Cavitt*, 78 Ind. 476.

[g] (Sup. 1883)

Heirs inheriting two-thirds of their land from their mother and one-third from their father are not estopped to bring an action against their father's administrator to restrain him from selling said land by the fact that they had been made parties to the petition to sell, as the court had no jurisdiction over that inherited from their mother.—*Goldsberry v. Genetry*, 92 Ind. 193.

[h] (Sup. 1885)

Judgments only conclude the parties in the character in which they sue or are sued. For instance, where the vendor of land is the heir of the vendee, and as heir is made a party to an administrator's petition to sell for the payment of debts, the adjudication will not preclude him from proceeding to enforce his vendor's lien.—*Lord v. Wilcox*, 99 Ind. 491.

[i] (Sup. 1885)

Land of which a widow died seised having been sold to pay her debts on the petition of her administrator averring that she was seised in fee simple, her seisin as alleged is conclusively established by the judgment, as against her children, who were made defendants, and they cannot collaterally impeach it, though she had only a dower interest, and the reversion was in them.—*Lantz v. Maffett*, 102 Ind. 23, 26 N. E. 195.

Where, in a proceeding to sell land of a deceased person to pay debts, the petition alleged that the fee of the land was in the decedent, the court had jurisdiction to direct the administrator to sell the same to pay her debts and hence, its judgment in that behalf, however erroneous, was not void, nor subject to collateral attack.—*Id.*

[j] (Sup. 1886)

The court has no power to order the sale of the widow's interest in the lands of her deceased husband to pay the husband's debts; but where the petition is filed after the widow's death, and the heir is made a party to the petition, and the judgment of the court is that all of the land shall be sold, he will be bound thereby.—*Bumb v. Gard*, 107 Ind. 575, 8 N. E. 713.

[k] (Sup. 1887)

Where a sale of decedent's real estate was made by order of court, it will be presumed, on

collateral attack, that the court obtained jurisdiction, though the record of the proceedings does not show affirmatively the necessary jurisdictional facts.—*Sims v. Gay*, 109 Ind. 501, 9 N. E. 120.

[l] (Sup. 1889)

An order for the sale of land of a decedent to discharge it of liens, providing that, if the proceeds are insufficient to discharge the mortgage debt, the deficiency shall, upon the order of court, be paid out of the assets applicable thereto in the hands of the administrator, does not adjudicate the priorities of different creditors to the fund.—*Ryker v. Vawter*, 117 Ind. 425, 20 N. E. 294.

[m] (Sup. 1889)

Where heirs were made parties to proceedings to sell lands of the estate only in their capacity as heirs, the proceedings could only affect them as heirs.—*Barrett v. Choen*, 20 N. E. 145, 119 Ind. 56, 12 Am. St. Rep. 363.

[n] (Sup. 1889)

The right of the heirs to assert title to an undivided one-third interest in land descended to their mother was not affected by an invalid order of sale, unless their ancestor through whom they claimed received the purchase money or in some way constituted the administrators who made the conveyance her agents so that she became bound by their acts or estopped to assert her title.—*Roberts v. Lindley*, 22 N. E. 967, 121 Ind. 56.

[o] (Sup. 1893)

Where the court in ordering a sale of realty acted, so far as the record discloses, without knowledge of the infancy of certain minors, the judgment for that cause is not void and the failure of the court to appoint a guardian ad litem was at most collateral to such error.—*Clark v. Hillis*, 34 N. E. 13, 134 Ind. 421.

[p] (Sup. 1897)

Where it was found by the court that notice was published, and that it was sufficient, it will be presumed, in a collateral inquiry, that the court had jurisdiction, though it was not found that defendant was a party.—*Boyer v. Robertson*, 48 N. E. 7, 149 Ind. 74.

Where plaintiffs claimed title through an administrator's sale, and defendant as heir of the decedent, and it was found by the court that notice of the pendency of the petition to sell was published, and that it was sufficient, it will be presumed, in a collateral inquiry, that the court, having jurisdiction of the subject-matter, had jurisdiction over the person of defendant, if it does not affirmatively appear that he was not a party to such proceeding, though it was not found that he was named as a party thereto, and as such included in the service of process or publication.—*Id.*

[q] (Sup. 1898)

A devisee who has quieted her title and who is subsequently made a defendant in proceedings to sell the land by the administrator,

in which she pleads the former suit unsuccessfully, is estopped from collaterally attacking the order of sale.—*Thomas v. Thompson*, 49 N. E. 268, 149 Ind. 391.

[r] (Sup. 1899)

The parties to a proceeding whereby lands were sold by an administrator as those of a decedent to pay her debts are concluded by the judgment and precluded from asserting that the decedent did not own the lands and that they were not liable for her debts.—*Armstrong v. Hufty*, 55 N. E. 443, 60 N. E. 1080, 156 Ind. 606.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1446, 1449-1455; 30 CENT. DIG. JUDGM. § 949.

See, also, 18 Cyc. p. 749.

§ 351. Special bond for sale.

Liabilities on special bonds, see post, § 392.

[a] (Sup. 1854)

Under the Revised Statutes of 1831, the court might, in its discretion, require an additional bond from an administrator when he applied for leave to sell real estate.—*Salzer v. State ex rel. Tyner*, 5 Ind. 202.

[b] (Sup. 1860)

Where an administrator omits to give a bond on a sale of real estate according to law, the omission does not render the sale void.—*Foster v. Birch*, 14 Ind. 445.

[c] (Sup. 1893)

Where an administrator was ordered to execute an additional bond, the failure to execute the bond did not invalidate the sale where it did not appear that the proceeds of the sale were misappropriated.—*Clark v. Hillis*, 34 N. E. 13, 134 Ind. 421.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1457.

See, also, 18 Cyc. p. 759.

§ 352. Special appointment to sell or convey.

[a] (Sup. 1883)

Where, without authority of law, a commissioner is appointed to make an administrator's sale of land, the appointment, sale, and bond are all void.—*State ex rel. Clawson v. Younts*, 89 Ind. 313.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1458.

§ 353. Appraisal of property to be sold.

[a] (Sup. 1839)

An order for the sale of realty to pay debts is erroneous, where an inventory of the real estate and appraisement thereof was not taken and filed in the office of the clerk of the probate court before obtaining the order, as required by the statute. Probate Act 1831 (Rev. Code, p. 161).—*Maple v. Shoyer*, 1 Blackf. 561.

[b] (Sup. 1854)

The probate court may correct an error in the description of land appraised for sale under an administrator's petition.—*Lasure v. Carter*, 5 Ind. 498.

[c] (Sup. 1863)

Rev. St. p. 458, §§ 27, 28, provide that an administrator's sale shall not be avoided, on account of irregularity, where it appears that it was directed by a court of competent jurisdiction, that an administrator took oath and gave bond, that notice was given, and that the premises were sold and held by purchaser in good faith. *Held*, that a sale would not be set aside because the appraisers were selected by the administrator and the appraisement made before his appointment.—*Rice v. Cleghorn*, 21 Ind. 80.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1450.

See, also, 18 Cyc. p. 753.

§ 354. Second application.

[a] (Sup. 1841)

Where any portion of the land of a deceased debtor has been sold and converted into assets by his executor or administrator for the payment of debts under an order of the court of probate, no other land of the estate can be ordered to be sold on the application of creditors until the assets obtained as aforesaid have been exhausted.—*Brown v. Rose*, 6 Blackf. 69.

[b] (Sup. 1890)

After obtaining an order to sell decedent's land to pay debts, an administrator de bonis non, at a subsequent term, in the same cause, filed another application setting forth that he was unable to sell the land. Without notice of the filing or pendency thereof to the widow or heirs of decedent, an order was made authorizing him to mortgage the land, and to take possession of and lease it. *Held*, that as Rev. St. § 2368, authorizing the court to license administrators to mortgage land, "if it shall appear that the money necessary to be raised can be procured thereby to the interest of the estate," is a separate provision from that authorizing a sale, and requires different facts to be proved, the proceedings for license to mortgage and lease could not be grafted on the proceeding for leave to sell, without further notice; that, as the record showed that the order for the mortgage and lease was made on the same day that the petition therefor was filed, it affirmatively appeared that no notice was given, and such order was void, and could be attacked collaterally; and the order constituted no defense to an action by the widow to recover the possession of the land, and damages for detention.—*Martin v. Neal*, 125 Ind. 547, 25 N. E. 813.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1460, 1461.

See, also, 18 Cyc. p. 795.

**§ 356. Actions for sale.**

Statutory new trial as of right, see *NEW TRIAL*, § 178.

[a] (Sup. 1882)

Where one purchases real estate with his owns means, and to defraud his creditors causes the conveyance to be made to another, it is a fraudulent transfer, within 2 Rev. St. 1876, pp. 526, 527, §§ 84, 85, providing that an action by an executor or administrator to sell lands fraudulently conveyed by his testator or intestate must be commenced within five years after the death of the decedent.—*Bushnell v. Bushnell*, 88 Ind. 403.

[b] (App. 1895)

A bill of review does not lie to review an interlocutory order to an administrator to sell land.—*First Nat. Bank of Indianapolis*, No. 2,556, v. *Hanna*, 12 Ind. App. 240, 39 N. E. 1054.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 1463–1467.

**§ 357. Restraining sale.**

Real party in interest, see *PARTIES*, § 6.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. § 1468.

See, also, 18 Cyc. p. 756.

**§ 358. Review.**

Decisions reviewable, see *APPEAL AND ERROR*, § 77.

[a] An order of the probate court directing or refusing to direct a sale of real estate by an executor or administrator is appealable.—(Sup. 1848) *Black v. Meek*, 1 Ind. 180, *Smith*, 131; (1869) *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577.

[b] (Sup. 1863)

Heirs who are not named in proceedings by the administrator to sell lands of decedent are not parties thereto, nor bound thereby, so as to entitle them to maintain a complaint to review the proceedings.—*Guy v. Pierson*, 21 Ind. 18.

[c] (Sup. 1878)

In a proceeding to sell the lands of a decedent to pay debts, an appeal by the defendant to the supreme court is not authorized by section 550, Prac. Act, but can be taken only in the manner, and on the filing of the bond, prescribed by Act June 17, 1852, relating to the estates of decedents.—*Seward v. Clark*, 67 Ind. 289.

[d] (Sup. 1882)

Under the direct provisions of Civ. Code (2 Rev. St. 1876, pp. 245, 246) §§ 576, 577, an appeal from an order of sale of a decedent's land can only be taken at the term at which the order is made.—*Baker v. Griffith*, 83 Ind. 411.

[e] (Sup. 1882)

An appeal may be taken from a judgment denying a petition for the sale of the real estate of a decedent to pay debts at any time within one year after final judgment.—*Hunter v. French*, 86 Ind. 320.

[f] (Sup. 1884)

An administrator's petition to sell his intestate's lands to pay debts, averring that the administrator knows of no other liens or claims than the one described, is sufficient, on an objection thereto made for the first time on appeal.—*Jackson v. Weaver*, 98 Ind. 307.

[g] (Sup. 1894)

Rev. St. 1881, § 2333, provides that the real estate liable to be sold for the payment of debts of an estate shall include "all lands and any interest therein which deceased in his lifetime may have transferred with the intent to defraud his creditors." Section 2336 provides that when the personal estate is insufficient to pay the deceased's debts, the administrator shall file his petition in the circuit court issuing letters for the sale of deceased's real estate. *Held*, that an action by an administrator, in the court issuing his letters, against decedent's heirs and the grantees of certain land conveyed by decedent, to set aside such conveyances as in fraud of creditors, and to procure an order to sell such land, is a proceeding under the decedents' act, and an appeal in such action is governed by the provisions of such act relating thereto.—*Galentine v. Wood*, 137 Ind. 532, 35 N. E. 901.

[h] (Sup. 1894)

An appeal from a petition by an administrator to sell lands to make assets for the payment of debts is not governed by the Code, but must be taken pursuant to the provisions of the statute governing the settlement of decedents' estates, and, if the parties desire to appeal after the expiration of the 30 days allowed by law, they must make application to the Supreme Court for leave to appeal in accordance with the provisions of the statute upon that subject.—*Beaty v. Voris*, 37 N. E. 785, 138 Ind. 265.

Where an administrator petitions for an order to sell land to pay a debt, and other claimants file cross-complaints, asking that the land be sold to pay their claims, and a judgment is rendered for such claimants, the administrator is a necessary party to an appeal from such judgment.—*Id.*

[i] (Sup. 1897)

An administrator filed a petition to sell real property belonging to an estate, and incidentally to set aside certain tax sales made thereof. *Held*, that it was a suit growing out of a matter connected with a decedent's estate, within Rev. St. 1894, §§ 2609, 2610 (Rev. St. 1881, §§ 2454, 2455), providing that an appeal may be prosecuted from any decision of a circuit court "growing out of any matter connected with a decedent's estate," upon filing a bond, etc.—*Bol-*

lenbacher v. Whisnand, 47 N. E. 706, 148 Ind. 377.

[U] (App. 1903)

Burns' Rev. St. 1901, § 2401, provides that on the filing of a petition to sell the real estate of a decedent, any one claiming any interest or lien may be a defendant. Section 2501 provides that if it be shown on the hearing that the realty is incumbered the court shall fix the amount and extent of each lien and their priorities. In a proceeding by an administrator for a sale of real estate belonging to his decedent, cross-complaints were filed by defendants, who sought to establish a vendor's lien. Demurrers were sustained to the cross-complaints, and defendants appealed. The record did not show what disposition had been made of the case. *Held*, that the appeal would be dismissed, since, if the court had determined the priority of liens, appellants were not injured by the ruling on the demurrers, and, if a hearing had not been had, the appeal was premature.—*Kneerr v. McDonald*, 66 N. E. 773, 30 Ind. App. 600.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1460-1479.  
See, also, 18 Cyc. pp. 754-756.

#### (C) SALE.

Application of general statutes of limitation to actions to recover land sold, see LIMITATION OF ACTIONS, §§ 19, 37, 39, 44.

Color of title, see ADVERSE POSSESSION, § 77. Laws relating to, as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 154. Laws relating to, as violating a right of private property, see CONSTITUTIONAL LAW, § 87. Retroactive operation of statute of limitation as affecting widow's right to recover land, see LIMITATION OF ACTIONS, § 6.

Under proceedings against heir in absence of administration, see DESCENT AND DISTRIBUTION, § 150.

#### § 360. Authority and powers in making sale in general.

[a] (Sup. 1858)

An administrator, authorized by the court to sell land by private sale, may appoint an agent to sell.—*Lewis v. Reed*, 11 Ind. 230.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1481-1483.  
See, also, 18 Cyc. p. 757.

#### § 361. Statutory provisions.

As encroachment by legislature on judiciary, see CONSTITUTIONAL LAW, § 54.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1481, 1482, 1484, 1490.  
See, also, note, 79 Am. St. Rep. 82.

#### § 362. Notice.

Notice to parties in interest, see ante, § 337.

[a] (Sup. 1893)

Where the statute does not require the order of sale to direct the sale to be with or without notice, and the administrator gives notice as required by law, the sale is not invalid because the order of sale unnecessarily and incorrectly directed the sale to be without notice.—*Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1484-1487.

See, also, 18 Cyc. pp. 760-762.

#### § 363. Manner and conduct.

[a] (Sup. 1833)

Commissioners appointed to sell land of a deceased debtor, on a bill by creditors, must, before selling the land itself, offer to sell the rents and profits for seven years.—*Martin v. Densford*, 3 Blackf. 205.

[b] (Sup. 1891)

Under Rev. St. 1881, §§ 2275, 2280, authorizing administrators to sell the personal property of their decedents, where a sale is private, under an order of the court, it must be made in substantial compliance with the order.—*Citizens' St. Ry. Co. v. Robbins*, 26 N. E. 116, 128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1488-1494.

See, also, 18 Cyc. pp. 763-765.

#### § 364. Terms and conditions.

[a] (Sup. 1834)

2 Rev. St. 1876, p. 528, providing that, whenever any executor or administrator shall sell any lands or interest therein subject to any lien, such executor or administrator may take a bond of the purchaser conditioned that such purchaser will make all payments and indemnify the executor and administrator and all persons interested in the estate of the decedent against all of the liabilities of the decedent on account of the land, is imperative, and not permissive, and the word "may" must be construed to mean "shall."—*Sparrow v. Kelso*, 92 Ind. 514.

[b] (Sup. 1834)

Where real estate assigned to a widow is incumbered by a mortgage also covering land subject to sale by the administrator, the land may be appraised and conveyed subject to the whole amount of the mortgage.—*State ex rel. Sparrow v. Kelso*, 94 Ind. 587.

[c] (Sup. 1891)

Under an order requiring the sale to be made on good and sufficient security, and 2 Rev. St. 1876, p. 510, by which the personal rep-

representative has no power to give credit for more than one year, where the personal representative takes the individual note of the purchaser without security, and sells on a credit of 10 years, the sale is void.—*Citizens' St. Ry. Co. v. Robbins*, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498.

[d] (App. 1900)

Plaintiff purchased growing wheat at an administrator's sale. The terms of the sale provided a credit until December 25th, but the auctioneer announced that the purchaser would have to pay a bill for a fertilizer used in sowing the wheat, due September 1st. Plaintiff received notes for his signature and that of a surety. Thereafter he called on the administratrix with the notes, the one for the fertilizer bill having no surety, and stated that his father refused to sign it. The notes were found in the administratrix's house, lying on a bed. The evidence was conflicting whether plaintiff left them there or gave them to a member of the family. That evening the administratrix and her son returned the notes to plaintiff's wife, he being away from home. She sought a settlement later, but he stated that the notes were in his attorney's hands. The sale bill of the clerk reported the property as unsold. Afterwards plaintiff paid the fertilizer bill to the company. *Held*, in an action for failure to deliver the property, that the evidence showed an understanding that a surety would be required for both notes, and plaintiff could not recover.—*Meek v. Beaver*, 58 N. E. 730, 25 Ind. App. 576.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1495-1497.

See, also, 18 Cyc. pp. 766-768.

### § 365. Persons who may purchase.

Extent of liability of administrator purchasing at his own sale, see post, § 391.

Purchase by administrator at execution sale, see EXECUTION, § 228.

[a] If an administrator, directly or indirectly, purchases land at a sale made by himself as administrator, the sale will be set aside on application of the parties interested.—(Sup. 1849) *Shaw v. Swift*, 1 Ind. 565, Smith, 398; (1879) *Morgan v. Wattles*, 69 Ind. 260; (1892) *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

[b] (Sup. 1851)

A sale of real estate by an administrator will not be set aside at law because the administrator himself became the purchaser.—*Doe ex dem. Harkrider v. Harvey*, 3 Ind. 104.

[c] (Sup. 1863)

Where an administrator sells land at an auction, and the crier employed by him makes the highest bid, which is accepted by the administrator, the sale is merely voidable; and, on being confirmed by the court without objection, it will stand.—*Hawkins v. Ragan*, 20 Ind. 193.

In proceedings by an administrator to sell real estate, the record recited that it appeared to the satisfaction of the court that process had been served more than 10 days before the first day of the term, that a guardian ad litem was appointed and answered for the infant heirs, and that the adult heirs were defaulted. A sale was ordered, and at it the administrator sold the land to the crier himself, who was the highest bidder. The court approved the sale, the administrator reported payment of the purchase money, and the court ordered the deed, etc., which was subsequently made, approved and delivered. On appeal, the record showed that writs were regularly issued against defendants, but did not show returns thereon. *Held*, that the sale was to a third person, and valid.—*Id.*

[d] (Sup. 1892)

At the sale of a decedent's real estate under order of court, the wife of one of the executors may, in the absence of fraud or collusion, bid and become a purchaser.—*Crawford v. Gray*, 131 Ind. 53, 30 N. E. 885.

[e] (Sup. 1893)

Where a third person is the apparent purchaser of land at a sale by an executrix under order of court, the fact that the purchase was in reality collusively made by the executrix, and that the apparent purchaser subsequently conveyed the land to her, does not render the sale void, but only voidable; and, while the devisees may have the sale set aside on proper application and proof, yet they have the right, as against the executrix, to allow the sale to stand, and treat her as trustee holding the land in trust for them, and they may maintain an action to have the trust declared, and their title to the land quieted, on just and equitable terms.—*Comegys v. Emerick*, 134 Ind. 148, 33 N. E. 899, 39 Am. St. Rep. 245.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1498-1503.

See, also, 18 Cyc. pp. 768-773; note, 4 L. R. A. (N. S.) 820; note, 12 Am. Dec. 83.

### § 366. Bids or offers.

Contract to prevent competition at sale, see CONTRACTS, § 130.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1504-1506.

See, also, 18 Cyc. pp. 773, 774.

### § 367. Validity in general.

Failure to give bond for sale, see ante, § 351.

Failure to inventory and appraise or defects therein, see ante, § 353.

Purchase by administrator, see ante, § 365.

Unauthorized appointment of commissioner to make sale, see ante, § 352.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1545-1549.

See, also, 18 Cyc. pp. 804-812.

**§ 368. Payment of purchase money.**

[a] (Sup. 1880)

A purchaser of land at an administrator's sale credited the amount of the notes for the price with interest on a note held by him against the administrator, and the latter surrendered the notes for the price and made a deed. *Held*, that an administrator de bonis non could recover the price from the purchaser.—*Chandler v. Schoonover*, 14 Ind. 324.

Generally an administrator can receive nothing but money upon a sale of his intestate's property.—*Id.*

[b] (App. 1900)

Where an executor had reported the sale of certain real estate to the court as a cash sale, and stood charged with such cash, while in truth he took in payment a note which he testified could be turned into cash at any time, an objection that a finding that the assets of the estate had all been turned into cash was not supported by the evidence is untenable.—*Tarplee v. Capp*, 56 N. E. 270, 25 Ind. App. 56.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1507-1515.

See, also, 18 Cyc. pp. 774-785.

**§ 369. Failure of bidder to complete purchase.**

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1516-1527.

See, also, 18 Cyc. p. 783.

**§ 371. — Resale.**

[a] (Sup. 1856)

An administrator sold a crop of corn at auction, and, the purchaser refusing to take it and pay for it, he applied for and obtained leave to sell it again at private sale. It sold, at private sale, for less than it sold at auction, and the administrator sued the first purchaser for the difference. *Held*, that obtaining leave to sell at private sale was not an abandonment of the sale to the first purchaser.—*Meek v. Spencer*, 8 Ind. 118.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1517.

See, also, 18 Cyc. p. 783.

**§ 373. — Actions on bids.**

[a] (Sup. 1856)

Corn standing in the field was sold at administrator's sale. It was to be gathered by the administrator, and stored upon the premises within a reasonable time. When it was gathered and stored, the purchaser refused to receive it. The administrator afterwards obtained an order from the probate court to sell it at private sale. He sold it for a sum less than the first purchaser had bid for it, and sued him for the difference. *Held* that, on the trial, the proceedings relative to the second sale were admissible in evidence.—*Meek v. Spencer*, 8 Ind. 118.

[b] (Sup. 1880)

Where, on death of mortgagor, the mortgagee gave a note to an attorney to collect, and the attorney filed a petition to sell the land as assets for the payment of said mortgage debt, and the mortgagee became the purchaser for less than his claim, under the assurance that his debt would be credited on the claim, and gave his note to the administrator on the statement that he wanted it to show the amount that should be credited, and the court thereupon ordered a deed made to him, without ordering the collection of said note, the circumstances are a complete defense to the subsequent action by the administrator on the note.—*Woolery v. Voris*, 15 Ind. 223.

[c] (Sup. 1886)

In a suit by an administrator de bonis non on a note given for property purchased at an administrator's sale, defendant pleaded as a set-off a debt due him by the decedent in his lifetime, and it was alleged that the former administrator had agreed, when defendant purchased the property, to allow a set-off. *Held* that, by the execution of the note, the agreement to allow the set-off was waived.—*Dayhuff v. Dayhuff's Adm'r*, 27 Ind. 158.

[d] (Sup. 1877)

In an action by an administrator to recover the balance of purchase money due upon land sold by him belonging to his decedent's estate, the purchaser cannot set off taxes paid by him, accrued against such land subsequent to the death of such decedent, though prior to such sale.—*Henderson v. Whiting*, 56 Ind. 131.

[e] (Sup. 1882)

Where an administrator de bonis non brought suit on a note given for the purchase of land at the administrator's sale, an answer alleging a set-off for taxes paid by the purchaser at the request of the former administrator is insufficient to authorize the allowance of the set-off, since the mere promise of the administrator is insufficient to bind the estate, in the absence of facts showing a right to charge the estate, or that the consideration for the promise arose prior to the intestate's death.—*Moody v. Shaw*, 85 Ind. 88.

[f] (Sup. 1884)

Fraudulent representations by an administrator, in the sale of his decedent's land, that it was free from incumbrance, are no defense to suit on a promissory note given for the unpaid purchase money, as his fraud was an individual tort.—*Riley v. Kepler*, 94 Ind. 308.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1519-1527.

**§ 374. Report or return.**

Proceedings against heir in absence of administration, see DESCENT AND DISTRIBUTION, § 150.



[a] (Sup. 1840)

It is no objection to the validity of a sale of a decedent's real estate by order of court that the sale was reported by only one of the two administrators.—*Doe ex dem. Hawkins v. Harvey*, 5 Blackf. 487.

[b] (Sup. 1803)

Burns' Rev. St. 1901, § 2512, provides for return by the administrator "at the next term after" sale by him to pay debts, and that, if the court be satisfied, it shall confirm the sale, and direct execution of a deed. *Held*, that the provision as to time is directory merely, especially as postponement of the report and confirmation to the next term is not one of the essentials enumerated in section 2520, providing that no irregularity shall avoid a sale if certain things appear.—*Custer v. Holler*, 67 N. E. 228, 160 Ind. 506.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1528.

See, also, 18 Cyc. p. 786.

### § 375. Confirmation.

[a] (Sup. 1880)

Where, by the terms of an order authorizing a sale, it is to be reported to the court for confirmation, until such confirmation the contract of purchase does not confer a vested right on the purchaser.—*Williams v. Perrin*, 73 Ind. 57.

The provision of the statute that, in sales of realty by administrators, the court may vacate the sale, when it appears that a sum exceeding that paid by 10 per cent., exclusive of expense, can be obtained, applies to sales of personalty made under order of court.—*Id.*

[b] (Sup. 1881)

Under Loc. Laws 1850, p. 435, providing for the relief of the estate of Noah Noble, deceased, and authorizing the sale of the lands of the estate by a commissioner, no confirmation of the sales by the court was necessary to the validity of such sales or to the validity of the several deeds executed by the commissioner in pursuance thereof.—*Davidson v. Koehler*, 76 Ind. 398.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1529-1538.

See, also, 18 Cyc. pp. 787-794.

### § 376. Persons who may question validity.

[a] (Sup. 1879)

In the absence of fraud or mistake, a proceeding by an administrator to sell real estate of infant heirs to pay debts, to which the infants are properly made parties, is final, and not liable to be annulled by the infants on attaining their majority.—*Seward v. Clark*, 67 Ind. 289.

[b] (Sup. 1900)

Children of decedent by a former marriage have no present estate or interest in the share

of decedent's childless second wife in the decedent's real estate, and hence are not entitled to object to the sale thereof for the payment of debts.—*Bell v. Schaffer*, 56 N. E. 217, 154 Ind. 413.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1539-1542.

See, also, 18 Cyc. pp. 796-799.

### § 377. Ratification of invalid sale.

[a] One who has accepted and retained a part of the price for which land was sold by the administrator is estopped from claiming the land on the ground that the sale was void.—(Sup. 1869) *Hanlon v. Waterbury*, 31 Ind. 168; (1886) *Bumb v. Gard*, 107 Ind. 575, 8 N. E. 713; (1889) *Roberts v. Lindley*, 121 Ind. 56, 22 N. E. 967; (1892) *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874; (1895) *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546.

[b] (Sup. 1871)

If an heir permits an administrator to buy land of the estate at public sale, without objection, and afterwards to make valuable improvements thereon, he is not estopped from action to have the sale set aside.—*Potter v. Smith*, 36 Ind. 231.

[c] (Sup. 1873)

Where, after the sale of land of a decedent by the administrator, the heir appears, makes an objection in hostility to the title of his ancestor, which objection is overruled, the sale confirmed, and the purchase money paid, the heir is concluded by that judgment as long as it remains unreversed, and cannot be heard to make other objections to the proceedings afterwards.—*Gavin v. Graydon*, 41 Ind. 559.

[d] (Sup. 1880)

Where plaintiffs as devisees of their mother sued to recover lands alleged to have been sold to the defendant's grantor on the petition of the administrator of the plaintiffs' father for the sale of the father's land to pay debts of his estate, an answer setting up an alleged estoppel against plaintiffs on the ground that they appeared to the petition to sell the lands of their deceased father and received a portion of the proceeds of the sale is insufficient in the absence of any averment showing that the proceeds received by them was not a portion which descended to them as children and heirs of their father.—*Elliott v. Frakes*, 71 Ind. 412.

Where children of decedent were made defendants to a petition by the administrator of decedent to sell his land to pay debts and appeared to the petition on which the order of sale was made, they were not estopped from setting up claim of title to a portion of the land ordered sold as devisees of the widow of the decedent, to whom one-third of the land sold descended in fee, no issue having been tendered in the proceedings as to their interest as devisees.—*Id.*

[e] (Sup. 1882)

A widow, whose interest in her husband's land was sold by his administrator for the payment of decedent's debts, is not, by accepting a part of the proceeds of the sale as a portion of her distributive share of the estate, estopped from asserting her interest in the land as against the purchaser.—*Compton v. Pruitt*, 88 Ind. 171.

[f] (Sup. 1884)

An order was granted an administrator for the sale of the interest of both heirs and widow, and she requested the administrator to sell her interest, and he advertised it both as agent and administrator, sold the same without objection, made deed as administrator, and paid her one-third the proceeds. *Held*, that she was estopped to claim title.—*Pepper v. Zahnsinger*, 94 Ind. 88.

[g] (Sup. 1894)

The fact that after the sale, but before payment of the price, one of such heirs died, does not affect the estoppel as to the other heirs' interest in the share of decedent; they having received all the price,—both the amount given for their own interest, and that paid for the interest of decedent.—*Wilmore v. Stetler*, 137 Ind. 127, 34 N. E. 357, 36 N. E. 856, 45 Am. St. Rep. 169.

[h] (Sup. 1896)

Where, in an administrator's sale of land, the heirs, the owners of the third of the land subject to the life estate of the widow, join in the proceedings for the sale, and accept the price paid for it by the purchaser, they cannot afterwards object that the sale of the one-third which was subject to the life estate was invalid.—*Myers v. Boyd*, 144 Ind. 406, 43 N. E. 567.

[i] (Sup. 1900)

The heirs of a widow are not estopped from asserting their title to her interest in her husband's realty as against a purchaser under an administrator's sale by the acceptance of a small sum derived from such husband's estate, and distributed to them, it not appearing that any part of such sum was derived from the sale of the widow's interest.—*Bell v. Shaffer*, 56 N. E. 217, 154 Ind. 413.

[j] (App. 1902)

One who joined with his wife in a mortgage of her land for more than it was worth, and is present at a sale thereof by her administrator to discharge the debt, and hears it announced that all the land will be sold, and, though knowing all his rights, says nothing, is estopped to claim a third interest in the land, as against the purchaser, who bought in ignorance of any right or claim of his.—*Roach v. Clark*, 62 N. E. 634, 28 Ind. App. 250.

[k] (App. 1904)

All the land of a decedent having been unwarrantably sold, because such sale was not necessary to raise funds to pay the purchase price, the receipt by the children of deceased's

first wife of money derived from the sale would not estop them from claiming one-third of the land on the death of the second wife, they having no estate when the sale was made, and being in no position to object to the petition and order.—*Fry v. Lawson*, 69 N. E. 1038, 32 Ind. App. 364.

[l] (App. 1908)

A widower participated in the administrator's sale of his wife's real estate, incumbered by a mortgage in which he had joined, and tried to induce a person to raise a bid. He procured the appointment of the administrator, permitted the petition to sell the real estate to go by default, receipted to the administrator for the surplus of the proceeds arising from the sale of other real estate described in the petition, and sold under the same order and terms as the real estate embraced in the mortgage. *Held*, that he was estopped from challenging the validity of the sale of the mortgaged real estate.—*Hampton v. Murphy*, 86 N. E. 436.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. &amp; AD. § 1543.

See, also, 18 Cyc. p. 799.

## § 378. Curative statutes.

[a] (Sup. 1861)

The curative statutes of this state for healing certain defects of executors' sales embrace only the proceedings of such persons as have acted, or attempted to act, as executors, under the laws of this state, either by original appointment under the same, or by conforming thereto if appointed out of the state.—*Lucas v. Tucker*, 17 Ind. 41.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. &amp; AD. § 1544.

See, also, 18 Cyc. p. 830.

## § 379. Opening or vacating.

Defects in appraisement, see ante, § 353.

Purchase by administrator as ground for setting aside, see ante, § 365.

[a] (Sup. 1874)

In a proceeding seeking to annul the appointment of an administrator, and to set aside a sale of real estate made by him, the purchaser of such real estate is not a proper party defendant because the result could not affect the rights of such purchaser or of those claiming under him.—*McMannus v. Bush*, 48 Ind. 303.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. &amp; AD. §§ 1545-1564, 1567, 1568.

See, also, 18 Cyc. pp. 796-820.

## § 380. Actions to set aside.

Return of purchase money on setting aside, see post, § 389.

[a] (Sup. 1862)

Where lands are sold by executors, and the sale is confirmed, an action to set aside the sale cannot be maintained. The only remedy of persons aggrieved is by motion for new trial or for review of, or appeal from, the decree of confirmation.—Quick v. Goodwin, 19 Ind. 438.

[b] (Sup. 1863)

In proceedings by an administrator to sell real estate, the record recited that it appeared to the satisfaction of the court that process had been served more than 10 days before the first day of the term, that a guardian ad litem was appointed and answered for the infant heirs, and that the adult heirs were defaulted. A sale was ordered, and at it the administrator sold the land to the crier himself, who was the highest bidder. The court approved the sale, the administrator reported payment of the purchase money, and the court ordered the deed, etc., which was subsequently made, approved, and delivered. On appeal, the record showed that writs were regularly issued against defendants, but did not show returns thereon. *Held*, in a suit by the heirs to recover the land, instituted 11 years afterwards, that, at the most, the sale was only voidable, and the defects could not be availed of after the estate had passed into the hands of bona fide purchasers without notice.—Hawkins v. Ragan, 20 Ind. 193.

[c] (Sup. 1879)

Evidence *held* sufficient to support a verdict setting aside a sale of lands made by the administrator of a decedent on the ground that the administrator was individually interested in the purchase thereof.—Morgan v. Wattles, 69 Ind. 260.

When lapse of time is relied upon by an administrator who has purchased at his own sale as a defense to a suit by the heirs, it must generally, under the Code, be pleaded, and based upon some statute of limitations. In the case in question, no statute of limitations was pleaded. *Held* that, upon general principles, the time elapsed was not material to the case.—Id.

[d] (Sup. 1881)

Where, on the death of a wife before that of her husband, two thirds of a tract of land conveyed to them descends to their only son and heir, and is not subject to the payment of the debts of the husband, who took the other third in fee, a decree of sale of such two thirds for the payment of his debts, and the confirmation thereof, are mistakes, within the meaning of 2 Rev. St. 1876, p. 554, § 177; and the son, who is an infant, is entitled to have them set aside and annulled, and his title quieted, even as against a subsequent grantee of the purchaser from the administrator.—Edwards v. Beall, 75 Ind. 401.

[e] (Sup. 1881)

When the court has jurisdiction, and the sale is for a fair price, and the proceeds prop-

erly applied, an action to set aside the sale on account of irregularities therein, brought after 25 years' possession by the purchaser, cannot be maintained.—Davidson v. Koehler, 76 Ind. 398.

[f] (Sup. 1882)

Code 1852, § 211, providing that actions for the recovery of real property sold by administrators upon judgment ordering the sale, brought by any persons claiming title under a party to the judgment, his heirs or any person claiming a title under a party, acquired after the date of the judgment, shall be brought within five years after the sale is confirmed, does not apply to an action by a widow to recover her interest in the land of which her husband died seised, where such interest was not specially directed to be sold.—Compton v. Pruitt, 88 Ind. 171.

[g] (Sup. 1883)

Where an administrator fraudulently represented that he would sell only the parcel of land described in his petition, and afterwards had it amended so as to include another parcel, and designedly kept it off the files to conceal the fact from the heirs, the sale will be set aside.—Jones v. French, 92 Ind. 138.

[h] (Sup. 1885)

Children of the testator, having no interest in the proceeds of the sale of land, cannot maintain an action to set aside the sale made by the administrator, and their complaint being insufficient as to them, it was insufficient as to all who united with them, as the complaint must be sufficient as to all, or else it is not sufficient as to any of the parties.—Brumfield v. Drock, 101 Ind. 190.

[i] (Sup. 1892)

To a proceeding resulting in the obtaining of an order by an administrator for the sale of intestate's land for the payment of the debts of the estate, the administrator's wife, to whom, jointly with him, two-fifths of the land had been deeded by the heirs, was a party. On the death of the administrator, before sale under the order, she became owner of the two-fifths as survivor of her husband, and owner of one-third of another fifth, which he had inherited, as his widow. The administrator de bonis non, as authorized by Act Feb. 23, 1855 (Rev. St. 1876, p. 525), sold the land under the order procured by the administrator. *Held*, that she was within the statute (Rev. St. § 293, subd. 4) providing a five-years limitation for recovery of land sold by an administrator on a judgment directing the sale, where the action was brought by a party to the judgment.—Palmerton v. Hoop, 131 Ind. 23, 30 N. E. 874.

[j] An action by heirs of a decedent to set aside a sale of land by an administrator to himself through a third person is within Rev. St. 1894, § 294, cl. 4 (Rev. St. 1881, § 293, cl. 4), which provides that an action to recover land

sold by an administrator on a judgment specially directing the sale of property sought to be recovered, brought by a party to the judgment, or his heirs, is barred in five years after the sale is confirmed.—(Sup. 1892) *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924; (1895) *Axton v. Carter*, 141 Ind. 672, 39 N. E. 546. CONTRA, see (1871) *Potter v. Smith*, 36 Ind. 231.

[k] (Sup. 1892)

The first count, in describing plaintiff's interest in the land, stated that plaintiff's mother died the owner of the undivided part in value of the land, leaving plaintiff and her father only heirs at law. *Held*, that the count was insufficient, since it failed to state what portion of the land plaintiff owned.—*Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

[l] (Sup. 1896)

In an action to set aside an executor's sale, the complaint alleged that he procured the order to sell without making any of the heirs or legatees parties to the petition therefor, and without giving any of them any notice of the filing of the proceeding. *Held*, that the complaint was bad in not alleging what the order discloses as to notice and parties, especially under Rev. St. 1894, § 2498 (Rev. St. 1881, § 2343), providing that any person not a party to the petition may be admitted as a party, and set up any interest in or lien on the land, etc.—*Bailey v. Rinker*, 146 Ind. 129, 45 N. E. 38.

[m] (Sup. 1899)

Action to recover land, brought by a party to the proceeding, is barred in five years, as provided by Burns' Rev. St. 1894, § 294 (Horner's Rev. St. 1897, § 293), though the sale was void for misdescription.—*Armstrong v. Hufty*, 55 N. E. 443, 60 N. E. 1080, 156 Ind. 606.

[n] (Sup. 1905)

Under Burns' Ann. St. 1901, § 294, requiring actions for the recovery of real property sold by executors, etc., upon a judgment specially directing the sale of such property, to be brought within five years after the confirmation of the sale, an action to recover or to quiet title to real estate sold under Burns' Ann. St. 1901, §§ 2385-2390, providing for the administration of the estates of residents who have absented themselves from the state and gone to parts unknown, is barred after five years from the confirmation of the sale, although the sale was void because of a misdescription in the proceedings and deed of the property sought to be sold.—*Barton v. Kimmerley*, 76 N. E. 250, 165 Ind. 609, 112 Am. St. Rep. 252.

[o] (App. 1908)

Under Burns' Ann. St. 1908, § 295, providing that an action for the recovery of real property sold by an administrator on a judgment directing the sale must be brought within five years after the confirmation of the sale, an action by a widower to recover a third of his

wife's land, or quiet title thereto, is barred after the expiration of five years from the confirmation of the sale of the real estate by the probate court, though the sale is void.—*Hampton v. Murphy*, 86 N. E. 436.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1545-1564, 1567, 1568.

See, also, 18 Cyc. pp. 812-818.

§ 383. Collateral attack.

[a] (Sup. 1851)

A sale of real estate for the payment of debts by an administrator under an order of the probate court is not void because the record does not show that notice of the application to sell was given to the heirs, for notice in that case will be presumed.—*Doe ex dem. Harkrider v. Harvey*, 3 Ind. 104.

[b] (Sup. 1854)

A sale of land of infant heirs on the administrator's petition under Rev. St. 1843, can be impeached collaterally, if the infants having been residents of the state were not personally served with notice of the petition and of the time and place of hearing the same.—*Doe ex dem. Platter v. Anderson*, 5 Ind. 33.

[c] (Sup. 1856)

The rule is that, where the record is silent, notice to the heir of a sale of land may be presumed; that this rule applies to cases only where the heir is a party.—*Doe ex dem. Mitchell v. Bowen*, 8 Ind. 197.

[d] (Sup. 1859)

Where the facts recited in the record do not forbid the conclusion that notice to the heir of an application for an order for the sale of his land could have been given, and jurisdiction of the person thereby obtained, it will be presumed in a collateral suit that notice was given.—*Gerrard v. Johnson*, 12 Ind. 636.

Title to land was made under an administrator's sale by order of court. It appeared from the record that there was no service on the heirs, as there should have been, in the proceedings for the sale; but it was presumed in a collateral proceeding that they voluntarily appeared, the record showing nothing to the contrary, and, therefore, that the title was good.—*Id.*

[e] (Sup. 1863)

In proceedings by an administrator to sell real estate, the record recited that it appeared to the satisfaction of the court that process had been served more than ten days before the first day of the term, that a guardian ad litem was appointed and answered for the infant heirs, and that the adult heirs were defaulted. A sale was ordered, and the administrator sold the land to the crier himself, who was the highest bidder. The court approved the sale, and the administrator recorded payment of the purchase money and the court ordered the deed, which was subsequently made, approved, and

delivered. *Held* that, if the auctioneer should be held to have been a trustee and his purchase to have been unauthorized, it could not be impeached collaterally, but should be attacked in a direct proceeding to set aside the sale and reoffer the property.—*Hawkins v. Ragan*, 20 Ind. 193.

In the case of an administrator's application to the court of common pleas to sell real estate, the record said that it appeared to the satisfaction of the court that process had been served more than 10 days before the first day of the term, that a guardian ad litem was appointed and answered for the infant heirs, and the adult heirs were defaulted. Regularly issued writs were shown in the transcript, but no returns thereon. A sale was ordered, and at it the administrator knocked off the land to the crier himself, who was the highest bidder. The court approved the sale, the administrator reported payment of the purchase money, and the court ordered the deed, etc., which was subsequently made, approved, and ordered to be delivered. Upward of 11 years afterwards, the heirs of the intestate sued to recover possession. *Held* that, upon the statements in the transcript of the record, jurisdiction in the court below over the heirs must be presumed.—*Id.*

[f] (Sup. 1882)

An administrator's sale is not void because he bid off the land, and the sale cannot be questioned collaterally.—*Hoover v. Malen*, 83 Ind. 195.

[g] (Sup. 1892)

Fraud on the part of an administrator, and the purchaser of land from him, in letting the purchaser have the land at less than another had offered and was willing and able to pay, does not render the judgment confirming the sale absolutely void.—*Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874

[h] (Sup. 1893)

Where the record in proceedings for the sale by an administrator of a decedent's land shows notice by publication and posting of the pendency thereof, the absence from the files of the notice will not defeat the presumption that it was the proper notice.—*Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13.

[i] (Sup. 1898)

Where an administrator lawfully, by leave of court, sells the land set apart as the wife's dower to satisfy a purchase-price mortgage thereon, the sale cannot be attacked collaterally on the ground that the petition to sell set up other claims, which were not liens on her dower interest.—*Denton v. Arnold*, 51 N. E. 240, 151 Ind. 188.

A proceeding in the proper court by an administrator to sell land of his decedent to pay debts cannot be attacked collaterally, where the court was vested with jurisdiction over the subject-matter and the parties.—*Id.*

[j] (Sup. 1902)

*Burns' Rev. St. 1901, § 2393* (Rev. St. 1881, § 2239; *Horne's Rev. St. 1901, § 2239*), enacts that a special administrator of a testator shall collect the debts, by suit or otherwise, in the same manner as the administrator of an intestate. *Held* that, where a sale of personalty by a special administrator was ordered by the court and confirmed, it was not subject to attack on the administrator's final account.—*Bruning v. Golden*, 64 N. E. 657, 159 Ind. 199.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1554.

See, also, 18 Cyc. pp. 802-804.

### § 384. Operation and effect in general.

[a] (Sup. 1898)

Where a party defends his title to land through an administrator's deed, the widow of decedent cannot avoid the defense by alleging that she was not notified of the pendency of the proceedings to sell, since, in order to overcome the presumption of the probate court's jurisdiction over her, she should have alleged what was shown by the record in such proceedings in respect to the service of process on her.—*Denton v. Arnold*, 51 N. E. 240, 151 Ind. 188.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1569.

See, also, 18 Cyc. p. 820.

### § 385. Effect on rights of creditors.

Liability of purchaser to widow for failure to pay mortgage assumed, see post, § 390.

[a] (Sup. 1859)

A sale of a decedent's estate under order of court to satisfy liens gives a good title as against a junior incumbrancer, though the proceeds of the sale are not enough to satisfy all the incumbrances and his is unsatisfied. *Rev. St. 1843, pp. 531, 532, §§ 245, 251*.—*West v. Townsend*, 12 Ind. 434.

[b] (Sup. 1861)

Where the court orders a sale of lands of one deceased to be made by the administrator, for the purpose of discharging existing liens upon the land, the purchaser takes the land free from such liens, although the claims be not fully discharged by the purchase money; the undischarged surplus becoming a claim against the estate.—*Foltz v. Peters*, 16 Ind. 244.

[c] As a general rule, a purchaser at an administrator's sale takes the property subject to all incumbrances to which it is liable.—(Sup. 1874) *Martin v. Beasley*, 49 Ind. 290; (1877) *Henderson v. Whiting*, 56 Ind. 131; (1879) *McCallam v. Pleasants*, 67 Ind. 542; (1882) *Moody v. Shaw*, 85 Ind. 88.

[d] (Sup. 1885)

Under *Rev. St. 1881, § 2350*, providing that, on sale of land to pay decedent's debts, if the sale be made subject to liens, the pur-

chaser shall execute his bond payable to the executor or administrator, conditioned that he will pay and discharge the lien, *held*, that a purchaser took subject to the lien, though he failed to execute a bond.—*Massey v. Jerauld*, 101 Ind. 270.

[e] (Sup. 1891)

Intestate left real estate incumbered by a mortgage. Upon petition of the administrator, the land was decreed to be sold to pay debts, one-third of the proceeds to be paid to the widow, and the balance upon the debts. No mention of the mortgage was made in the petition or order of sale, and the land was sold under an agreement with the purchaser that the mortgage would be paid out of the proceeds of such sale. The mortgagee was not made a party to the proceedings. *Held*, that the mortgagee not being made a party, and it not appearing by the record that the land was to be sold freed of the lien, the purchaser took the land subject to the mortgage.—*Crum v. Meeks*, 128 Ind. 360, 27 N. E. 722.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1569½.  
See, also, 18 Cyc. p. 824.

§ 386. Rights of devisees and heirs.

[a] (Sup. 1882)

The heirs have a right to possession of the land until the title passes to the purchaser at the sale made by the administrator.—*Cole v. Lafontaine*, 84 Ind. 446.

[b] (Sup. 1883)

An order for the sale of an intestate's land cannot be so framed as to enable the purchaser to acquire more than the present estate of the heirs, or estop them from claiming an after-acquired title.—*Flenner v. Benson*, 89 Ind. 108; *Same v. Travellers' Ins. Co.*, Id. 164.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1570.  
See, also, 18 Cyc. p. 820.

§ 387. Rights of surviving husband or wife, or their successors in interest.

Pleading rights, see ante, § 336.

Widow's interest as subject to sale, see ante, § 329.

[a] (Sup. 1869)

If the entire real estate of an intestate has been sold by order of the probate court, subject to the widow's dower, the purchaser at such sale becomes entitled, on the death of the widow, to the possession of the land assigned as dower.—*Moody v. West*, 12 Ind. 399.

[b] (Sup. 1881)

Decedent's real estate may not be sold to pay debts, subject to the widow's right of dower.—*Armstrong v. Cavitt*, 78 Ind. 476.

[c] The purchaser at administrator's sale takes the land charged with the widow's inter-

est.—(Sup. 1882) *Compton v. Pruitt*, 88 Ind. 171; (1885) *Clark v. Deutsch*, 101 Ind. 491.

[d] (Sup. 1883)

Although the entire real estate of an intestate has been sold by order of the probate court, subject to the widow's dower, the purchaser at such sale does not become entitled, on the death of the widow, to the possession of the land assigned as dower.—*Flenner v. Travellers' Ins. Co.*, 89 Ind. 164.

[e] (Sup. 1883)

Where the same person is administrator of the estate of a deceased husband and also of the estate of the widow, a sale by the administrator of the whole of a tract of land owned by the husband to make assets does not pass the title to the share which the widow took on her husband's death.—*Elliott v. Frakes*, 90 Ind. 389.

[f] (Sup. 1893)

Where the petition of the widow and administratrix of a decedent, to sell lands of the estate for the payment of decedent's debts, did not expressly ask for the sale of her interest in the lands described, and her appearance and consent did not expressly designate such interest, a sale under an order of court had in such proceedings will not vest her interest in the lands so sold in her vendee.—*Irey v. Mater*, 134 Ind. 238, 33 N. E. 1018.

[g] (Sup. 1900)

On petition of an administrator for the sale of decedent's realty to pay general debts he was ordered to sell an undivided two-thirds of it exclusive of the widow's interest. After a sale of the whole of the lot, an amended petition for an order to sell the same realty, averring the insufficiency of personal assets to pay debts, and the existence of certain liens against the property, was permitted to be filed as of date of the original petition, and the sale of the whole lot was confirmed, and deed made to the purchaser. *Held* that, the filing of the amended petition and the entry that it be treated as of date of the original petition being illegal, and the court having no authority to sell more than two-thirds of the realty for the payment of general debts, the purchaser acquired no interest in the widow's third as against her heirs.—*Bell v. Shaffer*, 56 N. E. 217, 154 Ind. 413.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1363, 1572.  
See, also, 18 Cyc. p. 821.

§ 388. Title and rights of purchasers and their privies.

Estoppel of widow by disclaimer, see ESTOPPEL, § 71.

[a] (Sup. 1840)

The rule of caveat emptor applies to sales of property of decedents under order of court, and the purchaser has no grounds of complaint for defects in the quantity, quality or title of

the property purchased.—*Loudon v. Robertson*, 5 Blackf. 276.

[b] (Sup. 1860)

An administrator, under an order of court granted upon a proper petition in which it was stated that the decedent left a widow surviving him, sold a certain lot, being one of the two tracts of land of which the decedent was seised in fee simple at his death for the payment of the debts of the decedent. After the payment of the debts, the widow, with knowledge of all the facts, received the residue of the proceeds of the sale as a part of the \$300 to which she was entitled, under the statute, as against heirs and creditors. *Held*, that the purchaser at such sale or his vendee could not claim to be a purchaser in good faith, believing that he was acquiring an unincumbered title to the entire lot.—*Hanlon v. Waterbury*, 31 Ind. 168.

[c] (Sup. 1877)

Where personal property belonging to a decedent's estate is sold at public sale by the executor or administrator, the purchaser thereby acquires the same title thereto as was had by the decedent in his lifetime, though the sale may be wholly unnecessary.—*Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198.

A purchaser of property at an administrator's sale buys at his peril. He is bound to know whether the administrator has power to make the sale.—*Id.*

[d] (Sup. 1939)

A purchaser of land at a sale by an administrator under the order of the court, to pay decedent's debts, has no right to cord-wood cut and piled and crops growing on the land at the time of his purchase, though the persons claiming them were parties to the order of sale, which directed the sale of the land only, as heirs of the decedent, and the administrator announces at the sale that it is made without reservation of the crops.—*Barrett v. Choen*, 119 Ind. 56, 58, 20 N. E. 145, 21 N. E. 322, 12 Am. St. Rep. 363.

[e] (Sup. 1891)

Where an order of court authorizing a private sale of personalty of a decedent by his personal representative, under Rev. St. 1881, § 2289, does not require a confirmation of the sale, title passes to the purchaser immediately on his compliance with the terms of sale, if the latter is made in substantial accordance with the order of court.—*Citizens' St. Ry. Co. v. Robbins*, 128 Ind. 449, 26 N. E. 116, 25 Am. St. Rep. 445, 12 L. R. A. 498.

[f] (Sup. 1892)

Where the record of an administrator's sale shows that the administrator's attorneys were the firm of O. & G., and that the purchaser at the sale was one G., it is sufficient to put subsequent purchasers on inquiry as to whether G. was one of the administrator's attorneys.—*Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

[g] (Sup. 1893)

Where the purchaser of a decedent's lands knew when he received a conveyance that a legal obstacle had arisen because of the marriage of the widow, which rendered it impossible that her interest in the lands might be conferred on him, such knowledge placed him in a position where he could not assert an estoppel.—*Irey v. Mater*, 33 N. E. 1018, 134 Ind. 238.

[h] (Sup. 1896)

Where, in an administrator's sale of a decedent's lands, the parties act in accordance with the interpretation then given to the statute by the supreme court in regard to the interest of a childless widow of a decedent leaving children by a prior wife, namely, that she takes only a life estate in the third of decedent's lands, the interest of the parties under the sale is to be determined by such construction of the statute, instead of by a subsequent construction overruling the former cases, and giving the widow a fee in such third.—*Myers v. Boyd*, 144 Ind. 496, 43 N. E. 567.

[i] (Sup. 1897)

Rev. St. 1894, §§ 2609, 2610 (Rev. St. 1881, §§ 2454, 2455), providing that appeals in matters connected with a decedent's estate must be perfected within 40 days, do not apply to proceedings brought to procure a writ of assistance to obtain possession of land purchased at an administrator's sale, as such a remedy is not provided by the probate procedure act.—*Roach v. Clark*, 48 N. E. 796, 150 Ind. 93, 65 Am. St. Rep. 353.

[j] (Sup. 1898)

In an action to recover possession of land, where defendant pleads title under an administrator's deed, and alleges that plaintiff was a party to the proceedings to sell the real estate for debts, and that due notice thereof was given to her, after which the court assumed jurisdiction and ordered the sale of the land, it will be presumed, on demurrer to the answer, that the probate court found that plaintiff, as a party to the petition, was duly notified thereof "as required by law."—*Denton v. Arnold*, 51 N. E. 240, 151 Ind. 188.

[k] (App. 1905)

Where an administrator's deed of land sold to pay debts described the kind of record, the number of the volume, and the page wherein the order of judgment of the court was entered, by virtue of which the administrator was authorized to execute the deed in question, as required by Burns' Ann. St. 1901, § 2518, and such deed, if examined, would have disclosed that the administrator sold only 12 acres of land, more or less, and a subsequent purchaser afterwards discovered that the description therein covered more than three times that amount of land, such purchaser was chargeable with notice thereof, and of the right of the admin-

istrator to correct the mistake.—*Pierce v. Vansell*, 74 N. E. 554, 35 Ind. App. 525.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1573-1582.  
See, also, 18 Cyc. pp. 824-832.

**§ 389. Rights and remedies of purchasers on avoidance of sale.**

Priority of claim for purchase money paid over other claims against estate, see ante, § 263. Rights of mortgagee on avoidance of mortgage, see post, § 398.

[a] (Sup. 1849)

Where a sale is set aside because the administrator was the purchaser, and it appears that he paid nothing out of his own funds for the property, he is not entitled to any reimbursement on account of purchase money paid.—*Shaw v. Swift*, 1 Ind. 565, Smith, 398.

Where a sale to the administrator is set aside, and it appears that the improvements put upon the land by him are of less value than the rents and profits, he cannot recover therefor.—Id.

[b] (Sup. 1861)

The heirs of an intestate stand in the same relation to an administrator's sale of real estate as if it had been made by themselves, and cannot set it aside on the ground of fraud or trust without first restoring the purchase money.—*Shepherd v. Fisher*, 17 Ind. 220.

[c] (Sup. 1871)

If an heir permits an administrator to buy land of the estate at public sale without objection, and afterwards to make valuable improvements thereon, though he is not estopped from bringing action to have the sale set aside, yet it may be good ground in equity for a claim by the administrator for reimbursement out of the first moneys arising from a resale of the property when ordered by the court; but, when this is done, he cannot equitably claim anything more.—*Potter v. Smith*, 36 Ind. 231.

[d] (Sup. 1883)

A bona fide purchaser at an administrator's sale, which is set aside because of the administrator's misconduct, has a lien on the land for the money actually paid, though there was sufficient personalty to pay the debts, and no additional bond was filed by the administrator, and another tract was sold for a sum sufficient to pay the debts.—*Jones v. French*, 92 Ind. 138.

[e] (Sup. 1887)

The administrator of a decedent's estate obtained an order to sell real estate, sale was made, the purchaser paid the purchase money in full, and subsequently sold the property to the ancestor of the plaintiffs. After the confirmation of the administrator's sale the widow brought suit to set aside the sale, and it was so ordered. *Held*, that the plaintiffs are not entitled to a deed on the sale so set aside, but they are entitled to a vendee's lien on the real

estate for the money paid by their ancestor.—*Stults v. Brown*, 112 Ind. 370, 14 N. E. 230, 2 Am. St. Rep. 190.

[f] (Sup. 1892)

In an action to set aside an administrator's sale of land, where it appears that the administrator had paid out of the proceeds certain debts with which the land was chargeable, plaintiff cannot recover without first repaying to the purchaser the amount so paid out by the administrator.—*Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

[g] (Sup. 1893)

Where, owing to a defect in the sale of a decedent's land, the purchaser gets no title, the purchaser's claim on account of purchase money paid, even if founded on a vendee's lien, is a claim against the decedent's estate, which must be enforced by filing a claim therefor, as provided by Rev. St. 1881, § 2310.—*Stults v. Forst*, 135 Ind. 297, 34 N. E. 1125.

[h] (Sup. 1894)

An invalid sale under order of court cannot be set aside without a return of the purchase price.—*Wilmore v. Stetler*, 137 Ind. 127, 34 N. E. 357, 36 N. E. 856, 45 Am. St. Rep. 169.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1583-1587.  
See, also, 18 Cyc. pp. 818, 819.

**§ 390. Liabilities of purchasers.**

[a] (Sup. 1884)

Real estate assigned to a widow was incumbered by a mortgage, also covering land subject to sale by the administrator. The purchaser, assuming the payment of the mortgage, failed to discharge it. *Held*, that the widow had a right of action against him, she being entitled to have her interest discharged from the mortgage, either out of the personalty or by the sale of the other real estate.—*State ex rel. Sparrow v. Kelso*, 94 Ind. 587.

A purchaser of real estate at an executor's or administrator's sale, subject to liens, the amount of which is deducted from the purchase price, assumes the payment of such liens, whether it is so stated in his deed or whether a bond is taken from him, as required by Rev. St. 1881, § 2350, providing that an executor or administrator in selling real estate subject to liens shall take a bond from the purchaser to secure their payment.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1588.

**§ 391. Liabilities of executor or administrator.**

[a] (Sup. 1830)

Where an administrator purchased at his own sale, and thereafter sold the property at a profit, and there was uncertainty as to the amount of profit, he was chargeable with the largest amount which, from the circumstances,



he would be presumed to have realized.—*Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123.

Where an executor or administrator becomes the purchaser at his own sale, he must account for all the profits which he makes by the purchase.—*Id.*

[b] (Sup. 1884)

Rev. St. 1876, p. 528, provides that, whenever any administrator shall sell land of decedent subject to any lien created thereon by decedent, he may take a bond from the purchaser, conditioned that the purchaser will indemnify all persons interested in the estate against the lien. *Held*, that where, after the assignment in partition of a widow's third, the administrator sold the other two thirds subject to a mortgage executed by decedent and the widow, but took no bond for the payment of the mortgage, and the whole property was sold under foreclosure of the mortgage, the administrator is liable to the widow for any damage sustained by her because of his failure to take the bond.—*Sparrow v. Kelso*, 92 Ind. 514.

An administrator sold, under an order of court, to a person in good credit, but omitted to take security. *Held*, that he was chargeable with the amount of the sale upon the insolvency of the purchaser.—*Id.*

[c] (Sup. 1884)

A purchaser of lands at an administrator's sale, who, as part of the purchase price, assumes and agrees to pay a mortgage thereon executed by decedent and wife, is liable to a suit by the widow on the sale of her third under foreclosure of said mortgage, whether he had promised orally or in writing, or had given a bond to the administrator to pay the mortgage; and therefore a complaint against an administrator for failure to exact a bond from the purchaser, which fails to allege the insolvency of the purchaser, is insufficient, as it does not show any damages to plaintiff.—*State ex rel. Sparrow v. Kelso*, 94 Ind. 587.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1589-1592.

See, also, 18 Cyc. pp. 843-846.

§ 392. Liabilities on bonds for sale.

Liability as between sureties on bond for sale and on general bond as affected by rule that personalty is primary fund for payment of debts, see ante, § 272.

Liability on general bond, see post, § 528.

[a] The additional bond given by an administrator when he procures an order for the sale of real estate is subsidiary to his original administration bond, and not a primary security; and no action can be maintained upon it until the penalty of the original bond has been exhausted.—(Sup. 1854) *Salver v. State ex rel. Tyner*, 5 Ind. 202; (1860) *Salvers v. Ross*, 15 Ind. 130.

[b] (Sup. 1856)

An executor was also guardian of a minor, who, as legatee of a second estate, was entitled to one-half of a sum due such second estate from the first estate. The executor of the second estate agreed with the guardian that he might retain the ward's share on paying the balance. The guardian charged himself as guardian and credited himself as executor with the ward's share, but never paid the other half to the executor of the second estate. The executor and guardian died insolvent after recovering the proceeds of a sale of real estate of his testate. *Held*, that the sureties on his bond as executor for sale of land were liable for the amount charged by the executor to himself as guardian.—*Burtch v. Thorn*, 7 Ind. 508.

[c] (Sup. 1861)

In an action on an administrator's bond, given on application to sell real estate, the answer alleged that the administrator had fully paid all the said money except a certain sum, which defendant, as his surety, had since paid in full. *Held*, that the reply that, after the payment of said alleged payment, a further accounting took place, and that the administrator was found in arrears over and above said balance, was a discrepancy; and the money therein sought to be recovered was not shown to have been the proceeds of the real estate sold, for which only the surety was liable.—*Burtch v. State ex rel. Richardville*, 17 Ind. 506.

[d] (Sup. 1863)

The bond required of an administrator by 2 Gav. & H. St. p. 510, § 82, requiring the giving of a bond by an administrator before the making of an order for the sale of real estate, is designed only to secure the faithful discharge of the new duties imposed on the administrator, and it covers only the neglect of duty in the administration of the proceeds of such real estate.—*Worgang's Adm'r v. Clipp*, 21 Ind. 119, 83 Am. Dec. 343.

[e] (Sup. 1880)

The personalty being insufficient to pay the debts of the estate, the administrator, without any order of court, but with the consent of the only heirs of the decedent, who were of lawful age, sold real estate for that purpose. After the sale, the court took cognizance thereof, and directed the administrator to give an additional bond to account for the proceeds. *Held* that, under such bond, the administrator and sureties were bound to account to the creditors and distributees of the estate for the full amount of the proceeds of the sale.—*Fleece v. Jones*, 71 Ind. 340.

[f] (App. 1908)

In an action by creditors of a decedent on bonds given by the administrator on procuring orders to sell real estate, special findings that the administrator received proceeds of sales of real estate; that the court ordered him to pay the proceeds to the clerk of the court to be applied to the payment of debts; that the cred-

itors had previously obtained an allowance of their claims; that the administrator failed to comply with the order of the court, or to pay the creditors; that he was afterwards removed by order of the court; and that he had in his hands at the time of his removal a specified amount derived from the sale of real estate, which amount he withheld—shows that the fund received from the sale of real estate was not paid into court, or to the creditors, or to the administrator's successor.—*Moore v. State ex rel. Ferguson*, 43 Ind. App. 387, 84 N. E. 161.

In an action by creditors of a decedent on bonds given by the administrator on procuring orders to sell real estate, a complaint which alleges as breaches the failure of the administrator, on demand of the creditors, to apply the proceeds to the payment of debts, and the failure to comply with the order of the court requiring payment thereof into court, and which shows that the administrator withheld proceeds after his removal as administrator, is sufficient without alleging what the administrator did with the proceeds, and without showing that the creditors were injured, since the acts of the administrator amounted to a conversion, giving the creditors a right to sue and recover the amount of the funds in the hands of the administrator at the time of the commencement of the action with interest and penalty.—*Id.*

In an action by creditors of a decedent on bonds given by the administrator on procuring orders to sell real estate, findings that the administrator on demand of the creditors failed to apply the proceeds to the payment of the creditors, and failed to comply with the order requiring him to pay the proceeds into court, and that he withheld the proceeds after his removal as administrator, are sufficient on which to predicate a judgment on the bonds.—*Id.*

In an action by creditors of a decedent on bonds given by the administrator on procuring orders to sell real estate, it appeared that the administrator withheld the proceeds, and that the administrator was the principal in an obligation to which decedent was a surety. The court allowed the administrator for his services a sum less than the amount of such obligation. *Held*, that the court properly provided that the sum allowed for services should not be allowed as a credit to the administrator in his account, but should be paid by him on the indebtedness of the estate.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1593.

#### (D) CONVEYANCE.

Reformation, see REFORMATION OF INSTRUMENTS, §§ 13, 23.

#### § 397. Deed to purchaser.

Administrator's deed as notice to third person, see VENDOR AND PURCHASER, § 230.

Estoppel to reform deed, see REFORMATION OF INSTRUMENTS, § 23.

#### [a] (Sup. 1861)

A. devised land to his wife for life, at her death to be sold by his executor to the highest bidder among his children. The wife leased for her life to B., who held over as a tenant at sufferance after her death. The executor, in 1858, sold to the child who made the highest bid, who assigned his certificate of purchase to C., a married woman. The court confirmed the sale January 3, 1859, and the executor, March 7, 1859, made his deed to C., who, jointly with her husband, thereafter sued B., alleging that on January 4, 1859, and on divers succeeding days, up to March 10, 1859, he had wrongfully, and without leave of said C., turned a large number of hogs and cattle on part of the land, whereby the clover field and meadow were rooted up and injured, and also that he had dug up, carried away, and destroyed fruit trees, etc., of the value of \$100, etc. *Held*, that the deed, when executed, related back to the confirmation, and gave C. the legal title at the time of the alleged injury.—*Bellows v. McGinnis*, 17 Ind. 64.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1598-1604.

See, also, 18 Cyc. pp. 835-837; note, 74 C. A. 382.

#### § 398. Mortgage.

##### [a] (Sup. 1901)

Under Rev. St. 1881, §§ 1084, 1085 (*Horner's Rev. St. 1897*, §§ 1084, 1085; *Burns' Rev. St. 1904*, §§ 1097, 1098), providing that where land is sold under judicial process, and the sale is subsequently pronounced invalid, the purchaser at such sale shall have a lien on the land for the amount of his purchase money, a mortgagee, under a mortgage made by an administrator to pay debts, on leave obtained from court, is entitled to a lien on the premises for the amount of his loan, when the mortgage is set aside for defect in the proceedings.—*Baker v. Edwards*, 59 N. E. 174, 156 Ind. 53.

##### [b] (App. 1901)

*Burns' Rev. St. 1904*, §§ 2524, 2525 (*Horner's Rev. St. 1897*, §§ 2368, 2369), empower the court to authorize the personal representative of a decedent to mortgage realty for the payment of debts, and provide that such a mortgage, executed by the personal representative under authority of the court, shall be as valid as if executed by the deceased in his lifetime. *Held*, that where such a mortgage was executed by the administrator under order of court, and was approved by the court, it was valid, though it incorporated a clause waiving the valuation and appraisal laws.—*Smith v. Eels*, 61 N. E. 200, 27 Ind. App. 321.

*Burns' Rev. St. 1904*, §§ 2489, 2524 (*Horner's Rev. St. 1897*, §§ 2336, 2368), provide for raising funds out of the realty of a decedent with which to pay his debts, by sale, by mort-

gage, and by lease. Section 2524 (2368) provides that, instead of ordering a sale, the court may authorize the personal representative to mortgage or lease the realty for a period not over five years, if it is made to appear that the necessary money can be thereby procured to the interest of the estate. *Held*, that an administrator authorized by order of court to mortgage the realty is vested with such an interest therein as will enable him to execute a valid mortgage, though the title to the realty under ordinary circumstances vests in the heirs.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1605.

See, also, 18 Cyc. p. 838.

#### § 399. Lease.

Estoppel of tenant of administrator to controvert title, see LANDLORD AND TENANT, § 61. Notice of proceeding, see ante, § 337.

#### (E) PROCEEDS.

Rights of creditor of devisee, see WILLS, § 871.

Rights of holder of unrecorded mortgage, see MORTGAGES, § 173.

#### § 400. Disposition in general.

[a] (Sup. 1851)

On a bill in chancery against heirs to set aside a conveyance of land, made by a deceased debtor in his lifetime, for fraud, and for a sale of the land for payment of debts, the entire proceeds of the sale should be paid into court, to be distributed among creditors in the course of administration.—*McNaughtin v. Lamb*, 2 Ind. 642.

[b] (Sup. 1880)

An administrator cannot apply the proceeds of a sale of his intestate's property in payment of his own debts.—*Chandler v. Schoonover*, 14 Ind. 324.

[c] (Sup. 1874)

Where, by agreement of all the parties in interest, a decedent's lands, a decree of foreclosure of a mortgage on which is owned by the widow as assignee thereof, are appraised and sold at their full value, without regard to such foreclosure decree, or to the widow's one-third interest, the widow, who agreed to join in a deed to the purchaser, and to take the amount of the decree and what she might be entitled to as owner of one-third of the lands, becoming herself the purchaser of the lands for more than the appraisement, and for a greater sum than the foreclosure decree and her one-third, is entitled to one-third of the purchase money for her one-third ownership in the land, and the amount of her decree out of the other two-thirds of the purchase money; the residue thereof to be paid to the administrator, by whom a deed should be executed to her.—*Goodspeed v. Flood*, 45 Ind. 522.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1606.

See, also, 18 Cyc. p. 842.

#### § 401. Costs and expenses.

[a] (App. 1896)

Where a mortgage is foreclosed after the death of the mortgagor, and the land is sold by the administrator under orders of the court, free from the incumbrances thereon, the costs of the foreclosure proceedings are a lien on the land, which must be discharged out of the proceeds of the sale.—*Connecticut Mut. Life Ins. Co. v. Hobbs*, 14 Ind. App. 681, 43 N. E. 452.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1607.

See, also, 18 Cyc. p. 841.

#### § 404. Right to surplus.

[a] (Sup. 1883)

Where an heir mortgages the realty inherited by him, and it is afterwards sold by the administrator to pay debts, the mortgagee is entitled to any excess, and, before the settlement of the estate, may obtain an order against the administrator to pay such excess on the mortgage.—*Ball v. Green*, 90 Ind. 75.

[b] (App. 1905)

A debt due an estate from the heir may be retained out of his distributive share of the surplus proceeds of real estate sold to pay debts.—*Barnett v. Thomas*, 75 N. E. 868, 36 Ind. App. 441, 114 Am. St. Rep. 385.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1611.

See, also, 18 Cyc. p. 841.

#### § 406. Proceedings for distribution.

[a] (Sup. 1882)

Where a court orders an executor to apply the proceeds of property sold to the payment of claims in their proper order and the executor without proper excuse fails to obey, the court may enforce obedience by attachment.—*Ex parte Hayes*, 88 Ind. 1.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1612½.

### IX. INSOLVENT ESTATES.

#### § 410. Proceedings on reporting or declaring insolvency.

[a] (Sup. 1889)

Where a decree directs an estate to be settled as insolvent, as prayed for by the administrator, and he makes no motion to modify the decree, he cannot attack the decree on appeal because it also directs him to pay into court within 30 days the money found to be in his hands.—*Bristow v. McClelland*, 122 Ind. 64, 22 N. E. 299.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1617-1619.

### § 411. Effect of insolvency upon previous acts and proceedings.

[a] (Sup. 1845)

After a judgment had been obtained in the probate court against an administrator, and an execution awarded and issued against the real estate of the deceased, the administrator filed a complaint, under the statute, for the purpose of settling the estate as insolvent. *Held* that, on motion of the administrator, the execution should be set aside.—*Joyce v. Hufford*, 7 Blackf. 382.

Where an execution had been issued against the real estate of a decedent, and the administrator filed a complaint, under the statute, for the purpose of settling the estate as insolvent, it destroyed the lien of the judgment.—*Id.*

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1620-1623.  
See, also, 18 Cyc. p. 851.

### § 414. Sales and conveyances under order of court.

[a] (Sup. 1865)

An intestate died insolvent, leaving two parcels of realty, on each of which was a mortgage, in the execution of which his wife had joined. The administrator petitioned for the sale of the realty, and the wife consented thereto, reserving her interest in the proceeds. The administrator sold one parcel, and, after paying the mortgage thereon, paid the widow one-third of the residue, and then sold the other parcel, distributing the proceeds in the same manner. *Held*, that the administrator should have applied the balance of the proceeds of the sale of the first tract, after paying the mortgage and one-third of the residue to the widow, to the discharge of the mortgage on the second tract, and not to the claims of general creditors, as the waiver of the widow, by joining in the mortgages, operated in favor of the mortgagees, and not in favor of other creditors.—*Perry v. Borton*, 25 Ind. 274.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1627-1629.  
See, also, 18 Cyc. p. 853.

### § 416. Payment of claims.

[a] (Sup. 1850)

The executor of an insolvent estate should not first apply the personal assets to the redemption of incumbered real estate for the benefit of the widow.—*Whitehead v. Cummins*, 2 Ind. 58.

[b] (Sup. 1859)

The administrator of an insolvent estate is not bound to set off a judgment in favor of his decedent against a claim upon his estate; but, having done so, he cannot complain because it makes an unequal distribution.—*Denny v. Moore*, 13 Ind. 418.

[c] (Sup. 1880)

The firm of B. & C. had a claim against A.'s estate, which B. induced A.'s administrator

to pay to him, with the understanding and in consideration that, in case A.'s estate were insolvent, B. would refund the excess above his distributive share therein. The estate was insolvent, and A.'s administrator filed a claim against B.'s estate for such excess, setting up the above facts. *Held*, that the payment to B. having been made on an express contract to refund, founded on a good consideration, plaintiff was entitled to recover.—*Wright v. Jordan*, 71 Ind. 1.

[d] (Sup. 1881)

Mortgages given by a deceased person are not rendered invalid by reason of the insolvency of his estate, but such mortgages constitute preferred claims as to the personal estate.—*Evans v. Pence*, 78 Ind. 439.

[e] (Sup. 1890)

In an action against an administrator, it appeared that plaintiff held a promissory note executed by the intestate, and secured by a chattel mortgage; that the administrator, under order of court, sold the mortgaged property, free of such lien, for the purpose of discharging the same; that, so far as general creditors were concerned, the estate was insolvent. *Held*, that under Elliott's Supp. 1889, § 401, providing that an administrator shall pay the debts of his intestate in proper order, as soon as he shall have money in his hands with which to pay the same, it was the duty of defendant to pay plaintiff's claim as soon as the property was sold.—*Jewett v. Hurtle*, 121 Ind. 404, 23 N. E. 262.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1652-1654.

### § 417. Rights and remedies of creditors.

Remedies of ward against administrator of insolvent estate of deceased guardian, see GUARDIAN AND WARD, § 73.

[a] (Sup. 1825)

After a judgment against A., a statute (St. 1821, p. 140) was enacted, directing the debts of persons dying insolvent to be paid pro rata. A. afterwards died insolvent. *Held*, that the judgment had no priority.—*Berry v. Marshall*, 1 Blackf. 340.

[b] (Sup. 1843)

An action cannot be brought against an administrator on a promise of the intestate (the administrator not having been guilty of waste, negligence, or fraud) after a complaint had been filed in the probate court by the administrator for the purpose of settling the estate as insolvent.—*Remy v. Butler*, 7 Blackf. 5.

[c] (Sup. 1846)

A promissory note was assigned after the death of the maker, and after his estate had been declared insolvent by the probate court; but it appeared that a dividend, uncertain in amount, would be paid to the creditors. The assignee, without waiting to receive the dividend, sued on the assignment. *Held*, that the

suit would not lie.—*Hardesty v. Kinworthy*, 8 Blackf. 304.

[d] (*Sup.* 1897)

A creditor's complaint against an administrator to set aside a fraudulent conveyance of land by the intestate, alleging that the estate is wholly insolvent, sufficiently shows that plaintiff's claim cannot be paid without setting aside such conveyance, and need not allege that intestate had no property from the making of the conveyance until his death.—*State ex rel. Little v. Parsons*, 47 N. E. 17, 147 Ind. 579, 62 Am. St. Rep. 430.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1646-1651;

28 CENT. DIG. Insolv. § 3.

See, also, 18 Cyc. pp. 864-867.

#### § 418. Distribution and settlement.

[a] (*App.* 1900)

Where the evidence showed that an estate had been left open for the purpose of prosecuting actions to recover excess payments made to unpreferred creditors above their distributive share, on discovering the estate was insolvent, and the administrator was ordered to prosecute same, and the court's findings showed the aggregate indebtedness, and the aggregate assets of the estate, and the per cent. that could ratably be paid, an objection that there was no finding that the estate has been finally settled as insolvent, and that the final dividend has not been ascertained and decreed, is untenable.—*Tarplee v. Capp*, 56 N. E. 270, 25 Ind. App. 56.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1655-1659.

See, also, 18 Cyc. pp. 867-873.

### X. ACTIONS.

Abatement of suit against administrator by failure to serve process and going to trial, see ABATEMENT AND REVIVAL, § 30.

Administrator as necessary party to action to set aside fraudulent conveyance of deceased debtor, see FRAUDULENT CONVEYANCES, § 255.

Against executors de son tort, see post, § 544.

Attachment, see ATTACHMENT, § 18.

By or against foreign executors and administrators, see post, § 525.

By or against foreign or ancillary executors and administrators, see post, § 524.

By or against surviving partners or representatives of deceased partners, see PARTNERSHIP, § 258.

Contest of will by cross-complaint in action by executor to quiet title, see WILLS, § 222.

Continuance or revival of action by or against descendants, see ABATEMENT AND REVIVAL, §§ 71-77.

Description of plaintiffs as executors, see PARTIES, § 71.

Effect of settlement by beneficiary on right of action by personal representative for causing death, see DEATH, § 25.

For accounting or administration, see post, §§ 468-474.

Joinder of causes of action, see ACTION, §§ 41, 42.

Jurisdiction of one state court to order dismissal of action brought by executor of another state court, see COURTS, § 480.

Liability of executor or administrator to garnishment, see GARNISHMENT, §§ 35, 36, 61.

Necessity of raising objection to right of plaintiff to sue as executor or administrator by answer in abatement, see PARTIES, § 76.

Necessity of verification and bond in proceedings by executor to contest will, see WILLS, § 281.

On administration bonds, see post, § 537.

Proceedings to enforce payment of debts, see ante, § 283.

Proceedings to enforce payment of legacies and distribution, see ante, §§ 314, 315.

Right of executor of purchaser at tax sale to sue to enforce lien for money paid for deed, see TAXATION, § 827.

Right of executor of vendor to compel specific performance of contract, see SPECIFIC PERFORMANCE, § 16.

Rights of action by devisees or legatees, see WILLS, § 747.

Right to sue for causing death of decedent, see DEATH, § 31.

Right to trial by jury in action by widow to recover distribution share, see JURY, § 14.

Subjects and titles of acts, see STATUTES, § 124.

Suit to cancel taxes, see TAXATION, § 500.

Summary remedies and actions for unpaid taxes, see TAXATION, §§ 504, 597, 601.

Survival of actions by or against decedents, see ABATEMENT AND REVIVAL, §§ 48-69.

Time for action against heirs to foreclose mortgage, see MORTGAGES, § 423.

To enforce testamentary charge, see WILLS, § 826.

To set aside election under will, see WILLS, § 797.

#### § 421. Nature and form.

[a] (*Sup.* 1327)

In an action by an administrator in his own name on promises made to himself, the declaration may be either in debet or detinet.—*Capp v. Gilman*, 2 Blackf. 45.

[b] (*Sup.* 1834)

An administrator may file a bill in chancery against one who intermeddles with or embezzles goods of the estate, instead of proceeding at law.—*Thorn v. Tyler*, 3 Blackf. 504.

[c] (*Sup.* 1853)

The jurisdiction of equity in a case where the original debtor is dead rests on the ground that executors, administrators, and heirs are, or may be, trustees for creditors, and hence are liable to account in chancery.—*Unknown Heirs*

of *Whitney v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638.

Where a debtor is living and possesses an equitable interest in real estate, inasmuch as the creditor acquires at law by the judgment a lien on the real estate in which the debtor has a legal interest, equity, in aid of the law, carries along the lien and enforces it against real estate in which the debtor has only such equitable interest; and as by law the creditor acquires, by judgment and execution, a lien on a personal property to which the debtor has the legal title, equity enforces the lien on the equitable interest of the debtor in personal property, but it does this only where a judgment, which constitutes the lien at law, in one case, and a judgment and an execution, in the other, have been obtained.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1663, 1677.

#### § 422. Statutory provisions.

Retroactive operation of statutes, see STATUTES, § 267.

#### § 423. Actions by creditors and others interested in estate.

Jurisdiction of action to set aside fraudulent conveyance, see post, § 435.

Property fraudulently conveyed as assets of estate, see ante, § 57.

[a] (Sup. 1850)

By Rev. St. p. 692, a party interested in an estate is authorized to institute a suit in equity against the administrator for waste or maladministration.—*Persons v. Crane*, 2 Ind. 157.

[b] (Sup. 1853)

Where a bill is filed by one or a few creditors of a decedent in behalf of all, they are all allowed to come into the decree, prove their claims, and have them paid in the course of administration.—*Unknown Heirs of Whitney v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638.

[c] (Sup. 1878)

To enable a creditor to maintain an action against the heirs of his deceased debtor to set aside an alleged fraudulent conveyance of real estate by the debtor, he must allege and prove that the personality of such debtor has been exhausted without satisfying his claim.—(1877) *Allen v. Vestal*, 60 Ind. 245. Compare (Ind. 1878) *Price v. Sanders*, 60 Ind. 310.

[d] (Sup. 1883)

Rev. St. 1881, § 2335, renders lands fraudulently conveyed by a decedent liable to be sold for payment of his debts, and empowers an executor, etc., who has been authorized to sell lands thus conveyed, to file a petition be-

fore sale to avoid the conveyance. *Held*, that one creditor may maintain an action to set aside a conveyance made by a deceased debtor with intent to defraud creditors, though the grantor's estate is represented by an administrator; and the administrator may also maintain such action.—*Bottorff v. Covert*, 90 Ind. 508.

[e] (Sup. 1897)

A creditor's complaint against an administrator to set aside a fraudulent conveyance of land by the intestate must allege that the estate is insufficient to pay the intestate's debts, including such claim.—*State v. Parsons*, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1660, 1660½.

See, also, 18 Cyc. pp. 945-946.

#### § 425. Rights of action by executors or administrators.

Against surviving partner, see PARTNERSHIP, § 258.

By administrator de bonis non, see ante, § 120.

Effect of settlement by beneficiaries on right of action for causing death, see DEATH, § 25.

For accounting as to assets of estate, see ante, § 85.

For collection of assets of estate, see ante, § 86.

For construction of will, see WILLS, § 697.

For personal property converted, see ante, § 154.

For possession of realty, see ante, § 130.

For rents and profits of realty, see ante, § 131.

Notes taken by representative, see ante, § 153.

Personal property of decedent, see ante, § 153.

Relating to real estate in general, see ante, § 129.

Relating to trust estates and other equitable interests, see ante, § 45.

Right of married woman to sue as administratrix without joinder of husband, see HUSBAND AND WIFE, § 203.

Rights of action as assets of estate, see ante, §§ 48-52.

Rights of action by heirs or personal representative, see DESCENT AND DISTRIBUTION, § 91.

Special administrator, see ante, § 122.

To recover leasehold of decedent, see ante, § 134.

To recover payments made on claims against estate, see ante, § 287.

To redeem from foreclosure sale, see MORTGAGES, § 615.

To set aside fraudulent conveyances, see ante, § 57.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1663, 1665-1672.

See, also, 18 Cyc. pp. 874-880.

**§ 426. — In general.**

Breach of agreement by joint debtors with decedent, to release him, ground for nominal damages, see DAMAGES, §§ 11, 12.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1663, 1665.

See, also, 18 Cyc. p. 874.

**§ 427. — Personal or representative capacity.****[a] (Sup. 1825)**

If an executor change the nature of the debt originally due to the intestate by a contract made with himself, he must sue for the new debt in his own name, and not in his representative character.—*Helm v. Van Vleet*, 1 Blackf. 342, 12 Am. Dec. 248.

[b] An executor or administrator may sue in his individual capacity on a note payable to him in his representative capacity.—(Sup. 1833) *Barnes v. Modisett*, 3 Blackf. 253; (1882) *Ratcliff v. Everman*, 87 Ind. 446.

**[c] (Sup. 1842)**

An administrator to whom a note is made payable may sue thereon in his own name or in his representative capacity, at his election.—*Sheets v. Pabody*, 6 Blackf. 120, 38 Am. Dec. 132.

Where a note made payable to an executor is delivered to him as such executor, he may sue thereon in his representative capacity.—*Id.*

**[d] (Sup. 1843)**

An executor can sue in his own right on a judgment obtained by him as executor for a debt due to his testator.—*Campbell v. Baldwin*, 6 Blackf. 364.

**[e] (Sup. 1878)**

In an action by one styling himself administrator of the estate of decedent against an adjoining proprietor for obstructing the passage of driftwood theretofore carried across the lands of both by the overflow of an adjacent river, the complaint averred that plaintiff, by inheritance from decedent, was the sole owner of the lands injured by such obstruction. *Held*, that the action could not be maintained by plaintiff as administrator, as the averments of the complaint showed a personal right of action.—*Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114.

**[f] (Sup. 1881)**

Where a note, given for a debt due the estate, was payable to the administratrix individually, she might sue on it in her representative capacity, as the money recovered would be assets of the estate.—*Krutz v. Stewart*, 76 Ind. 9.

**[g] (Sup. 1883)**

Where notes evidencing an indebtedness to an estate were executed to the administrator, he might sue on them in his own name, treating his designation as administrator as merely

descriptio personæ and as surplusage.—*Sedgwick v. Tucker*, 90 Ind. 271.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1666-1672.

See, also, 18 Cyc. pp. 874-880; note, 51 L. R. A. 261.

**§ 428. Rights of action against executors or administrators.**

As parties to foreclosure suit, see MORTGAGES, § 419.

Effect of insolvency of estate, see ante, § 417.

Enforcement of distress for rent, see LANDLORD AND TENANT, § 268.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1677-1691.

See, also, 18 Cyc. pp. 880-885, 975-978.

**§ 429. — In general.****[a] (Sup. 1841)**

An administrator may be sued in equity for a debt due from the intestate.—*Judah v. Brandon*, 5 Blackf. 506.

**[b] (Sup. 1873)**

The administrator of a county clerk is not liable in a suit on the clerk's official bond for sheriff's fees collected by the clerk, but not turned over; the remedy being by filing a claim as in other cases.—*State ex rel. Arnold v. Givan*, 45 Ind. 267.

**[c] (Sup. 1874)**

Where the demand in suit is against an administrator on a cause of action against the surety of his decedent, the circumstance that there are other defendants does not change the liability of the administrator, as in such case separate judgments may be rendered.—*Steinmetz v. State ex rel. Bricka*, 47 Ind. 465.

**[d] (Sup. 1890)**

Where money which belonged to heirs was paid to the administrator, the proper remedy of the heirs to recover the same was an action in the nature of an application for an order requiring him to pay over the money to them, and not an action upon a common count for money had and received.—*Johnson v. Alexander*, 125 Ind. 575, 25 N. E. 706, 9 L. R. A. 600.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1677, 1678.

See, also, 18 Cyc. p. 881.

**§ 430. — Personal or representative capacity.****[a] (Sup. 1851)**

If an administrator promises in writing that, in consideration of having assets, he will pay a debt of the intestate, he may be sued on his promise in his individual capacity, and the judgment against him will be de bonis propriis.—*Carter v. Thomas*, 3 Ind. 213.

## [b] (App. 1881)

Where decedent lived on a farm at the time of his death on which there was a growing crop of wheat on a 40-acre tract of land adjacent to the dwelling, planted by a tenant on shares, and his widow claimed the landlord's share of the crop under the statutory right of quarantine, but the administrator disregarded her claim and inventoried the wheat and disposed of it, accounting for the proceeds as part of the assets of the estate, the widow could waive her right of action for the conversion, and pursue and obtain the proceeds as against the administrator in his trust capacity.—*Willitts v. Schuyler*, 29 N. E. 273, 3 Ind. App. 118.

## [c] (App. 1892)

Where an administrator unlawfully obtains possession of personal property, and retains the same as part of his decedent's estate, an action for the recovery of the property cannot be brought against him in his representative capacity.—*Davis v. Schmidt* (App.) 31 N. E. 840.

## [d] (App. 1900)

Where an executor empowered by a will to mortgage testator's estate executes notes and a mortgage on which he is personally liable, a foreclosure and sale of the mortgaged premises do not prevent the mortgagee from bringing action against the executor, in his personal capacity, to recover a deficiency.—*De Condres v. Union Trust Co.*, 58 N. E. 90, 25 Ind. App. 271, 81 Am. St. Rep. 95.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1683-1688.

See, also, 18 Cyc. pp. 880-885.

## § 431. Conditions precedent.

## [a] (Sup. 1858)

It is not necessary that claims against an estate should have been reduced to judgment in order that an administrator may be authorized to sue to set aside a conveyance made by his intestate, fraudulent as against the creditors.—*Love v. Mikals*, 11 Ind. 227.

An administrator may sue to set aside a conveyance of his intestate, fraudulent as against creditors, without leave of court to dispose of the intestate's land for his debts, provided that he in his complaint aver facts upon which leave will be granted.—*Id.*

## [b] (Sup. 1859)

No action will lie against the estate of a decedent for the recovery of money placed in his hands as the plaintiff's agent, until a demand has been made on the administrator for an accounting. Nor does the placing of the claim on the appearance docket operate in lieu of a demand.—*Hannum v. Curtis*, 13 Ind. 206.

## [c] (Sup. 1880)

Where, in a suit against an executor on a claim against his decedent's estate, the record shows that the claim was duly entered on the

appearance docket 10 days prior to the first day of the term, it will be held that the defendant had sufficient notice so as to give the court jurisdiction over defendant.—*Round v. State ex rel. Riley*, 14 Ind. 493.

## [d] (Sup. 1865)

2 Gav. & H. St. § 60, relating to the settlement of decedents' estates, provides that claims against estates shall be filed in the court of common pleas. *Held* not to apply to cases where the legal representative of a deceased joint obligor is a proper party defendant in an action against the survivor.—*Braxton v. State ex rel. Albert*, 25 Ind. 82.

## [e] (Sup. 1865)

The statute requiring claims against decedents' estates to be filed in the court of common pleas and placed upon the issue docket does not apply to cases where other parties are necessarily joined as defendants in suits against the personal representatives of a decedent. In such cases the suit may be commenced by summons.—*Martin v. Asher's Adm'r*, 25 Ind. 237.

## [f] (Sup. 1870)

Under 2 Gav. & H. St. p. 501, § 62, and *Id.* p. 503, § 66, where a complaint shows on its face that the action is to recover a claim against the estate of decedent, and the proceeding has been commenced, not by filing a claim, but as an ordinary action, the suit should be dismissed on motion.—*Hyatt v. Mavity*, 34 Ind. 415.

## [g] (Sup. 1873)

In a proceeding to enforce a claim against the estate of a decedent, if another person is a necessary party with the administrator or executor, the claim need not be filed against the estate, but an ordinary action may be brought against the administrator and such other defendant.—*Stanford v. Stanford*, 42 Ind. 485.

To confer jurisdiction over the subject of the action, a claim against the estate of a decedent must be filed, placed upon the appearance docket, and, if not allowed, must be transferred to the issue docket; and, upon demurrer for want of jurisdiction, the record must show that such steps have been taken.—*Id.*

## [h] (Sup. 1881)

The heirs of a decedent may maintain an action against his administrator to recover rents and profits of the real estate accrued since the decedent's death, and received by the administrator, without any other demand than filing the claim therefor in the proper court.—*Trimble v. Pollock*, 77 Ind. 576.

## [i] (Sup. 1881)

The rule requiring a creditor to proceed with his judgment and execution before suing in equity to subject property to the payment of debts does not apply where the debtor has deceased.—*Johnson v. Jones*, 79 Ind. 141.



[J] (Sup. 1888)

Claims against an estate even though such as ordinarily require a demand before suit brought may be filed and prosecuted to judgment without a demand.—*Armacost v. Lindley*, 116 Ind. 295, 19 N. E. 138.

A complaint, in an action by a widow against her husband's estate, alleging that on a sale of land, of which four-fifths belonged to her, her husband, without her knowledge or consent, took notes for, and collected and converted, the entire deferred payments, is sufficient without alleging a demand.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 764, 767, 819, 1664, 1679-1682, 1689-1691; 1 CENT. DIG. Action, § 64.

See, also, 18 Cyc. pp. 885-890.

**§ 432. Defenses against executors or administrators.**

[a] (Sup. 1871)

In an action by an executor of an estate on a note payable to him as executor, etc., an answer alleging that the note belonged to the estate, and that his letters testamentary have been revoked, is good.—*Leach v. Lewis*, 38 Ind. 160.

[b] (Sup. 1900)

In an action to set aside a conveyance by a testator, and for a sale of the property necessary to pay debts, an answer alleging that other property conveyed by testator was equally liable with that conveyed to defendant was insufficient.—*Kaufman v. Elder*, 56 N. E. 215, 154 Ind. 157.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 1074-1076.

See, also, 18 Cyc. p. 891.

**§ 433. Defenses by executors or administrators.**

[a] (Sup. 1845)

If an administrator be sued for a debt of the intestate, and, after the commencement of the suit, his letters of administration be revoked, he may plead such revocation in bar of the further maintenance of the action.—*Morrison v. Cones*, 7 Blackf. 593.

[b] (Sup. 1876)

Where an administrator is sued, as such, for the recovery of a money judgment against the estate represented by him, he cannot, in such action, set up an estoppel to protect his title to real estate under a purchase thereof made by him in his individual capacity from the heirs at law of his decedent.—*Lee v. Carter*, 52 Ind. 342.

[c] (Sup. 1877)

In an action by a widow against the administrator of her husband's estate to recover one-third of the value of property belonging to the estate, which the administrator has allowed to be sold under a mortgage foreclosure, the

fact that the plaintiff did not join in such mortgage, and had not relinquished her interest in the property, is no defense thereto.—*Morgan v. Sackett*, 57 Ind. 580.

[d] (App. 1892)

An answer in an action against an administrator of an estate which alleges that part of the claim sued on was not due at the original filing thereof, but arose after such filing, is insufficient, under Rev. St. 1881, § 2310, providing that the holder of a claim against an estate, whether it be due or not, shall file a statement thereof with the clerk of the court in which the estate is pending.—*Sheeks v. Fillion*, 3 Ind. App. 262, 29 N. E. 786.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 1692-1697.

See, also, 18 Cyc. pp. 892-894.

**§ 434. Set-off and counterclaim.**

In action to recover attorney's fees, see ATTORNEY AND CLIENT, § 161.  
Pleading, see PLEADING, § 147.

[a] (Sup. 1850)

Decedent recovered a judgment against a third person before a justice of the peace. Decedent was indebted to the justice, and told the latter to take the first money collected on the judgment and apply it on the debt. Afterwards decedent died intestate. His administrator demanded the money collected on the judgment from the justice, who refused to pay it over, but applied it on his debt. *Held*, that the justice's authority to so apply the money ceased on decedent's death; and hence the money, being collected after decedent's death, belonged to his administrator.—*Slaughter v. State ex rel. Chase*, 2 Ind. 220.

[b] (Sup. 1859)

Where the intestate held the note of the defendant, and agreed that it should be paid by boarding, etc., his children, and afterwards the administrator sanctioned the agreement, the defendant was allowed to set it up in a suit on the note by the administrator de bonis non as to board both before and after the death of the intestate.—*Sorin v. Olinger*, 12 Ind. 20.

[c] (Sup. 1860)

A died intestate, leaving an estate worth not over \$300. After letters of administration had been granted, the assets of the estate were, on petition of the widow, delivered to and vested in her by order of the court. Suit by the widow upon an account, part of such assets. The defendant pleaded as a set-off a note of the deceased purchased after his death. *Held*, that no claim against the decedent, acquired after his property vested in his widow, could be set off against her claim.—*Haugh v. Seabold*, 15 Ind. 343.

[d] (Sup. 1861)

A set-off may be pleaded to an action by an administrator.—*Schoonover v. Quick*, 17 Ind. 196.

[e] (Sup. 1865)

A lessor in a written lease under seal, who has bought an unexpired term from the administrator of the lessee, who died insolvent, will be allowed by a court of equity to set off the amount of the rent stipulated in the lease against the amount of the purchase money of the unexpired term, when all the parties were under the mistaken belief at the time the unexpired term was sold that the lessee's estate was solvent.—*Carley v. Lewis*, 24 Ind. 23.

[f] (Sup. 1866)

In an action by an administrator for a debt due decedent's estate which originated after the intestate's death, defendant cannot set off a debt due him by the intestate in his lifetime.—*Dayhuff v. Dayhuff's Adm'r*, 27 Ind. 158.

[g] (Sup. 1875)

In a suit by an administrator on a note executed to him for an indebtedness to the estate which he represents, which originated after the death of the intestate, the defendant cannot set off a debt due to him from the decedent in his lifetime.—*Harte v. Houchin*, 50 Ind. 327.

[h] (Sup. 1877)

In an action by an administrator to recover the balance of purchase money due on land sold by him belonging to his decedent's estate, the purchaser cannot set off taxes paid by him accrued against the land prior to the sale, but subsequent to the death of the decedent, since the administrator is not liable for such taxes.—*Henderson v. Whiting*, 56 Ind. 131.

[i] (Sup. 1877)

In an action by an administrator of the estate of an insolvent decedent against an attorney to recover money collected by the latter for such decedent, the defendant cannot set off the value of services rendered by him for such decedent.—*Ferris v. Mullan*, 56 Ind. 164.

Services rendered to an executor after the testator's death cannot be set off in an action by the executor for money due the estate, since, being expenses of the administration, they must be allowed by the probate court.—*Id.*

[j] (Sup. 1879)

Where a cross demand against an estate is a proper set-off to a claim in favor of the estate, the fact that it was not due at the time of decedent's death does not deprive the holder thereof of the benefit of the set-off, if it be due at the time it is pleaded.—*Convery v. Langdon*, 66 Ind. 311.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1698-1715.

See, also, 18 Cyc. pp. 894-903.

### § 435. Jurisdiction.

As dependent on situs of property, see COURTS, § 19.

Effect of substitution of administrator on death of party, see ABATEMENT AND REVIVAL, § 50.

Exclusive or concurrent jurisdiction, effect of priority of jurisdiction, see COURTS, § 475.

Jurisdiction as dependent on amount or value in controversy, see COURTS, § 198.

Jurisdiction of common pleas courts, see COURTS, § 132 (1).

Jurisdiction of justices of the peace, see JUSTICES OF THE PEACE, § 37.

Waiver of objections to jurisdiction, see COURTS, § 37.

[a] (Sup. 1838)

Under Prob. Act, § 47, investing probate courts with jurisdiction in all suits against administrators arising from any duty omitted in the discharge of their trusts, an action may be brought in the probate court to compel specific performance of a contract of sale of land against an administrator who had individually executed a bond to convey to his intestate prior to his death, and who, in selling his intestate's interest in the land, executed a bond to convey in his individual capacity, instead of signing as administrator the bond that had been executed in favor of his intestate.—*Boyle v. Moss*, 4 Blackf. 535.

[b] (Sup. 1857)

The actions contemplated in Common Pleas Act, §§ 11, 12, and Circuit Court Act, § 5, are different from those specified in Common Pleas Act, § 4; and statutory provisions touching the former class do not necessarily affect the latter.—*Fleece v. Indiana & I. C. R. Co.*, 8 Ind. 460.

Under Common Pleas Act, § 4, giving that court exclusive jurisdiction among others of all actions against executors and administrators, and section 11, giving the common pleas and circuit court concurrent jurisdiction in all civil cases except for slander, libel, etc., the Legislature has not included the action specified in section 4 as civil cases, but limited the term "civil cases" to that class of common-law actions not heretofore ranked with equitable or fiduciary.—*Id.*

[c] (Sup. 1865)

All suits against executors or administrators must be brought in the court of common pleas.—*Wheeler v. Calvert's Adm'r*, 25 Ind. 365.

[d] (Sup. 1867)

The circuit court cannot give full relief in suits to subject lands fraudulently conveyed because the common pleas court has exclusive jurisdiction of applications for the sale of the real estate of decedents for the payment of debts. The circuit court can proceed no further than to decree that the lands are liable to be sold to pay such debts.—*Tyler v. Wilkerson*, 27 Ind. 450.

The circuit court has jurisdiction of an application by creditors to subject lands alleged to have been fraudulently conveyed by a decedent to the payment of debts.—*Id.*

[e] (Sup. 1873)

The circuit court has no jurisdiction to entertain a suit to have a claim against an es-

tate set off against a judgment in favor of such estate.—*Reno v. Robertson*, 41 Ind. 567.

[f] (Sup. 1874)

Where the legal representative of a deceased joint obligor is a proper or necessary party defendant in a suit on the joint obligation against the survivors, the court of common pleas has jurisdiction to try the claim against the estate.—*Myers v. State ex rel. McCray*, 47 Ind. 293.

[g] (Sup. 1877)

A cause of action against an administrator and the guardian of a person of unsound mind jointly must be prosecuted by ordinary civil proceeding under the general jurisdiction of the circuit court.—*Noble v. McGinnis*, 55 Ind. 528.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1716-1725.

See, also, 18 Cyc. pp. 905-911.

§ 436. Venue.

Application of general statutes, see VENUE, § 5.

[a] (Sup. 1865)

When an administrator is a necessary party to an action, he may be sued in any county where any of his co-defendants reside.—*Owen v. State ex rel. Owen*, 25 Ind. 107.

[b] (Sup. 1880)

A claim filed against a decedent's estate is a civil suit within the statute relating to changes of venue.—*Lester v. Lester*, 70 Ind. 201.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1726-1728.

See, also, 18 Cyc. pp. 911, 912.

§ 437. Time to sue and limitations.

Accrual of cause of action, see LIMITATION OF ACTIONS, §§ 50, 65, 66.

Acknowledgment or new promise by executor or administrator as affecting limitations, see LIMITATION OF ACTIONS, § 143.

Application of general statutes of limitation, see LIMITATION OF ACTIONS, §§ 25, 20, 39.

Effect of death and administration in general, see LIMITATION OF ACTIONS, §§ 80-83.

Estoppel to rely on limitations, see LIMITATION OF ACTIONS, § 13.

Evidence as to limitations, see LIMITATION OF ACTIONS, § 196.

Existence of trust as affecting limitations, see LIMITATION OF ACTIONS, § 102.

Issues and proof as to limitations, see LIMITATION OF ACTIONS, § 193.

Part payment of debt as affecting limitations, see LIMITATION OF ACTIONS, §§ 154, 155.

Pleading limitations, see LIMITATION OF ACTIONS, §§ 179, 183.

Time of commencement of action as affecting limitations, see LIMITATION OF ACTIONS, § 130.

[a] (Sup. 1822)

A statute (Act Jan. 6, 1821) providing that executors of any individual banker may sue

within five days after the taking out of letters testamentary does not preclude suit after the expiration of the five days.—*Gray v. Rees*, 1 Blackf. 518.

[b] (Sup. 1840)

A plea in bar by an executor, that he was not appointed executor one year before suit brought, is good.—*Ferrand v. Walker*, 5 Blackf. 424.

[c] (Sup. 1844)

The statute of limitations does not run in favor of an administrator against an action for distributive shares.—*Smith v. Calloway*, 7 Blackf. 86.

[d] (Sup. 1860)

If a settlement is made without in some manner finally disposing of the debts against an estate, which are within the knowledge of an administrator, the creditors will be barred from any further action against such administrator after three years.—*Beard v. First Presbyterian Church of Town of Peru*, 15 Ind. 490.

[e] (Sup. 1874)

In an action against decedent's executors on a mutual open account, it was error to charge that limitations would not bar any of the items of plaintiff's account.—*Sanders v. Sanders*, 48 Ind. 84.

Since, in an action against decedent's executors on a mutual, open, and current account, limitations begin to run from the date of the last item proved on either side, an instruction that the jury should disallow all items in plaintiff's account which accrued six years prior to deceased's death was error.—*Id.*

[f] (Sup. 1878)

In an action by the administrator of an estate against a former administrator to recover money received by defendant for the benefit of the estate, an answer averring that a final settlement of the estate was made and confirmed by the court, and that the suit was not commenced within three years after said settlement was so made and confirmed, is sufficient.—*Sanders v. Loy*, 61 Ind. 298.

[g] (Sup. 1886)

Where an action by an administrator to avoid a conveyance of his intestate on the ground that it was in fraud of creditors must be brought within five years from his death (Rev. St. 1881, § 2334), a complaint by an administrator filed for that purpose is bad on demurrer, where it shows on its face that it was not filed within five years from the death of the intestate.—*Cook v. Chambers*, 107 Ind. 67, 8 N. E. 10.

[h] (Sup. 1905)

The three-year statute of limitations (Burns' Ann. St. 1901, § 2558) has no application to an action for money had and received, by a ward against the executor of his deceased

guardian's estate.—*Roberts v. Smith*, 165 Ind. 414, '74 N. E. 894.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1729-1764.

See, also, 18 Cyc. pp. 913-944.

### § 438. Parties.

Actions for causing death, see DEATH, § 41.  
Actions to construe will, see WILLS, § 700.

Actions to redeem from foreclosure sale, see MORTGAGES, § 615.

Administrator as necessary party to action to set aside fraudulent conveyance by deceased debtor, see FRAUDULENT CONVEYANCES, § 255.

Administrator as party in action by heirs of lessor for rent, see DESCENT AND DISTRIBUTION, § 90.

Contest of will, see WILLS, § 267.

In action on insurance policy, see INSURANCE, § 624.

Personal representative as necessary party in action against heir, see DESCENT AND DISTRIBUTION, § 144.

To foreclosure suits, see MORTGAGES, § 427.

Will contest, see WILLS, § 266.

#### [a] (Sup. 1842)

Where a petition for scire facias to have execution against the real estate of a decedent on a judgment against his executor or administrator does not make terre-tenants defendants, the defect may be assigned for error.—*Williams v. Morehouse*, 6 Blackf. 215.

#### [b] (Sup. 1856)

The fact that, if the widow and heirs are not parties in the prosecution of a claim against the administrator, they may be witnesses, is no reason for making them parties.—*Nelson v. Hart*, 8 Ind. 293.

A creditor of a decedent's estate in the prosecution of his claim against the administrator cannot join the widow and heirs, as the administrator represents their interest in the estate, and he is bound to make all necessary defense to the claimant's demand.—*Id.*

In a suit by a creditor of an estate against the administrator and the widow and heirs, a demurrer by the administrator for misjoinder of parties should be overruled.—*Id.*

#### [c] (Sup. 1859)

In an action against an administrator by heirs to recover certain sums for which he had failed to account, the answer set forth that certain heirs of B. were interested, and the reply alleged that B., by way of advancement, assigned his interest in the estate to his father, the decedent, by a writing which had been lost. *Held*, that the heirs of B. should have been made parties.—*Murphy v. Tilly*, 11 Ind. 511.

#### [d] (Sup. 1878)

Where the executors of a decedent's estate, who were charged with the duty of ap-

propriating the interest on a specified fund to the education of the testator's two sons, had failed in that duty, one of the sons, who had completed his education at his own expense, was entitled to bring an action on his own relation against them for the repayment of the amount of such expenses. His interests and those of the other son were not joint.—*Heady v. State ex rel. Heady*, 60 Ind. 316.

#### [e] (Sup. 1880)

A decedent's estate cannot be a party to a suit as such, but the suit should be carried on in the name of a representative of the deceased.—*Wells' Estate v. Wells*, 71 Ind. 509.

#### [f] (Sup. 1881)

Prior to Rev. St. 1881, § 2311, an ordinary suit might be brought against the principal debtor and the administrator of his surety, and, if the principal was not served with process, might go on against the administrator alone, unless objection was made by motion before pleading.—*Corbaley v. State ex rel. Holmes*, 81 Ind. 62.

#### [g] (App. 1899)

Under Burns' Rev. St. 1894, § 2466 (*Hornor's Rev. St. 1897*, § 2311), prohibiting a joint action against an estate and a joint or joint and several obligor with the decedent, but requiring the creditor to file his claim against the estate only, and section 2467 (2312), making every contract executed jointly by a decedent with any other person joint and several for the purpose of enforcing it against decedent's estate, the wife was properly not made a party to an action against the husband's estate on a mortgage signed by husband and wife.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

#### [h] (App. 1903)

A devisee having a life estate in an undivided third of testator's real estate has sufficient interest therein to be properly joined as party plaintiff in an action by the administrator to restrain a tenant from committing waste.—*Halstead v. Coen*, 67 N. E. 957, 31 Ind. App. 302.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1765-1785,

1790, 1791; 35 CENT. DIG. MTG. § 1282;

37 CENT. DIG. PARTIES, §§ 17, 25, 37, 50.

See, also, 18 Cyc. pp. 944-971.

### § 439. Joinder or intervention in actions by others.

Action to set aside settlement, see post, § 509 (7).  
Necessity for making sole distributee party where administrator is appointed after order that administration is unnecessary, see ante, § 29.

Unrepresented estate as party to action, see ante, § 3.

#### [a] (Sup. 1849)

On a bill by an administrator de bonis non to set aside the entry of satisfaction of a decree of foreclosure obtained by the former

administrator, the mortgagor and widow and heirs of the intestate being made defendants, it cannot be objected, on a bill of review or rehearing, that the representatives of the former administrator were not made parties to the original bill; the rights of the parties to the suit not being affected by the omission.—*Talbott v. Dennis*, 1 Ind. 471, *Smith*, 357.

[b] (Sup. 1850)

To a bill filed in chancery to subject certain real estate left by a decedent to the payment of a judgment assigned to the plaintiff, the administrator is properly made a party.—*Teetor v. Abden*, 2 Ind. 183.

[c] (Sup. 1853)

A bill filed to subject to the payment of a judgment the equitable estate of a deceased debtor, which does not make his administrator a party, must allege that none had been appointed.—*Unknown Heirs of Whitney v. Kimball*, 4 Ind. 546, 58 Am. Dec. 638.

[d] (Sup. 1863)

In an action by heirs for specific performance of a contract of their testator, the executor was not a necessary party in his character of executor, where he was also one of the devisees.—*Watson v. Mahan*, 20 Ind. 223.

[e] (Sup. 1863)

In an action by the heirs of a deceased lessor to recover rents from the lessee, the administrator may be made a party, on showing that rents have been paid to him which should have been paid to the heirs.—*King v. Anderson*, 20 Ind. 385.

[f] (Sup. 1878)

In an action to foreclose a mortgage, where complainant alleged that plaintiff, widow of decedent mortgagee, had made an amicable settlement with other heirs, and was the sole owner of the mortgage which had been assigned to her; that the administrator of the estate had fully settled it, and been discharged, and that the settlement had been approved by the court,—the administrator was neither a necessary nor a proper party to the action.—*Westfield v. Spencer*, 61 Ind. 339.

[g] (Sup. 1879)

Where a grantee dies leaving no personal estate to be administered, his administrator is not a necessary party defendant to a suit by the grantor's administrator to reform the deed and to enforce a vendor's lien.—*Overly v. Tipton*, 68 Ind. 410.

[h] (Sup. 1884)

A complaint to set aside a fraudulent conveyance of a deceased debtor, which does not make the administrator a party, is bad on demurrer.—*Willis v. Thompson*, 93 Ind. 62.

[i] (Sup. 1884)

Pending suit for partition between the heirs of decedent, the administrator cannot intervene praying for a sale of the land to make assets.—*Clayton v. Blough*, 93 Ind. 85.

[j] (Sup. 1885)

In a suit to enforce a vendor's lien, the vendee being dead, his administrator is properly made a party.—*Lord v. Wilcox*, 99 Ind. 491.

[k] (Sup. 1885)

Under Rev. St. 1881, § 2311, providing that no action can be brought against an executor or administrator on any contract executed jointly or jointly and severally by decedent and another person, but that the holder of such contract can enforce it against the estate only by filing his claim thereon, where an executor and two other persons are sued on a contract entered into by decedent and the other defendants, the executor has a right to a dismissal of the action as to him, but not as to all the defendants.—*State ex rel. Young v. Cunningham*, 101 Ind. 461.

[l] (Sup. 1889)

Where a creditor files a bill to set aside the conveyance of a deceased debtor for fraud, the personal representative of the debtor is a necessary party.—*Hays v. Montgomery*, 118 Ind. 91, 20 N. E. 646.

[m] (App. 1903)

Where, in ejectment, defendant seeks to obtain title to the west of three acres, of which he is in possession, relying on a mistake in the description in his deed, which described the middle, instead of the west, of three acres as that conveyed, the absence of the representatives of his grantor's estate is not material, where the grantor before her death had parted with all the interest in all of the acres.—*Wieneke v. Deputy*, 68 N. E. 921, 31 Ind. App. 621.

[n] (App. 1904)

Under Burns' Rev. St. 1901, § 273, providing that, when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be joined, on the death of a party defendant the plaintiff is entitled to have an administrator appointed and substituted as a party, whether issues have been joined or not.—*Trent v. Edmonds*, 70 N. E. 169, 32 Ind. App. 432.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1765, 1766, 1770, 1771, 1774-1786; 37 CENT. DIG. PARTIES, §§ 17, 25, 37, 38, 50, 64.

See, also, 18 Cyc. pp. 963-967, 974, 975.

#### § 440. Removal or death pending action.

Revocation of letters before suit, see ante, §§ 432, 433.

[a] (Sup. 1874)

The administrator of the estate of an executor in an action by the legatee and heirs of a testator against such executor since deceased and a creditor of the estate for the fraudulent payment of a claim of the creditor by the ex-

ecutor is not a necessary party.—*Lancaster v. Gould*, 46 Ind. 307.

[b] (*Sup.* 1885)

The pendency of proceedings to remove an administrator de bonis non is not a ground for staying or abating proceedings in an action brought by him.—*Langsdale v. Woollen*, 90 Ind. 575.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1787-1789.

See, also, 18 Cyc. pp. 968-970.

§ 441. Process and appearance.

Process to sustain default judgment, see post, § 453.

[a] (*Sup.* 1827)

On a bill against an administrator and the heir to enforce the lien of the complainant on land alleged to have been sold and conveyed by him to the deceased, the heir being a nonresident, a decree should not be made without proof of publication of notice of the suit.—*Aborn v. Burnett*, 2 Blackf. 101.

[b] (*Sup.* 1853)

Under the Revised Statutes of 1843, service of process in the probate court upon an administrator must be made 20 days before the first day of the term.—*Carter v. Spencer*, 4 Ind. 78.

[c] (*Sup.* 1853)

The court has not jurisdiction over the person of an administrator, sued on a note of his intestate, without actual or constructive notice to him, according to statute.—*Crabb v. Atwood & Co.*, 10 Ind. 322.

[d] Where an administrator is sued on a claim against his decedent's estate, and process is served upon him, he may, on special appearance, and on his affidavit showing that such claim has never been filed in the clerk's office and placed on the appearance docket, obtain a dismissal of the action; but if he enters a full appearance to the action, and demurs to or answers the complaint, he waives the statutory requirements as to filing claims.—(*Sup.* 1877) *Morrison v. Kramer*, 58 Ind. 38. CONTRA, see (1873) *Stanford v. Stanford*, 42 Ind. 485.

[e] (*Sup.* 1877)

An appearance by attorney is a sufficient appearance by an administrator in an action on a claim against his decedent's estate where judgment is rendered by agreement against the estate.—*Collins v. Rose*, 59 Ind. 33.

[f] (*App.* 1900)

*Horner's Rev. St.* 1897, §§ 2311, 2319, 2324 (*Burns' Rev. St.* 1894, §§ 2466, 2474, 2479), provide that, on refusal of an administrator to admit a claim against the estate, it shall be transferred to the issue docket, and amended by making any other person bound with the decedent a defendant in the action,

and that thereafter the action shall be prosecuted against him as a codefendant with the administrator, and judgment rendered accordingly. Held that, in an action against an administrator on a joint and several note signed by his decedent, where the administrator had appeared to defend the claim, and the claim had been amended by making the other signers of the note co-defendants with the administrator, and one of such co-defendants set up, by cross complaint, that he signed the note only as surety for the decedent, the court had jurisdiction of the person of the administrator on the cross complaint, and might issue a rule against the administrator to answer it, though no process was issued on the cross complaint, and the administrator had not appeared to it.—*Rowman v. Citizens' Nat. Bank of Martinsville*, 56 N. E. 39, 25 Ind. App. 38.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1792-1797.

See, also, 18 Cyc. pp. 972, 973.

§ 442. Pleading.

Aider by verdict or judgment, see PLEADING, § 433.

Alternative allegations, see PLEADING, § 20.

Filing written instruments with pleading, see PLEADING, § 308.

Necessity for reply, see PLEADING, § 105.

Pleading limitations, see LIMITATION OF ACTIONS, §§ 179, 183.

Set-off or counterclaim, see PLEADING, § 144.

Verification, see PLEADING, § 290.

Waiver of objections, see PLEADING, § 406.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1798-1857; 39 CENT. DIG. Plead. § 881.

See, also, 18 Cyc. pp. 978-1019.

§ 443. — In general.

Pleading limitations, see LIMITATION OF ACTIONS, § 178.

[a] In suit by an administrator de bonis non against a debtor of the original intestate, the declaration must state the name of the previous administrator, and aver that the money had not been paid to him, nor to the original intestate, nor to the plaintiff.—(*Sup.* 1830) *Vanblaricum v. Yeo*, 2 Blackf. 322; (1837) *Griffith v. Fischli*, 4 Blackf. 427.

[aa] (*Sup.* 1840)

In an action against executors on a note executed by the testator and another, a declaration averred that the makers were dead, such other having died first, and that neither of them had paid the note, nor had the defendants paid the same. Held, that the declaration was not objectionable for not alleging the nonpayment by the representatives of the other maker.—*Newkirk v. Johnson*, 5 Blackf. 362.

[b] (*Sup.* 1840)

A replication to a plea of plene administravit as to the goods of the testator, that the

testator, at the time of his death, was seised of real estate which the defendant, if necessary, could have reduced to assets for the payment of debts, is bad on general demurrer.—*Joiner v. Sanders*, 5 Blackf. 378.

[bb] (Sup. 1842)

In assumpsit against an administrator on the promise of his intestate, the plea was not guilty. *Held*, on general demurrer, that the plea was insufficient.—*Morrison v. Kelly*, 6 Blackf. 224.

[c] (Sup. 1843)

In an action against an administrator, it is too late, after a plea to the merits, to object to the statement of demand.—*Davis v. Davis*, 6 Blackf. 394.

[cc] (Sup. 1845)

The declaration in a suit against the administrator of the acceptor of a bill of exchange need not allege that the plaintiff's claim had been filed in the office of the clerk of the probate court.—*Phipps v. Addison*, 7 Blackf. 375.

[d] (Sup. 1845)

A declaration is not objectionable because it describes the plaintiffs as executors and sets out a cause of action in their own right.—*Daniels v. Richie*, 7 Blackf. 391.

[dd] (Sup. 1852)

Under Rev. St. 1843, providing for the payment by an administrator of claims which have either been admitted by the judge or allowed by the executor, plaintiff in an action on a claim founded on a judgment, in averring that the probate court had ordered the payment of his demand, averred a sufficient establishment of his claim, and it was immaterial that he did not sufficiently allege a judgment.—*State ex rel. Pierson v. Bowden*, 3 Ind. 504.

[e] (Sup. 1853)

In assumpsit by executors on three promissory notes, defendants interposed a plea that the notes described in the declaration, and another, of the same date, for \$75, were all given to the testator in his lifetime, in consideration of the sale by the testator to the defendant of a certain tract of land, described therein, and for no other consideration whatever; and, at the time of the execution of the notes, the testator agreed to convey the land to the defendant on payment of said several notes. It was averred that, before the commencement of the suit, the defendant had paid the \$75 note and \$74 of the first note described in the declaration, and that all the notes were due before the commencement of the suit, and that neither the testator in his lifetime, nor the plaintiff since his death, at any time before the commencement of the suit, had conveyed or offered to convey to the defendant the said land upon the payment of the note. *Held*, that the plea was a bar to the action.—*Ireland v. Chauncey*, 4 Ind. 224.

[ee] (Sup. 1854)

In an action by the administrator of M. M. against the administrator of J. M., the com-

plaint alleged that J. M. had fraudulently induced M. M. to marry him, whereby he became possessed of a large amount of real and personal property of M. M., and that J. M. had a wife living, which was unknown to M. M. The answer alleged that the property was voluntarily given by M. M. to J. M. in his lifetime; that M. M., after she had given the property, learned that J. M. was married to another woman, but made no objection, and permitted him to retain the same. *Held*, that the answer was insufficient.—*Wiggins v. Holman*, 5 Ind. 502.

[f] (Sup. 1858)

In a suit by an administrator to set aside a conveyance of his intestate as fraudulent against creditors, the nature of the claims for the payment of which the real estate is sought to be subjected need not be alleged in the complaint.—*Love v. Mikals*, 11 Ind. 227.

[ff] (Sup. 1859)

The statute provides that, in the absence of heirs, the administrator shall receive rents. A complaint for rent by the administrator, averring that he had authority to, and did, rent the property, was *held* a sufficient allegation of authority under the statute.—*Guynn v. Jones*, 12 Ind. 486.

[g] (Sup. 1859)

In a complaint against an executor for neglecting to inventory and sell certain property, it must be expressly averred that the property has come to his knowledge.—*State ex rel. Leach v. Scott*, 12 Ind. 529.

[gg] (Sup. 1860)

In an action against an administrator for money paid for the use of the estate of decedent, the complaint must show that the money was paid at the request of the deceased or of defendant.—*Woodford v. Leavenworth*, 14 Ind. 311.

[h] (Sup. 1862)

Conceding that an administrator, who advances his own funds to pay demands against the estate, acquires a right of action against the heirs of the intestate, the purpose of the advance should be affirmatively alleged, that the court may determine from the complaint whether it constitutes a sufficient cause of action.—*McClure v. McClure*, 19 Ind. 185.

[hh] (Sup. 1865)

In a suit by a legatee against the administrator and a creditor of the estate, alleging fraudulent payment of the creditor's claim, the complaint need not set forth the will under which plaintiff claims the legacy.—*Bell's Adm'r v. Ayres*, 24 Ind. 92.

[i] (Sup. 1869)

The general denial by an administrator of a decedent's estate, not sworn to, puts in issue the execution of a promissory note purporting to have been made by the decedent.—*Cawood's Adm'r v. Lee*, 32 Ind. 44.

Where the execution of a note of a decedent is put in issue by the administrator in an action against him, the proof thereof is not waived by the fact that the administrator allowed it to be read in evidence without objection.—Id.

[ii] (Sup. 1872)

In an action by an executor on a duebill, an answer by defendant that he had paid the full amount of principal and interest due to the decedent, and that "the sum of money was paid in goods, wares, and merchandise, and was paid in full satisfaction of said note, and was so received by the deceased in his lifetime," is good as a plea of payment.—Hart v. Crawford, 41 Ind. 197.

[j] (Sup. 1872)

In an action by an executor on a note given for the price of land sold under order of court, defendant answered that the purchase was made with intent to sell the same to a railroad for a depot, to the knowledge of the executor, but that, because of his delay in obtaining confirmation of the sale, the opportunity to sell to the railroad was lost, to the damage of defendant, which damage he set up as a counterclaim. It was not averred that defendant moved the court to require the administrator to report the sale, or that defendant had made a valid contract with the railroad. *Held* to set up no defense.—Gadbury v. Stahl, 41 Ind. 348.

[jj] (Sup. 1874)

To a suit by an administrator, charging that the defendant converted to his own use \$500 of money left by the decedent, the defendant answered that he had loaned the identical money to the decedent, who had it on hand at the time of his death, and that his widow, at the time of his death, took possession of the money, and represented to the defendant that she would take out letters of administration, and requested him to take back said money and deliver to her the note the deceased had given him therefor, which he did. The answer did not state whether or not the estate was solvent or insolvent, nor was it pleaded as a set-off. *Held*, that the answer was insufficient.—Robinson v. Isenhower, 47 Ind. 199.

[k] (Sup. 1875)

To a complaint by an administrator as such on a note made payable to him as administrator, it is not a sufficient answer that the note is not the property of the estate represented by the plaintiff, but his individual property.—Harte v. Houchin, 50 Ind. 327.

[kk] (Sup. 1875)

A bill by an administrator to recover the value of certain personalty of decedent's estate, sold by plaintiff to defendant, alleged that sale of the property was made at such price as should be agreed upon by arbitrators selected, but that before the arbitrators had acted the purchaser declared that he would not abide by

their decision. It was not shown that any price was agreed upon, or that any inventory or appraisal of the property, or any order of court for private sale thereof, was made, or that either party to the contract was uninformed as to the facts. *Held*, that the bill was demurrable.—Ramey v. McCain, 51 Ind. 496.

[l] (Sup. 1877)

A complaint by an administrator, in an action on a note payable to his intestate, is not defective in failing to allege specially that the note has not been paid to deceased, where it avers that such note is due and unpaid.—Cromwell v. Barnes, 58 Ind. 20.

[ll] (Sup. 1877)

In an action against an administrator on a claim against his decedent's estate, the fact that such claim has not been filed according to the statutory requirements cannot be presented by a demurrer assigning that reason, where the fact does not appear on the face of the complaint.—Morrison v. Kramer, 58 Ind. 38.

[m] (Sup. 1878)

In an action on a note by administrators, the payee's widow was made a party plaintiff, and filed a complaint demanding to be declared the owner of the note, and asking judgment against the defendants. Her complaint alleged that the only consideration of the note sued on was the note of the defendant to the original complaint to her as her separate property, and which note her husband had obtained without her consent, surrendered, and caused the note sued on to be executed to him. An answer by the administrators admitted that the consideration of the note was once the widow's property, but alleged that it had become their decedent's separate property by the acceptance of a certain deed by her for real estate purchased therewith, and that before the execution of the note in suit, the money was placed in the hands of the husband, to be invested in real estate in her name. Their decedent caused a deed to be executed and delivered to the widow for a certain tract of land which the widow accepted, and still held the deed thereto in full satisfaction. *Held*, that in the absence of an averment that the widow had ever indorsed or in any way transferred the original note, and in the absence of the deed referred to in the answer having been set out in the record so that the date of the transaction on which the answer relied was not made to appear, the answer was insufficient and demurrable as viewed from the record presented on appeal.—Lynam v. Buckner, 60 Ind. 402.

[mm] (Sup. 1878)

In an action by an administrator of an estate against a former administrator to recover money received by defendant from two persons for the benefit of the estate, an answer which denies the receipt of the money from only one of such persons is insufficient as an answer to



the entire complaint.—*Sanders v. Loy*, 61 Ind. 298.

[n] (Sup. 1880)

In an action against a decedent's estate upon a written instrument, the execution by the decedent must be proved, though not denied under oath.—*Wells' Estate v. Wells*, 71 Ind. 509.

[o] (Sup. 1882)

In an action on a note, an answer of an administratrix to the claims of the plaintiff to recover costs and attorney's fees, admitting the execution of the note by her intestate as surety for one of the other makers, but alleging her appointment and qualification as administratrix, and that the suit was not commenced within one year from the date of the appointment, is bad because it does not show notice of her appointment.—*Iamson v. First Nat. Bank of Vevay*, 82 Ind. 21.

[oo] (Sup. 1882)

Where plaintiff in ejectment was described in the caption of his complaint as "administrator of the estate of R., deceased," and in the body of the complaint was alleged to be the owner and entitled to possession of the land, without claim as administrator, a demurrer to the complaint presented no question as to the right of the administrator to recover.—*Downs v. Opp*, 82 Ind. 166.

[p] (Sup. 1882)

A complaint by an administrator charged C. with having received \$400 for the use of plaintiff's decedent, and demanded that M. and other defendants be enjoined from asserting any claim to the money. Held that, the complaint not having charged that M. was asserting any claim to the money demanded of C. by plaintiff and no facts from which the assertion of such claim could be inferred, it was demurrable as to M.—*Belknap v. Caldwell*, 83 Ind. 14.

[pp] (Sup. 1882)

Under act June 17, 1852, § 62 (Rev. St. 1881, § 2310), providing for the settlement of decedents' estates, and requiring a creditor to file only "a succinct statement of the nature and amount" of his claim against an estate, a complaint in an action against the administrators of a deceased assignor of a promissory note by the assignee thereof, alleging the execution of the note, the death of the maker, the filing of plaintiff's claim with the administrators of decedent, the payment on such claim of a dividend of 25 per cent., "being the full pro rata share of the assets of said estate due on said note on distribution," and as large a pro rata amount as was or had been then or since paid on any claim of any general creditor of the estate not secured by a lien on decedent's property; that said claim had since been filed and allowed by the court as a valid claim against said estate, and the residue of said claim was then due and unpaid; that no amount had been

paid thereon save as aforesaid, and that there were no available assets in the hands of defendant executors; that no final settlement of the estate had been made, and that it had been declared by the court insolvent; and that plaintiff did not bring suit against the maker of the note at its maturity or afterwards up to the time of his death, nor proceed against his estate afterwards for the reason that said assignor requested him not to do so, but to give the maker time to pay the note without suit sufficiently averred a breach of the contract of assignment and of the failure of the assignor to repay the consideration thereof, and sufficiently apprised defendants of the nature of the claim and of the amount demanded, and barred another suit for the same cause of action.—*Huston v. First Nat. Bank of Centerville*, 85 Ind. 21.

[q] (Sup. 1882)

A complaint in an action against the heirs of a deceased administrator to recover plaintiff's distributive share of the estate represented by such administrator, and which share it was alleged he had converted to his own use and retained until his death, the same passing to defendants as his heirs, but not alleging the filing of a claim against his estate as required by 2 Rev. St. 1876, p. 512, § 62, nor alleging that six months prior to the final settlement of the estate of such administrator plaintiff was insane, an infant, or out of the state, was demurrable.—*McComas v. Long*, 85 Ind. 549.

[qq] (Sup. 1882)

Prior to the enactment of Act Feb. 4, 1881, and until September 19th of that year, when such act went into effect, limitations could not be availed of as a defense to a claim against a decedent's estate unless specially pleaded.—*Candy v. Coppock*, 85 Ind. 594.

[r] (Sup. 1882)

In an action to recover a legacy, an allegation that testator's widow "has not elected to take under the provisions" of the will is not equivalent to an averment that she has elected not to take under the will, and has taken under the statute.—*Wilson v. Moore*, 86 Ind. 244.

[rr] (Sup. 1882)

In an action against a decedent's estate on a written instrument, the execution of the instrument must be proved, though not denied under oath.—*Ruddell v. Tyner*, 87 Ind. 529.

[s] It is not necessary for an administrator or executor to plead the statute of limitations as a defense to a claim against the decedent's estate in order to avail himself thereof.—(Sup. 1883) *Zeller v. Griffith*, 89 Ind. 80; (1883) *Perrill v. Nichols*, Id. 444; (App. 1902) *McBride v. Ulmer*, 65 N. E. 610, 30 Ind. App. 154.

[ss] (Sup. 1883)

Where, in an action by an administrator to recover certain notes, defendant answered that he held the notes as a gift from plaintiff's decedent under certain directions, such direc-

tions must be assumed to have been verbal because not alleged to have been in writing.—*Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216.

[t] (*Sup.* 1884)

Where a widow's third was set off to her in partition and the other two-thirds were sold by the administrator, subject to a mortgage made by deceased and the widow, and the administrator failed to take a bond conditioned that the purchaser would pay the mortgage as provided by 2 Rev. St. 1876, p. 528, and the whole property was sold under foreclosure of the mortgage, a complaint by the widow against the administrator for damages for his failure to take the bond, which fails to allege that the whole property was worth more than the amount of the mortgage, does not state a cause of action.—*Sparrow v. Kelso*, 92 Ind. 514.

[tt] (*Sup.* 1885)

A complaint against an administrator of a decedent alleging that plaintiff at the special instance and request of the intestate performed work for him for a certain time, and that on a named day she had a settlement with him for the services performed, and the amount found due to her was agreed upon, and thereupon he agreed to leave her by will the sum found due for her services, and executed to her a written agreement promising to pay a certain sum at his death, sufficiently stated a cause of action.—*Caviness v. Rushton*, 101 Ind. 500, 51 Am. Rep. 759.

[u] (*Sup.* 1889)

A complaint against an estate need not be technically formal, but it must state the facts essential to show that the estate is liable under the statute.—*Lucas v. Donaldson*, 19 N. E. 758, 117 Ind. 139.

[uu] (*Sup.* 1889)

In an action against an executor to recover a legacy, the will was not the foundation of the action, and could not properly have been made an exhibit to the pleading.—*Harrell v. Seal*, 22 N. E. 983, 121 Ind. 193.

[v] (*Sup.* 1890)

In an action by a widow against the administrator of her husband's estate to recover her distributive share, it is not necessary that she should aver that she did not desert her husband, and was not living in adultery at the time of his death.—*Sherwood v. Thomasson*, 124 Ind. 541, 24 N. E. 334.

[vv] (*Sup.* 1893)

In an action by an administrator to set aside a conveyance of land made by the intestate in his lifetime, a complaint is sufficient which alleges that claims allowed against the estate amount to \$550, and claims pending to \$250 more, and that the personal estate is only \$14, without further alleging that the claims are valid.—*Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694.

[w] (*App.* 1895)

A complaint in an action against a decedent's estate by a guardian which alleges that the claim is for "services rendered under contract with decedent in performing manual labor in attending to his physical wants, to making rails, cutting wood, looking after his farm and personal property, by which the said decedent agreed to will the said ward the whole of his estate, valued at \$13,500," does not entitle claimant to recover on a quantum meruit, and is demurrable. *Lotz, J., dissenting.*—*Stone v. Morgan* 13 Ind. App. 48, 41 N. E. 79.

[ww] (*App.* 1899)

The complaint of the administrator of a life tenant under a will to recover rents and profits belonging to her, but converted to his own use by one named in the will as executor, but who did not qualify as such, need not allege that the estate of testator had been settled and his debts paid.—*Niehaus v. Cooper*, 52 N. E. 761, 22 Ind. App. 610.

[x] (*App.* 1901)

A complaint in an action against a decedent's estate need not be strictly formal, and is sufficient if it states a prima facie case, and shows the nature and amount of the claim, so as to bar another action.—*Shirk v. Lingeman*, 59 N. E. 941, 26 Ind. App. 630.

[xx] (*App.* 1902)

A paragraph of a complaint, averring that there was due plaintiff a certain sum for work and labor performed for defendant's intestate in his lifetime, between 1872 and 1886, under circumstances as follows: That decedent took plaintiff into his family to work for him, and promised to make suitable provision for plaintiff in his will in payment for such work; that plaintiff worked for decedent until he was 21; and that decedent died in 1900 without making any will or provision for plaintiff, etc.,—is bad because not showing performance of the agreement on plaintiff's part, the length of the service being alleged, but not the length of the term contracted for.—*Gullett v. Gullett*, 63 N. E. 782, 28 Ind. App. 670.

Another paragraph in the complaint, which failed to show performance of the agreement by plaintiff, and which in addition showed that he was a minor and failed to aver that he had been emancipated, was bad.—*Id.*

[y] (*App.* 1903)

In an action against an executor to compel the payment of a general legacy of \$1,000 the petition alleged that the debts and expenses of administration had been paid, and that there was in the hands of the executors property of the value of \$10,000. *Held*, that the complaint was insufficient, as it did not show that there was in the hands of the executors sufficient personal property to pay the legacy, or that there was real estate which it was the intention of the testator should be charged with such legacy.—*Coulter v. Bradley*, 66 N. E. 184, 30 Ind. App. 421.

## [yy] (App. 1903)

Where a complaint in an action against a decedent's estate alleged that plaintiff was compelled to pay and did pay on certain dates certain sums of money for intestate as her surety on certain notes specified, the complaint contained sufficient allegations to bar another action for the same demand, and was therefore a sufficient statement of a claim against decedent's estate.—*Christian v. Highlands*, 69 N. E. 206, 32 Ind. App. 104.

## [yyy] (App. 1905)

Under the provisions of Burns' Ann. St. 1901, § 2479, in an action on a claim against a decedent's estate it is not necessary for defendant to plead any matter by way of answer, except a set-off or counterclaim.—*Kennedy v. Swisher*, 73 N. E. 724, 34 Ind. App. 676.

## [z] (Sup. 1907)

Under Burns' Ann. St. 1901, § 2479, relating to claims against decedents' estates, and providing that, when any claim is transferred for trial, it shall not be necessary for the executor or administrator to plead any matter by way of answer except a set-off or counterclaim, to which plaintiff shall reply, etc., a verified plea of non est factum in an action on a note against an administrator of one of the parties was not necessary to impose on plaintiff the burden of proving the execution of the instrument sued on and the assignment thereof.—*Digan v. Mandel*, 187 Ind. 586, 79 N. E. 899, 119 Am. St. Rep. 515.

## [zz] (App. 1907)

Complaint in an action by an administrator against decedent's sole heir, charging defendant with the sale of real estate belonging to decedent, and that a certain sum is due from defendant to complainant on account of moneys "and other personal property" wrongfully converted by defendant, does not by the use of the words "and other personal property," sufficiently allege that decedent at the time of his death owned any personal property.—*Tippecanoe Loan & Trust Co. v. Carr*, 40 Ind. App. 125, 78 N. E. 1043.

In an action by an administrator to recover for real estate sold by defendant which belonged to decedent, an averment in the complaint that defendant is the sole heir of decedent sufficiently shows that defendant took the fee to the land.—*Id.*

## [zzz] (App. 1910)

Where a complaint against a decedent's estate contains a definite statement of the claim, the amount thereof, and enough to bar another action therefor, it is sufficient.—*Bailey v. Wilson*, 91 N. E. 249.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1798-1812, 1823-1830, 1842-1845, 1848; 39 CENT. DIG. PLEAD. § 881.

See, also, 18 Cyc. p. 978.

## § 444. — Allegation and denial of representative capacity.

## [a] (Sup. 1822)

In a proceeding by notice and motion, under the statute, by the administrator of an execution creditor against a late sheriff, for not returning an execution in favor of the intestate, the defendant may deny the representative character of the plaintiff by a plea of ne unques administrator.—*Weathers v. Newman*, 1 Blackf. 232.

## [b] (Sup. 1824)

In an action by two as executors, the defendant, after oyer of the probate, pleaded in abatement that one of the plaintiffs was not executor; the other only having proved the will and taken out letters testamentary. *Held* a good plea, under the statute requiring security of executors. St. 1817, p. 152.—*Call v. Ewing*, 1 Blackf. 301.

## [c] (Sup. 1825)

In debt by an administrator, if the plaintiff declare on a promise made to himself, and take judgment in his own name, his styling himself administrator in the declaration may be considered as only a descriptio personæ.—*Helm v. Van Vleet*, 1 Blackf. 342, 12 Am. Dec. 248.

[d] In an action by the plaintiff as administrator, the general issue pleaded admits the representative character of the plaintiff.—(Sup. 1833) *Pollard v. Buttery*, 3 Blackf. 239; (1840) *Lowe v. Bowman*, 5 Blackf. 410.

## [e] (Sup. 1833)

If one sues as administrator, a plea in bar admits him to be administrator.—*Pollard v. Buttery*, 3 Blackf. 239.

## [f] (Sup. 1833)

In an action on a note payable to the plaintiff as administrator of the decedent's estate, the description of the plaintiff in the action as administrator of the decedent may be rejected as surplusage.—*Brown v. Modisett*, 3 Blackf. 381.

## [g] (Sup. 1838)

After the general issue and special matter pleaded in bar to an action by an executor or administrator, commenced before a justice of the peace and removed to the probate court, the defendant cannot deny the character in which the plaintiff sues.—*Scanland v. Ruble*, 4 Blackf. 481.

## [h] (Sup. 1840)

Ne unques administrator may be pleaded in bar of an action brought by an administrator for a cause of action which accrued in the lifetime of the intestate.—*Codding v. Whitaker*, 5 Blackf. 470.

## [i] (Sup. 1841)

The mere description by plaintiff, in his declaration, of his person as the executor of one W., is insufficient to show his interest in the cause of action, which was a note payable to W.—*Hamilton v. Ewing*, 6 Blackf. 88.

[j] (Sup. 1845)

Where an administrator is sued for the debt of the intestate, and after suit his letters are revoked, a plea of such revocation that "plaintiff should not further," etc., because he (the defendant) says, "that since the commencement of the suit" his letters have been revoked, is proper.—*Morrison v. Cones*, 7 Blackf. 593.

[k] (Sup. 1853)

In an action by an administrator to recover a debt, the declaration concluded, "to the damage of the plaintiff's administrator as aforesaid," instead of to his damage "as" administrator. No objection was made to the declaration, and the counts plainly showed that plaintiff was sued as administrator. *Held*, that the declaration sufficiently alleged plaintiff's representative character.—*Durham v. Hudson*, 4 Ind. 501.

[l] (Sup. 1854)

The complainants in a bill described themselves as "administrators of the goods and chattels, rights, credits, moneys, and effects which were of H. O., late of H. county, deceased, who died intestate." The bill further stated that "on or about the 1st day of October, 1848, said H. O. died intestate, and your orators were duly appointed," etc. *Held*, that the bill sufficiently showed that the complainants were administrators of H. O., deceased.—*English v. Roche*, 6 Ind. 62.

[m] The question of the capacity of an executor to sue can only be raised by a sworn answer.—(Sup. 1871) *Kelley v. Love*, 35 Ind. 106; (1881) *Hansford v. Van Auker*, 79 Ind. 302.

[n] (Sup. 1871)

A complaint by an executor need not allege the death of the testator or show an appointment of the executor, it being sufficient if it appears from the statements of the complaint that plaintiff sues in his representative capacity.—*Kelley v. Love*, 35 Ind. 106.

[o] (Sup. 1880)

Plaintiff, as administrator of an estate, sued defendant as administrator de son tort, charging him with having wrongfully intermeddled with and taken possession of the assets of the estate. Defendant answered, and filed a cross-complaint, alleging that deceased in his lifetime transferred all his property, moneys, and choses in action to defendant; that deceased was the owner of and held certain promissory notes against plaintiff, which notes were in plaintiff's possession, due and unpaid, and wrongfully detained from defendant by plaintiff. *Held* that, while the cross-complaint named plaintiff only as an individual, yet it was apparent therefrom that the acts charged against him were committed by him as administrator, so that a demurrer to the cross-complaint on the ground that it stated a cause of action against plaintiff individually and not in his representative capacity was properly overruled.—*Fessler v. Crouse*, 73 Ind. 64.

[p] (Sup. 1881)

The right of a plaintiff to sue as administrator cannot be disputed by the defendant unless the latter has interposed a plea to that effect.—*Hansford v. Van Auker*, 79 Ind. 157, 302.

An administrator, suing on a judgment recovered by his intestate, need not allege her death or his appointment.—*Id.*

[q] (Sup. 1881)

A complaint by an administrator alleging that he is the administrator with the will annexed of a decedent named is a sufficient statement of his representative character.—*Bennett v. Gaddis*, 79 Ind. 347.

[r] (App. 1899)

A complaint showing that plaintiff is the administrator of the estate of a certain decedent, and that the action is brought for the benefit of decedent's widow, is sufficient to show the capacity in which plaintiff sues, though the complaint does not expressly allege that plaintiff was duly appointed and qualified as administrator.—*Chicago & E. R. Co. v. Cummings*, 53 N. E. 1026, 24 Ind. App. 192.

[s] (App. 1899)

Under Burns' Rev. St. 1894, § 2447, making it unnecessary for an administrator plaintiff to make proof of his letters, and prohibiting the questioning of his right to sue as administrator unless the opposite party files a plea denying his right, an administrator plaintiff need not allege the death of his intestate, or state facts showing his right to maintain the action as an administrator.—*McDowell v. North*, 55 N. E. 789, 24 Ind. App. 435.

[t] (Sup. 1902)

A complaint entitled "W., Administrator of the Estate of B., Deceased, v. T.," and commencing, "The plaintiff in the above-entitled cause, as administrator of the estate of B., deceased, complains," etc., sufficiently shows that plaintiff is suing in his representative capacity.—*Burns' Rev. St. 1901, § 379*, requiring a liberal construction to be given pleadings in civil causes,—though not containing a formal allegation of B.'s death and of the issuing of letters to plaintiff.—*Toner v. Wagner*, 63 N. E. 859, 158 Ind. 447.

[u] (App. 1902)

The right of an administrator de bonis non to sue can be questioned only by plea in abatement denying such right.—*Michigan Trust Co. v. Probasco*, 63 N. E. 255, 29 Ind. App. 109.

In a suit by an administrator de bonis non, it is only necessary that he aver that he is administrator, whereupon his right to sue cannot be questioned except by plea in abatement denying such right.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1813-1817, 1837-1841.

See, also, 18 Cyc. pp. 978, 993-998; note, 1 L. R. A. (N. S.) 161.

**§ 445. — Profert and oyer of letters.**

[a] (Sup. 1822)

If the plaintiff sue as administrator, where he might have sued in his own name, he need not make profert of his letters of administration.—*Savage v. Meriam*, 1 Blackf. 176.

[b] (Sup. 1827)

Where plaintiff names himself as administrator in a suit on a judgment recovered in his own name on promises made to himself, no profert of the letters of administration is necessary; the word "administrator" being considered as surplusage or mere descriptio personæ.—*Capp v. Gilman*, 2 Blackf. 45.

[c] (Sup. 1843)

An omission in a scire facias of profert of the plaintiff's authority, when he must sue as executor or administrator, is fatal on special demurrer; but, when he can sustain the action in his own right, such omission is immaterial, though he describe himself as executor or administrator.—*Campbell v. Baldwin*, 6 Blackf. 364.

[d] (Sup. 1871)

In a suit by an administrator, letters of administration need not be set out to show the right of the plaintiff to sue. 2 Gav. & H. St. p. 527, § 152.—*Wyant v. Wyant*, 38 Ind. 48.

[e] (Sup. 1877)

In an action by an administrator to recover upon a note made payable either to the plaintiff as administrator, or to the estate of the intestate, profert of the letters of administration is not necessary.—*Cromwell v. Barnes*, 58 Ind. 20.

[f] (Sup. 1881)

Where an administrator sues on a judgment recovered by his intestate, he is not required to make profert of his letters of administration.—*Hansford v. Van Auken*, 79 Ind. 157.

[g] (Sup. 1881)

Plaintiff suing administrator need not make his letters of administration a part of the complaint.—*Hansford v. Van Auken*, 79 Ind. 302.

[h] (Sup. 1881)

An administrator with the will annexed is not bound to set out or make profert of his letters when bringing suit. It is sufficient in such cases for the petition to show that the petitioner is the administrator without setting out his appointment and qualification.—*Bennett v. Gaddis*, 79 Ind. 347.

[i] (App. 1893)

An administrator de bonis non in a suit by him need only aver that he is the administrator and he need not make profert of his letters, nor can his right to sue be questioned unless the defendant files a plea under oath denying such right, and such a pleading is in abatement, and

not in bar.—*Barnett v. Vanmeter*, 33 N. E. 666, 7 Ind. App. 45.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 1818–1822.

See, also, 18 Cyc. p. 988.

**§ 446. — Plea of plene administravit.**

Pleading set-off or counterclaim, see PLEADING, § 147.

[a] (Sup. 1825)

At common law, if an administrator, when sued for a debt of the intestate, omit to plead plene administravit, and judgment be given against him, assets are admitted; and he cannot afterwards plead that plea in an action on the judgment suggesting a devastavit.—*Goodwin v. Wilson*, 1 Blackf. 344.

[b] (Sup. 1830)

If an administrator suffer judgment by default, he cannot afterwards, by the common law, in an action against him suggesting a devastavit, plead plene administravit, as the default is a confession of assets.—*Moore v. Martindale*, 2 Blackf. 353.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 1831–1836, 1843.

See, also, 18 Cyc. pp. 998–1002.

**§ 447. — Demurrer.**

Admissions by demurrer, see PLEADING, § 214.

[a] (Sup. 1832)

In an action by an executor on a cause of action only enforceable by the heirs, a general demurrer is sufficient to raise the question of the want of any cause of action in plaintiff.—*Stephenson v. Martin*, 84 Ind. 160.

[b] (App. 1900)

Where an amended complaint, based on a claim against a decedent's estate, was brought against the decedent, as though he were living, instead of against his administrator, the overruling of a demurrer of the administrator for such defect was not reversible error, though the complaint was defective in form, since the administrator was a party by operation of law.—*Bowman v. Citizens' Nat. Bank of Martinsville*, 25 Ind. App. 38, 56 N. E. 39.

[c] (Sup. 1902)

A demurrer to the complaint for want of facts in an action by an administrator on a note payable to his decedent raises the question whether it sufficiently appears from the complaint that plaintiff is suing in his representative capacity.—*Toner v. Wagner*, 63 N. E. 859, 158 Ind. 447.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. § 1856.

See, also, 18 Cyc. p. 1011.

**§ 448. — Amendment.**

Setting up new cause of action, see **PLEADING**, § 248.

**FOR CASES FROM OTHER STATES.**

SEE 22 CENT. DIG. EX. & AD. §§ 1846, 1847.

See, also, 18 Cyc. p. 983.

**§ 449. — Issues, proof, and variance.**

As to limitation of actions, see **LIMITATION OF ACTIONS**, § 103.

**[a] (Sup. 1842)**

In a suit by or against executors, administrators, or guardians, the want of jurisdiction of the probate court may be shown under the general issue.—*Brown v. McQueen*, 6 Blackf. 208.

**[b] (Sup. 1884)**

An administrator without a plea may avail the estate of all defenses except set-off or counterclaim.—*Brown v. Forst*, 95 Ind. 248.

**[c] (Sup. 1900)**

In an action to set aside a conveyance by a testator, and for a sale of the property for payment of debts, evidence that other property conveyed by testator was equally bound with defendant's was not admissible under the general denial, where the grantees, other than defendant, were not made parties to the action.—*Kaufman v. Elder*, 56 N. E. 215, 154 Ind. 157.

**[d] (Sup. 1901)**

Since *Burns' Rev. St. 1894*, § 2479 (*Horne's Rev. St. 1897*, § 2324), provides that, when any claim is transferred for trial, all defenses except set-off and counterclaim may be proved by the administrator without answer, does not apply where a claim is not filed against an estate, but the administrator of the assignor is made a party defendant to answer as to the assignment of a note sued on, or the interest of the estate, an instruction in such a case that the effect of a general denial by the administrator was simply to deny that deceased had assigned the claim to plaintiff is not erroneous.—*Johnson v. Johnson*, 60 N. E. 451, 156 Ind. 592.

**[e] (App. 1903)**

Under *Burns' Rev. St. 1901*, § 380, providing that under a mere general denial of any allegation no evidence shall be introduced that does not tend to negative what the party making the allegation is bound to prove. *Held*, that the defendant in an action on a quantum meruit for services rendered testatrix, to be paid for by a testamentary bequest, was entitled to take advantage of the satisfaction of the contract under a general denial without a plea of estoppel.—*Alerding v. Allison*, 68 N. E. 185, 31 Ind. App. 397.

Where a claim against a decedent's estate for services was based on a contract to bequeath decedent's property to claimant, no plea of estoppel was necessary to enable defendant to

take advantage of the satisfaction of the contract by showing that a legacy had been accepted by claimant which amounted to a satisfaction of the debt.—*Id.*

**[f] (App. 1909)**

Under the rule forbidding a recovery where the evidence makes out a case materially different from the case made by the pleadings, there could be no recovery where a complaint proceeds upon the theory of a liability to a decedent's representative, and the evidence makes out a prima facie case against defendant and in favor of the representative personally.—*Saylor v. Obendorf*, 89 N. E. 600.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 1850-1854.

See, also, 18 Cyc. p. 992.

**§ 450. Evidence.**

Admissions as evidence, see **EVIDENCE**, § 236.

As to limitation of actions, see **LIMITATION OF ACTIONS**, § 196.

Competency of administrator as witness, see **WITNESSES**, § 85.

Competency of one having a claim against estate as witness, see **WITNESSES**, § 98.

Competency of parties or persons interested to testify against executor or administrator as to transactions with decedent, see **WITNESSES**, §§ 128, 140, 149, 160, 164, 167, 168.

Documentary evidence, see **EVIDENCE**, § 354.

Evidence to establish claim, see ante, § 221.

On accounting, see post, § 506.

On trial of disputed claim against estate, see ante, § 252.

*Res gestæ*, see **EVIDENCE**, § 121.

Scope of cross-examination in proceedings to establish claim, see **WITNESSES**, § 268.

Self-serving declarations, see **EVIDENCE**, §§ 271, 273.

Statutory competency of administrator to testify in suits on claims against the estate, see **WITNESSES**, § 116.

**[a] (Sup. 1841)**

In an action by an executor on a promise by defendant to pay testator a certain sum annually for rent during testator's lifetime, proof of defendant's promise and payment of one year's rent, without any evidence as to the time when testator died, did not sustain the action.—*Ellis v. Ford*, 5 Blackf. 554.

**[b] (Sup. 1853)**

A note given by one of several administrators, admitting a sum of money to be due from the intestate's estate, is not admissible in evidence in a suit against a co-administrator unless accompanied by proof of an original indebtedness upon which such note was founded.—*Weston v. Murnan*, 4 Ind. 271.

**[c] (Sup. 1862)**

In an action on a note against the estate of a decedent, it is necessary to prove the hand-

writing or the execution of the note.—*Mahon's Adm'r v. Sawyer*, 18 Ind. 73.

[d] (Sup. 1864)

Where the complaint in an action against an administrator avers that he has taken possession of real estate of the decedent, it will be presumed that it was a legal possession.—*Butt v. Clark*, 23 Ind. 548.

[e] (Sup. 1880)

In an action by an administrator against the wife of the decedent, in which the defendant answered by way of set-off, alleging the wrongful conversion by the plaintiff of a wheat crop upon certain land, *held*, that it would not be presumed that the administrator appropriated as assets the emblements of the land, to which the widow and children were entitled.—*Tucker v. Murphy*, 71 Ind. 576.

[f] (Sup. 1881)

In an action by an administratrix for money loaned by her intestate, evidence that the money claimed to have been a loan was in fact drawn by the defendant from a bank on the intestate's check, and, at his request, paid to witness with other money advanced in discharge of a note of the intestate, was admissible.—*Slade v. Leonard*, 75 Ind. 171.

[g] (Sup. 1891)

Where the court, on petition alleging an indebtedness by decedent to a county, appoints as administrator the county treasurer, who is charged by law with the collection of the taxes, the presumption is that such action was proper, and the burden is on the heirs to show that the administration was unnecessary.—*Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

[h] (App. 1899)

Where a creditor sought to enforce a claim against the estate of a husband as principal with the wife, and the administrator did not make the wife a party, as provided by Burns' Rev. St. 1894, § 2479, to settle the question of suretyship between her and deceased, his evidence based on the theory of suretyship was properly excluded.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

[i] (App. 1907)

Where there had been a meeting of all the heirs to agree upon a disposition of decedent's estate, evidence, as to what was done and agreed upon at that meeting, was relevant in an action by the administrator to recover money alleged to have been left by decedent and converted by his widow, daughter, and son-in-law.—*Zimmerman v. Beatson*, 39 Ind. App. 604, 79 N. E. 518, 80 N. E. 165.

[j] (App. 1909)

In an action by an administratrix to recover securities representing loans of decedent, a bank cashier, which his sister took possession of under claim of ownership, evidence that decedent wanted to buy a controlling interest in the

bank, but that the sale was never consummated, and that at the time decedent was appointed cashier witness made an investigation of decedent's financial standing, and became satisfied from such investigation that decedent was worth from \$7,000 to \$8,000, is inadmissible.—*Baker v. Baker*, 43 Ind. App. 26, 86 N. E. 864.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1858-1876.

See, also, 18 Cyc. pp. 1019-1034.

§ 451. Trial.

Instructions invading province of jury, see TRIAL, § 192.

Questions to be submitted by special interrogatories, see TRIAL, § 350.

Responsiveness of findings, see TRIAL, § 357.

Right to open and close, see TRIAL, § 25.

Sufficiency of findings by court, see TRIAL, § 395.

Sufficiency of special findings by jury in general, see TRIAL, § 355.

[a] Upon the issue of plene administravit, the jury must find specially, not only the amount of damages, but the amount of assets in the hands of the administrator or executor; otherwise, the court cannot render judgment upon the verdict.—(Sup. 1828) *King v. Anthony*, 2 Blackf. 131; (1831) *Johnson v. Hawkins*, Id. 459; (1838) *Gaston v. Hiatt*, 5 Blackf. 44.

[b] (Sup. 1831)

Where, in an action of debt against an administrator on a bond of his intestate, the defendant pleaded non est factum and plene administravit, the jury should have not only found the amount of the debt due on the bond and damages, but also the amount of the assets in the hands of the administrator.—*Johnson v. Hawkins*, 2 Blackf. 459.

[c] (Sup. 1836)

Plaintiff's intestate obtained a judgment before a justice of the peace against defendant. While an appeal was pending, the suit abated by the death of the intestate, and was revived by the plaintiff as administrator. Defendant had filed before the justice an account against the intestate as a set-off, which amounted to more than the intestate's demand. On the trial, the jury gave a verdict in defendant's favor, without finding the amount of assets in the administrator's hands. *Held*, that the omission to find the amount of the assets was not an objection to the verdict.—*Adams v. Evans*, 4 Blackf. 247.

[d] (Sup. 1879)

In an action to recover a legacy of \$900, evidence offered by defendant executor showing an ademption of the legacy to the amount of \$100 and payments made by the executor more than one year after the death of the testator, aggregating \$800 will not support a verdict for defendant, since it fails to take into account interest which would have accrued on the de-

ferred payments of the \$800 to which the legatee would have been entitled.—*State ex rel. Brown v. Crossley*, 69 Ind. 203.

[e] (Sup. 1881)

In an action on a note executed by defendant's decedent, answers to interrogatories to the effect that decedent was not indebted to plaintiff at the date of the note in suit, but not otherwise relating to such note, that the note was given to "equalize J.'s family" with deceased's three brothers, but failing to state who J. was, and that the note was intended as a gift to plaintiff, but not stating that plaintiff has any relation with decedent such as to make a gift enforceable on the theory of love and affection, was not inconsistent with the general verdict for defendant.—*West v. Calvins*, 74 Ind. 265.

[f] (Sup. 1883)

Under Rev. St. 1881, § 2325, providing that the trial of a claim against a decedent's estate shall be conducted as in ordinary civil cases, and section 546, providing that the court, in all cases when requested by either party, shall instruct the jury that, if they render a general verdict, to find specially on particular questions of fact to be stated in writing, *held* that, on the trial of a claim against a decedent's estate, it was not error to charge that, when a cause was tried by a jury, either party might require the jury, in case they agreed on a general verdict to find specially on particular questions of fact, to be stated in writing; that a general verdict was a verdict on the issues, either for the plaintiff or for the defendant; and that the defendant had asked that, in case the jury agreed on a general verdict, they should find specially on particular questions of fact, which were stated in writing.—*Boots v. Griffith*, 89 Ind. 246.

[g] (Sup. 1885)

The existence or nonexistence of demands against the estate is immaterial in an administrator's action to recover trust moneys, and special interrogatories should not be addressed to the jury in that regard.—*Langsdale v. Woolen*, 99 Ind. 575.

[h] (App. 1891)

In an action by a wife against her deceased husband's estate, to recover money loaned him, special findings of fact by the court that she loaned him \$370; that she purchased land for \$3,000, paying \$1,669 of her own money, the balance being raised upon his note, which was secured by a mortgage on the premises; and that she directed him to apply the loaned money to the payment of said mortgage; and that it "was paid and fully satisfied by the decedent,"—were a sufficient finding that decedent applied said money to the payment of the mortgage to support a judgment that plaintiff could not recover, although they did not so state in the most direct terms.—*Brown v. Brown's Estate*, 2 Ind. App. 435, 28 N. E. 720.

A special verdict in an action by a wife to recover on a claim against her husband's estate found that the wife loaned money to her husband, and he afterwards purchased real estate, executing a mortgage on it for the balance of the purchase money, in which the wife joined, and that, when the mortgage was executed, the wife directed her husband to apply the money owing by him to her, on account of the loan to the payment of the mortgage indebtedness, and the mortgage was satisfied and released of record. *Held* that, while the finding was not explicit that the payment was actually made from plaintiff's money at her request, the court would not be justified in holding that the payment made by the husband, to the extent of his indebtedness on the loan, could not be treated as a payment at her direction and request, simply because the deed was executed to the husband as well as to the wife without her knowledge and consent, but the payment made by the husband should, to the extent of his indebtedness to the wife, be treated *prima facie* as good in compliance with the request.—*Id.*

[i] (App. 1897)

On the trial of a claim against an estate for services rendered deceased, an instruction, given at defendant's request, that there is no implied obligation to pay for the services of one who is taken into the family of another, and is regarded and treated as a member of the household, etc., was not rendered prejudicial to defendant by adding, after the word "household," the words "and is a member of such family."—*Boyd v. Starbuck*, 47 N. E. 1079, 18 Ind. App. 310.

[j] (Sup. 1901)

Where an administrator of an assignor is made a party to answer as to the assignment of the note sued on, an instruction that, if the jury returned a general verdict for the plaintiff on the note sued on, the effect would be a finding that the estate had no interest in such note, is not erroneous.—*Johnson v. Johnson*, 60 N. E. 451, 156 Ind. 592.

[k] (Sup. 1903)

In an action to enforce a claim against a decedent's estate, an instruction that plaintiff was entitled to recover, if she proved by a fair preponderance of the evidence all the material averments of her complaint, unless the jury was satisfied that defendant had established one or the other of the special paragraphs of her answer, setting up a defense, when taken in connection with another instruction that the burden was on plaintiff to prove all the material facts, was sufficient.—*Stanley's Estate v. Pence*, 66 N. E. 51, 67 N. E. 441, 160 Ind. 636.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 906, 1877-1882.

See, also, 18 Cyc. pp. 1035-1039.



**§ 452. New trial.**

Grounds in general, see **NEW TRIAL**, § 28.

Newly discovered evidence as ground for new trial, see **NEW TRIAL**, §§ 102, 104.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 1883.

See, also, 18 Cyc. p. 1040.

**§ 453. Judgment.**

Actions or other proceedings to review, see **JUDGMENT**, § 335.

Conclusiveness, see **JUDGMENT**, §§ 634-740.

Default as confession of assets preventing plea of plene administravit, see ante, § 446.

Equitable relief against judgment, see **JUDGMENT**, § 439.

Merger and bar of causes of action and defenses, see **JUDGMENT**, §§ 540-633.

Proceedings to settle estate as insolvent, as destroying lien, see ante, § 411.

**[a] (Sup. 1823)**

Where in an action of debt against an administrator on a bond of his intestate defendant made default, a judgment against him for the debt and costs de bonis propriis was erroneous.—*Songer v. Walker*, 1 Blackf. 251.

**[b] (Sup. 1835)**

In a bill against the administrator of a guardian to recover money received by the guardian for the ward, a decree against the administrator should be de bonis testatoris.—*Raymond v. Simonson*, 4 Blackf. 77.

**[c] (Sup. 1837)**

In a suit against an administrator on a note made by his intestate, where there is a trial upon the pleas of non assumpsit and failure of consideration, judgment for the plaintiff should not be de bonis propriis, but to be levied out of the assets in the defendant's hands to be administered, if he have so much; if not, then the costs out of the defendant's own goods.—*Priest v. Martin*, 4 Blackf. 311.

**[d] (Sup. 1840)**

A scire facias against an executrix to revive a judgment recovered against her testator must contain a suggestion of the death of the judgment debtor, and show the defendant's appointment as executrix.—*Walker v. Hood*, 5 Blackf. 266.

**[e] (Sup. 1844)**

If the plaintiff confess the plea of plene administravit, a judgment in his favor should be of assets quando acciderint.—*Wilt v. Bird*, 7 Blackf. 258.

**[f] (Sup. 1845)**

In a suit against the administrator of the acceptor of a bill of exchange, where a demurrer to the declaration was overruled and the court assessed the damages, the judgment, if for the plaintiff, should be for the damages and costs, to be levied of the intestate's goods, if

the defendant have so much, and, if he have not, then the costs of defendant's own goods.—*Phipps v. Addison*, 7 Blackf. 375.

**[g] (Sup. 1846)**

In assumpsit in the probate court by administrators, a judgment by default cannot be taken, unless the process has been served 20 days before the commencement of the term.—*Jones v. Roland*, 8 Blackf. 272.

**[h] (Sup. 1850)**

In actions against executors or administrators, judgment should be rendered against the defendant, to be made out of the goods of the deceased, and not against the defendant generally.—*Flagg v. Winans*, 2 Ind. 123.

**[i] (Sup. 1853)**

To authorize a judgment by default in the probate court against an administrator, under Rev. St. 1843, he must have been served with process at least 20 days before the first day of the term.—*Carter v. Spencer*, 4 Ind. 78.

**[j] (Sup. 1853)**

A judgment against an administrator, as such, should be paid out of the estate of the deceased as a judgment against the estate which he administers, and is never to be paid unless the estate is able to pay.—*Egbert v. State*, 4 Ind. 390.

**[k] (Sup. 1855)**

A judgment for plaintiff on a scire facias to revive a judgment after defendant's death intestate, and to obtain execution thereon against his real estate, should require the money to be first made of the assets in the administrator's hands, and, failing in this, then of the lands of the heirs.—*Graves v. Skeels*, 6 Ind. 107.

**[l] (Sup. 1859)**

An executor brought suit on notes secured by mortgage, averring that the notes ran to his testator and two others, and the mortgage to his testator alone, for the use of the three, and that, by some assignment unknown to him, the title passed to his testator. The two others interested were made co-defendants. Upon default, judgment for foreclosure went against all. *Held*, that the default admitted the existence of a good assignment.—*Eggleston v. Barnes*, 12 Ind. 604.

**[m] (Sup. 1863)**

Where suit is instituted against the heirs and administrator of a deceased mortgagor to foreclose a mortgage, no judgment can be rendered against such administrator for the balance of the debt not satisfied by the sale of the mortgaged premises.—*Newkirk v. Burson*, 21 Ind. 129.

**[n] (Sup. 1867)**

In an action against an administrator, as such, the judgment should be de bonis testatoris, and not de bonis propriis.—*Horral v. Scudder*, 27 Ind. 490; *Horral v. Mattingley*, Id. 500.

## [o] (Sup. 1874)

In a joint action brought against an administrator and others on a joint obligation, the judgment may be against all the parties for the full amount, and not against the administrator for a proportionate amount.—*Myers v. State ex rel. McCray*, 47 Ind. 203.

## [p] (Sup. 1874)

A judgment against an executor, on a debt due from the testator, should be de bonis testatoris.—*Steinmetz v. State ex rel. Bricka*, 47 Ind. 405.

## [q] (Sup. 1878)

Where, in an action against an administratrix and her surety upon a note of the intestate, the surety makes answer which, under Code, § 674, is in effect a complaint, a judgment that "all the assets of said estate be first exhausted before a levy be made on the property of the said" surety is erroneous.—*Johnson v. Meier*, 62 Ind. 98.

In no case can a judgment be rendered against an administrator, to be levied on the assets of the estate, except where, under 2 Rev. St. p. 199, § 411, cl. 2, it directs a sale of specified articles thereof.—*Id.*

## [r] (Sup. 1879)

Where one is sued both personally and as administrator of a decedent's estate, a judgment properly rendered against him individually will not be reversed because of failure of the court to render judgment against him as administrator, especially when no motion for such latter judgment has been made, nor any objection offered to entering the personal judgment against him.—*Carter v. Zenblin*, 68 Ind. 436.

## [s] (Sup. 1882)

Where defendant dies pending a suit for attorney's fees, and the administrator is made a party, and a decree entered allowing certain fees and establishing a lien thereon on a judgment recovered by the attorneys for the defendant, the adjudication binds all the creditors of the estate, though not parties thereto.—*Blankenbaker v. Bank of Commerce*, 85 Ind. 459.

## [t] (Sup. 1889)

In an action for seduction and to set aside a fraudulent conveyance of land made by the seducer, who died pending the suit and whose administrator was substituted, the court gave judgment setting aside the conveyance and ordering a sale of the land and the application of the proceeds to the costs of administration, expenses of last sickness, and to plaintiff's judgment. *Held*, that though the proceeds should be applied as required by statute, and should not be applied to the judgment in preference to other debts, the judgment would not be reversed, where no motion was made to modify it.—*Simons v. Busby*, 119 Ind. 13, 21 N. E. 451.

## [u] (App. 1898)

Under Burns' Rev. St. 1894, § 2479 (Rev. St. 1881, § 2324), an administrator may make any defense in an action on a claim against his intestate without plea except set-off or counterclaim; and where no answer is filed in an action against the administrator, and a demurrer to a cross complaint is sustained, the plaintiff is not entitled to judgment on the pleadings.—*Stout v. Harlem*, 48 N. E. 235, 50 N. E. 492, 20 Ind. App. 200.

## [v] (App. 1898)

The liability of an estate to pay a judgment recovered against the administrator as such cannot be attacked in a proceeding to enforce the same against the estate.—*Chicago & E. R. Co. v. Harshman*, 51 N. E. 343, 21 Ind. App. 23.

## FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 1884-1908; 30 CENT. DIG. Judgm. § 440.

See, also, 18 Cyc. pp. 1040-1067.

## § 454. Execution and enforcement of judgment.

Setting aside execution on taking proceedings to settle estate as insolvent, see ante, § 411. Supplementary proceedings, see EXECUTION, § 362.

## [a] (Sup. 1840)

If a judgment against the administrator for a debt of his intestate be replevied under the law, and the time expire without the judgment being paid, the creditor's remedy against the real estate of the intestate is the same that it was before the judgment was replevied.—*Elliott v. Moore*, 5 Blackf. 270.

## [b] (Sup. 1840)

The real estate of a decedent is not subject to execution on a judgment against his executor or administrator, unless the heirs, devisees, and terre tenants be made parties to the judgment.—*Joiner v. Sanders*, 5 Blackf. 378.

## [c] (Sup. 1841)

A petition was filed in the probate court against heirs, etc., under the statute, to have execution against the land of an intestate on a judgment obtained against his administrators. The plea was that the administrators had assets sufficient to pay the debt, consisting of notes payable to them, obtained in part from the sale of the personal property of the deceased, and in part from real estate sold by them, under an order of court, on a credit not then expired. *Held*, that the plea was good.—*Brown v. Rose*, 6 Blackf. 69.

## [d] (Sup. 1842)

If a petition to have an execution against the real estate of a decedent on a judgment against his executor or administrator does not make the terre-tenants defendants, or aver that there are none, it is defective.—*Williams v. Morehouse*, 6 Blackf. 215.

[e] (Sup. 1843)

To a petition for execution against real estate on a judgment against an administrator, a plea that the debtor did not die seised in fee simple of the lands mentioned in the petition, or of any part thereof, is good, and a plea, in such case, that there were terre-tenants on the land, who were in possession at the commencement of the suit, is also good; but a plea denying in general terms "each and every allegation in said petition contained" is bad, and may be rejected on motion.—*Armstrong v. Milligan*, 6 Blackf. 463.

[f] (Sup. 1844)

On a petition by a creditor of an intestate estate to subject certain lands of the deceased to execution on a judgment against the administrators, for want of sufficient personal property, it is not a sufficient plea that the administrators had procured a decree for sale of the lands at the appraised value, and had used their utmost exertions to make sale of the lands, but without effect, for want of buyers.—*Brownfield v. Vail*, 7 Blackf. 203.

[g] (Sup. 1847)

Under a petition for execution against a decedent's real estate, on a judgment against his administrator de bonis non, in whose hands there were no assets, a final judgment on default against an infant defendant, the record not showing the petition to have been proved, was erroneous.—*Berry v. Bullard*, 8 Blackf. 399.

Under a petition for execution against a decedent's real estate, on a judgment against his administrator de bonis non in whose hands there were no assets, a judgment by default against some of the defendants, no process appearing to have been issued against them, or publication made, was erroneous.—*Id.*

Against a petition for execution against a decedent's real estate, on a judgment against his administrator de bonis non, in whose hands there were no assets, some of the terre-tenants set up as a defense: (1) A purchase of the real estate of the deceased from the heirs without notice; (2) that notice of the judgment was never filed in the office of the clerk of the probate court; (3) that one of the heirs, from whom these defendants purchased, had a judgment against the deceased himself, constituting a lien on the real estate in question, prior to that of the plaintiff's. *Held*, that these grounds of defense were insufficient.—*Id.*

Under a petition for execution against a decedent's real estate, on a judgment against his administrator de bonis non, in whose hands there were no assets, answers and cross-bills are not admissible; this being a proceeding at law.—*Id.*

A petition for the execution against a decedent's real estate, on a judgment for a certain sum against his administrator de bonis non, alleged that an execution issued on the judgment, had been returned, "No goods of the estate"; that said administrator had resigned,

and another had been appointed in his place; and that there were no assets in the last administrator's hands. *Held*, that the petition was not objectionable for not showing a revivor of the judgment against the last administrator, the issuing of an execution against him, and a return of the same of no goods in his hands. *Held*, also, that the petition need not allege that the judgment was unpaid.—*Id.*

Under a petition for execution against a decedent's real estate, on a judgment against his administrator de bonis non, in whose hands there were no assets, to justify notice to defendant by publication, it should appear that he was a nonresident.—*Id.*

[h] (Sup. 1850)

A scire facias against administrators of a judgment defendant, alleging waste, must aver that there were not goods of the estate of the intestate in their hands sufficient to pay the judgment.—*Cooper v. Hanna*, 2 Ind. 97.

[i] (Sup. 1853)

Rev. St. 1843, §§ 346, 347, provide that any party against whom a judgment has been obtained may have a stay on his procuring some sureties to become bail for payment of the judgment. Section 357 requires a joint execution to be levied first on the property of defendant, and then on that of the bail. *Held*, that a judgment against an administrator in his representative capacity was not repleviable, so that one giving replevy bail to secure a stay thereof was not liable.—*Egbert v. State*, 4 Ind. 399.

[j] (Sup. 1871)

In a suit to compel a defendant to charge himself with property as administrator, wherein a judgment is recovered against the defendant, it cannot be required that the defendant shall secure the judgment by giving bond, or, in default thereof, that an attachment shall issue against his property.—*Pea v. Pea*, 35 Ind. 387.

[k] (Sup. 1882)

The complaint, under Rev. St. 1881, §§ 642, 645, to enforce a judgment against land of one deceased, is defective if it fails to show the personal estate to be exhausted or insufficient.—*Pauley v. Langdon*, 83 Ind. 353.

[l] (Sup. 1882)

At a sheriff's sale on a judgment obtained by an administrator, the latter bid off the land without an order of the court, and, he being afterwards removed, the deed was made to his successor, who sold the land under order of court, which sale was confirmed. *Held*, that the purchaser's title could not be questioned collaterally by those from whom he sought to redeem, as the purchase by the administrator was not void.—*Mitchell v. Hodges*, 87 Ind. 491.

[m] (Sup. 1889)

In an action for seduction and to set aside a fraudulent conveyance of land made by the seducer, who dies pending suit and whose administrator is substituted, the court, after ver-

dict for plaintiff and judgment setting aside the conveyance, may order the administrator to sell the land.—*Simons v. Busby*, 119 Ind. 13, 21 N. E. 451.

**FOR CASES FROM OTHER STATES,**

See 22 CENT. DIG. EX. & AD. §§ 1909-1928.

See, also, 18 Cyc. pp. 1067-1081.

**§ 455. Appeal and error.**

Appellate jurisdiction as between appellate and supreme courts, see COURTS, § 220 (1).

Exemption of executors and administrators from requirement of security on appeal or other proceeding for review, see APPEAL AND ERROR, § 374.

In action to construe will, see WILLS, § 706.

Review of justice's judgment, see JUSTICES OF THE PEACE, § 147.

Settlement of accounts pending appeal in action on claim against estate, see post, § 509 (4).

**[a] (Sup. 1835)**

An administrator, on appeal from a judgment against his intestate, executed an appeal bond. On the appeal plaintiff obtained a judgment, to be levied on the property of intestate. In an action on the appeal bond he did not prove that the estate, at the time of the judgment on appeal, was insolvent. *Held*, that plaintiff could not recover.—*Evans v. Adams*, 4 Blackf. 54.

**[b] (Sup. 1851)**

Where objection might have been taken by demurrer to an assignment of errors that an executor, suing in his own name, did not spread upon the record the matter which makes him privy to it, the general issue admits the representative character of the executor.—*Rundles v. Jones*, 3 Ind. 35.

**[c] (Sup. 1855)**

A. sued B.'s executors for services rendered B. in his lifetime. Answer: (1) Not indebted; (2) payment; (3) limitations. In the supreme court the further objection was made that A. had not duly filed his claim in the probate office. *Held* that as the objection was not taken in the pleadings below, it came too late.—*Hardin v. Crist*, 7 Ind. 167.

**[d] (Sup. 1861)**

The appellee, who was administrator, filed a claim against "the estate of G. T.," which was prosecuted to final determination. The record showed that the parties appeared, and that defendant demurred; but the plaintiff was the representative of the estate, and neither he nor the court had in any manner made any adversary party capable of defending. After transcript filed, the appellant, by petition averring that, as guardian of the only heir of G. T., he had appeared and made the defense, prayed that the record might be so changed as to permit him to prosecute this appeal. *Held*, that appellant could not be heard in his objection, now

made, that the record did not show an adversary party and proceeding below.—*Devol v. Halstead*, 16 Ind. 237.

**[e] (Sup. 1862)**

Where an administrator begins a suit, and after his death the administrator de bonis non is substituted, the objection that the latter was not duly appointed cannot be raised for the first time in the appellate court.—*Mahon v. Mahon's Adm'r*, 19 Ind. 324.

**[f] (Sup. 1864)**

An administrator, sued before a justice of the peace on a claim against him in his fiduciary capacity, has a right, under 2 Gav. & H. St. p. 593, § 64, to appeal from the judgment rendered, though the justice had no jurisdiction of the cause.—*Palmer v. Fuller*, 22 Ind. 115.

**[g] (Sup. 1881)**

Rev. St. 1876, p. 557, §§ 189, 190, providing for the taking of appeals in proceedings for the settlement of decedents' estates in the probate court, do not apply to actions brought by the administrator for the collection of assets of the estate; and it is not necessary that such appeal should be perfected within 30 days, but it may be perfected within 1 year, under Code, §§ 4, 21.—*Rusk v. Gray*, 74 Ind. 231.

**[h] (Sup. 1881)**

A suit by an administrator against the assignor of promissory notes is not governed by Decedent's Estates Act June 13, 1872, §§ 180, 190, which require appeals to be taken within 30 days, but by Civ. Code, §§ 4, 21, and an appeal taken within one year from the rendition of judgment as required by section 561 of such Code is taken in time.—*Willson v. Binford*, 74 Ind. 424.

**[i] (Sup. 1884)**

A joint debtor died after obtaining an agreement that the other joint debtors would assume a debt. The debt was allowed against his estate, and his administrator sued, alleging such facts, but not setting up that his decedent's estate had been compelled to pay such debt, or that there were no assets belonging to the estate. *Held* that, as he was entitled only to nominal damages, the appellate court would not reverse a judgment against him.—*Rhine v. Morris*, 96 Ind. 81.

**[j] (Sup. 1884)**

The provisions of the Civil Code in relation to the review of judgments in civil actions do not apply to judgments rendered on claims against a decedent's estate.—*McCurdy v. Love*, 97 Ind. 62; *Zimmerman v. Same*, Id. 602.

The only statutory remedy of the party aggrieved by any decision growing out of any matter connected with an estate is afforded by Rev. St. 1881, § 2454, providing that he may prosecute an appeal to the Supreme Court, as

the statute regulating the settlement of decedents' estate contains no provision authorizing the filing of a complaint for the review of any decision growing out of any matter connected with such an estate in the court where such decision was rendered.—Id.

The provisions of the Civil Code in relation to appeals to the Supreme Court from judgments in civil actions are not applicable to appeals from any decision of the circuit court or judge thereof in vacation, growing out of any matter connected with a decedent's estate, but such appeals are governed by the provisions of Rev. St. 1881, §§ 2454-2457, regulating the settlement of decedents' estate.—Id.

[k] (Sup. 1884)

Under Acts 1883, p. 156, § 101, providing that, on the finding for the claimant, the court shall render judgment against the executor or administrator for the amount thereof to be paid out of the assets of the estate to be administered, where a judgment was rendered not against the administrator, but against the estate for the amount of the finding and costs, and there was no objection to the form thereof, it will not be disturbed on appeal.—Maddox v. Maddox, 97 Ind. 537.

[l] Where an action is brought against a person who dies before it is finally determined, and his executrix is substituted as defendant, the rules governing appeals in ordinary civil actions apply as to the time within which the appeal may be taken, and not the rules prescribed by Rev. St. 1881, §§ 2254-2257, relative to appeals from decisions "growing out of any matter connected with a decedent's estate," and limiting the time for appealing to 10 days.—(Sup. 1885) Heller v. Clark, 103 Ind. 591, 3 N. E. 844; (1887) Wright v. Manns, 111 Ind. 422, 12 N. E. 160.

[m] (Sup. 1887)

An administrator, on the death of the appellee, was substituted, pending the appeal, which resulted in the cause being remanded for a new trial, and from the judgment rendered thereon the administrator appealed. Held, such judgment not growing out of a matter connected with a decedent's estate, the appeal need not be taken within the 10 days nor in the manner prescribed in Rev. St. 1881, §§ 2454-2457, relating to appeals in matters connected with decedents' estates, as amended by Acts 1885, p. 194.—May v. Hoover, 112 Ind. 455, 14 N. E. 472.

[n] (Sup. 1889)

An action by the creditor of a legatee against the legatee and administrator with the will annexed to subject money in the hands of the administrator to the payment of a debt due from the legatee is not a proceeding connected with the settlement of the estate of a decedent, and is not subject to the provisions of Rev. St. 1881, §§ 2454, 2455, regarding appeals in such cases.—Koons v. Mellett, 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231.

[o] In an action by an administrator to recover a note and mortgage as assets of the estate, the time to appeal is governed by the provisions of Rev. St. 1881, §§ 632, 633, relating to appeals in civil actions, rather than by sections 2454, 2455, relating to probate proceedings, and limiting the time for appealing to 10 days.—(Sup. 1889) Walker v. Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; (App. 1893) Merritt v. Straw, 6 Ind. App. 360, 33 N. E. 657.

[p] (App. 1891)

Rev. St. 1881, § 2455, providing for appeals from matters connected with a decedent's estate, does not apply to an action begun by a decedent and prosecuted to judgment by his executrix.—Louisville, N. A. & C. R. Co. v. Etzler, 4 Ind. App. 31, 34 N. E. 669.

[q] (Sup. 1892)

An appeal from a decree, in a suit by an executor to have his title to land under his testator's will quieted, is not governed by the provisions of Rev. St. 1881, § 2455 (Elliott's Supp. § 417), relating to the time of taking an appeal in matters connected with a decedent's estate.—Mason v. Roll, 130 Ind. 260, 29 N. E. 1135.

[r] (App. 1896)

An appeal in an action by an administratrix against the sureties on a gravel-road contractor's bond should be taken under Rev. St. 1894, § 645 (Rev. St. 1881, § 633), authorizing appeals within one year; and it is not governed by Rev. St. 1894, §§ 2609, 2610 (Rev. St. 1881, §§ 2454, 2455), relating to appeals in matters connected with decedents' estates.—Swindle v. State ex rel. Leak, 15 Ind. App. 415, 44 N. E. 60.

[s] (Sup. 1897)

Where the cause of action or demand is in favor of the estate and the procedure for its enforcement is not prescribed by the decedent's estate act (Burns' Rev. St. 1894, §§ 2365, 2621), the practice as to appeals is that prescribed by Civ. Code, § 644, which permits an appeal from the circuit court within one year from the rendition of final judgment.—Harrison Nat. Bank v. Culbertson, 45 N. E. 657, 47 N. E. 13, 147 Ind. 611.

[t] (App. 1899)

Burns' Rev. St. 1894, §§ 2609, 2610, governing appeals from orders relating to the settlement of decedents' estates, are not applicable to an action of replevin by an administrator, growing out of a matter not connected with the decedent's estate.—Sloan v. Lowder, 54 N. E. 135, 23 Ind. App. 118.

[u] (Sup. 1900)

Horner's Rev. St. 1897, §§ 2454, 2455, authorize an appeal to the supreme court from a decision connected with a decedent's estate, provided the appeal bond is filed within 10 days after the rendition of the judgment complained of, and require the transcript to be filed

within 30 days after filing the bond. Section 633 authorizes general appeals to the supreme court to be taken within one year after the rendition of judgment. *Held*, that an action by an administrator to set aside an assignment of a lease held by his decedent was not an action relating to the estate, and hence an appeal might be properly perfected, under section 633, at any time within a year.—*Mark v. North*, 57 N. E. 902, 155 Ind. 575.

[v] (App. 1900)

Under *Horner's Rev. St. 1897, §§ 2454, 2455*, providing that any person aggrieved by any decision of the circuit court in regard to any matter connected with a decedent's estate may appeal by filing a bond within 10 days after the decision complained of, unless the court to which the appeal is brought shall direct an appeal to be granted on the filing of a bond within 1 year after the decision, and also providing that a transcript shall be filed in the supreme court within 30 days after filing the bond, an appeal from a judgment of the circuit court rejecting a claim against a decedent's estate and overruling claimant's motion for a new trial is properly dismissed where no appeal bond was filed, and no application was made to the appellate court for leave to appeal, after the expiration of 10 days after entry of the judgment complained of.—*Lindley v. Darnall*, 56 N. E. 861, 24 Ind. App. 399.

[w] (App. 1901)

*Horner's Rev. St. 1897, § 2454 (Burns' Rev. St. 1894, § 2609)*, provides that an appeal may be taken from any decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate. *Held*, in an action by the state on relation of a legatee against an administrator de bonis non to recover his legacy, that the suit was a civil action, and that the time for appealing from the judgment rendered therein was controlled by the statute relating to appeals in civil actions, and not by that relating to the settlement of decedent's estate, since the judgment against the administrator must be a personal one, and cannot increase or diminish the assets of the estate.—*Rogers v. State ex rel. Beatty*, 59 N. E. 334, 26 Ind. App. 144.

[x] (App. 1904)

*Burns' Ann. St. 1901, § 2609*, authorizes any person aggrieved by any decision of a circuit court or judge in vacation growing out of a matter connected with a decedent's estate to appeal to the Supreme Court on filing an appeal bond. Section 2610, as amended, provides that such bond shall be filed within 10 days after the decision complained of, and that the transcript shall be filed in the Supreme Court 90 days after filing the bond. Section 2612 authorizes an executor or administrator to appeal from the decision of any court or judge in vacation without filing a bond. *Held*, that though an administratrix, in taking an appeal from a decision by which she was aggrieved in

her representative capacity, was not required to file an appeal bond, she was, notwithstanding that fact, governed by such sections, and was bound to file the transcript within 100 days after the decision.—*Chipman v. Wells*, 72 N. E. 172, 34 Ind. App. 1.

[y] (App. 1905)

Under *Burns' Ann. St. 1901, § 657*, providing that administrators may have an appeal and stay of proceedings in the court below without giving an appeal bond, the appeal of an administrator who fails to procure a stay of proceedings in the lower court, and who fails to file the record in the appellate court within the time allowed by law for term time appeals, must be treated as a vacation appeal.—*Holderman v. Wood*, 73 N. E. 199, 34 Ind. App. 519.

An action by an administrator to recover on a policy of insurance on the life of his decedent does not involve the exercise of probate jurisdiction, and an appeal from a judgment therein is therefore governed by the Civil Code.—*Id.*

Where an action does not involve exercise of probate jurisdiction an appeal from a judgment therein is governed by the civil code, though an administrator be a party.—*Id.*

[z] (App. 1905)

Where a surety on an administrator's bond sues to be released, and the administrator fails within the time given by the court to furnish a new bond and is removed, the administrator's appeal is governed by the civil code.—*Moore v. Bankers' Surety Co.*, 34 Ind. App. 633, 73 N. E. 607.

[zz] (App. 1907)

Leave to appeal in an action against an administrator must be proved by the record of the appellate court and cannot be proved by affidavit of attorneys.—*Atkinson v. Maris*, 40 Ind. App. 718, 81 N. E. 745.

Where, in an action against an administrator, leave to appeal was not granted by the appellate court, an appeal should be dismissed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1929-1940.

See, also, 18 Cyc. pp. 1081-1084.

§ 456. Costs.

As claims against estate, see ante, § 218.

In probate proceedings and actions relating to wills or probate, see WILLS, §§ 406-415.

In proceedings for allowance of claims, see ante, § 240.

Liability of special administrator, see ante, § 122.

Of accounting, see post, § 511.

[a] In suit by an administrator on a cause of action which accrued during the lifetime of his intestate, the administrator is not personal-

ly liable for costs. The judgment on that score should be against him in his representative capacity, to be satisfied out of the assets of the estate.—(Sup. 1825) *Harrison v. Warner*, 1 Blackf. 385; (1832) *Cooper v. Thatcher*, 3 Blackf. 59.

[b] (Sup. 1825)

Where an administrator suing in his representative character on a contract entered into with his intestate might have sued in his own name as on a contract made with himself for trover and conversion of the goods of the estate in his own time, he must pay costs in case of failure.—*Harrison v. Warner*, 1 Blackf. 385.

One suing as administrator, though necessarily as such, is liable for costs where he knowingly brings a wrong action, is guilty of willful default, fails to prosecute his suit, or sues on a contract which he knows to be annulled.—*Id.*

[c] (Sup. 1833)

If an executor or administrator, necessarily suing in his representative character, suffer a nonsuit in consequence of an illegal instruction given by the court to the jury against his right to recover, he is not liable for costs *de bonis propriis*.—*Pollard v. Buttery*, 3 Blackf. 239.

[d] (Sup. 1859)

In an action against the representatives of one deceased to enforce a conveyance according to the provisions of a bond for title given by him, they will be liable for costs necessarily incurred in procuring the appointment of a commissioner, making deed, etc., and the vendee will be liable for any part of the costs made by his resistance to the payment of the money.—*Cortner v. Amick*, 13 Ind. 463.

[e] (Sup. 1863)

Where an administrator sues for the recovery of the possession of property of the estate, he shall not be liable for the costs of suit; but, if, in such suit, the judgment for costs is a personal judgment against him, and fails to order that the costs shall be paid by him out of the assets of the estate, the same are collectible of him individually, although the judgment against him for costs was clearly erroneous.—*State ex rel. Mahoney v. Ritter*, 20 Ind. 406.

Where, in an administrator's suit to recover property belonging to the estate, judgment for costs is erroneously rendered against him individually, it is nevertheless effective until corrected on motion in the court in which it was rendered, or on review, or on appeal.—*Id.*

[f] (Sup. 1864)

Where, on appeal by an administrator from a judgment in an action against him before a justice of the peace, his plea to the jurisdiction of the justice is sustained, judgment

should be rendered against plaintiff for costs.—*Palmer v. Fuller*, 22 Ind. 115.

[g] (Sup. 1865)

In all actions by executors and administrators in the court of common pleas on claims or demands of any kind owing them in their fiduciary capacity, costs follow the judgment.—*Wheeler v. Calvert's Adm'r*, 25 Ind. 365.

[h] (Sup. 1870)

In an action by an administrator to recover damages for the death of his decedent, caused by the wrongful act of another, when plaintiff fails to recover, it is error to direct that the costs be made out of his property if there should be no property of the deceased out of which to collect them.—*Evans v. Newland*, 34 Ind. 112.

[i] (Sup. 1874)

Under Code, § 784, an administrator is not personally liable for costs in an action prosecuted by him in his fiduciary capacity.—*Cavanaugh v. Toledo, W. & W. R. Co.*, 49 Ind. 149.

[j] (Sup. 1882)

2 Rev. St. 1876, c. 512, § 62, providing for filing of claims against an estate within one year from the date of the first appointment of an executor, or no costs shall be recovered, does not refer to actions against an administrator or executor, when sued jointly with co-obligors of the deceased upon joint and several contracts.—*Lamson v. First Nat. Bank of Vevay*, 82 Ind. 21.

[k] (Sup. 1883)

Rev. St. § 591, providing that a plaintiff who recovered less than \$50 in the circuit court would be liable for costs, does not apply to suits by an administrator; he having been empowered to sue for any sum in the courts of common pleas, and their jurisdiction having been conferred on circuit courts by Acts 1873, pp. 87, 96.—*Hillenberg v. Bennett*, 88 Ind. 540.

[l] (Sup. 1887)

Costs were adjudged against an administrator in his individual capacity, in defending an action brought against him to recover the possession of property which in good faith he had taken possession of, supposing that it belonged to the estate of the decedent. *Held*, even though the action was prosecuted, and the costs adjudged against the administrator in his individual capacity, he could not be held personally liable for the same under Rev. St. 1881, § 2291, providing that an administrator shall have full power to maintain any suit in his name as such administrator, for the recovery of the possession of any property of the estate, and shall not be liable in his individual capacity for any costs in such suit.—*Mackey v. Ballou*, 112 Ind. 198, 13 N. E. 715.

[m] (Sup. 1890)

If, upon the refusal of the administrator to pay a note, the creditor is compelled to employ an attorney to collect the amount due thereon,

he is entitled to an allowance of attorney's fees provided for in the note.—*Jewett v. Hurtle*, 121 Ind. 404, 23 N. E. 262.

[n] (Sup. 1894)

Where an administrator knowingly brings a wrong action, it will be dismissed at his own cost.—*Rough v. Weis*, 138 Ind. 42, 37 N. E. 331.

[o] (App. 1898)

Where an administrator sues for the death of his intestate, and a judgment for costs is obtained against him, the general fund of the estate is liable to pay such judgment, if the rights of creditors do not intervene.—*Chicago & E. R. Co. v. Harshman*, 51 N. E. 343, 21 Ind. App. 23.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1841–1967.

See, also, 18 Cyc. pp. 1085–1100; note, 68 L. R. A. 418.

#### § 457. Liabilities for conduct of action or defense.

Foreclosure of mortgage, see MORTGAGES, §§ 423–425.

[a] The statute of 1822, enacting that no mispleading should thereafter render any executor or administrator personally liable, has no application to a judgment rendered previous to the statute.—(Sup. 1830) *Moore v. Martindale*, 2 Blackf. 353; (1833) *Martindale v. Moore*, 3 Blackf. 275.

[b] (App. 1900)

In an action against an administrator on a note executed by his intestate, an instruction that it is the duty of an administrator to put in every lawful defense he may have to a note filed against the estate which he represents was not erroneous.—*Ray v. Moore*, 56 N. E. 937, 24 Ind. App. 480.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1068–1970.

See, also, 18 Cyc. p. 1101.

### XI. ACCOUNTING AND SETTLEMENT.

Accounting and default necessary to liability of sureties on bond, see post, § 533.

By surviving partners, see PARTNERSHIP, § 245.

Collateral attack on interlocutory orders in general in settlement of estate, see JUDGMENT, § 480.

Right to trial by jury, see JURY, § 19.

Settlement as condition precedent to enforcement of charge of legacy on land, see WILLS, § 826.

Settlement of insolvent estates, see ante, § 418.

#### (A) DUTY TO ACCOUNT.

Failure to account, as contempt, see CONTEMPT, § 25.

#### § 459. Time for accounting.

[a] (Sup. 1884)

Where a decedent was a surety on a county treasurer's bond and the auditor brought suit on the bond, and decedent was not a party thereto, and his administrator was not made a party, the pendency of such suit afforded no reason why the estate should not be settled, the year having expired, at the end of which it was the duty of the administrator to settle the estate, under Rev. St. 1881, § 2311 et seq., providing that no action shall be brought by complaint and summons against an administrator or his legal representatives on any contract executed jointly or jointly and severally by the decedent, but the holder of the contract or judgment shall enforce the collection thereof against the estate of the decedent only by filing his claim as provided.—*Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739.

[b] (Sup. 1891)

Under Elliott's Rev. St. § 385, requiring claims against estates of decedents to be filed within 30 days before final settlement, a claim filed 2 days before such settlement does not operate to postpone such settlement, as the claim is barred.—*Schrichte v. Stites' Estate*, 127 Ind. 472, 26 N. E. 77, 1009.

[c] (App. 1909)

*Burns' Ann. St.* 1908, § 2906, provides that at the end of one year from notice of his appointment the administrator shall file in the court a true account of all assets of the estate which have come to his hands and all disbursements made by him. Section 2914 provides that after approval of the administrator's account, if there remain no claims pending for allowance, and no debts due the estate remaining uncollected, the court shall enter an order for the final settlement of the estate. Held that, if a claim be filed against a decedent's estate within a year from the appointment of the administrator, no final settlement can be made until such claim be disposed of.—*Tilson v. Hoosier Tropical Fruit Co.*, 43 Ind. App. 684, 88 N. E. 524.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 1973, 1974.

See, also, 18 Cyc. p. 1105.

#### § 464. Successors and representatives.

[a] (Sup. 1849)

Rev. St. c. 30, art. 12, authorizing the probate court to cite an administrator to account after his removal from office, and to compel the payment or delivery of any property in his hands belonging to the estate to his successor, does not authorize the probate court, on the hearing of a citation requiring a person, after his removal as administrator, to account,



to direct the administrator de bonis non to pay to the former administrator a balance found due him on the account.—*Kelly v. Weddle*, 1 Ind. 530, Smith, 362.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. § 1980.

See, also, 18 Cyc. p. 1112; note, 8 Am. St. Rep. 684.

**§ 465. Property to be included.**

Exclusive or concurrent jurisdiction, see COURTS, § 472.

[a] (Sup. 1862)

Where a husband comes into possession of money held by his wife in trust as her administrator, he may be compelled to account for it.—*Keister v. Howe*, 3 Ind. 208.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 1900–1992.

See, also, 18 Cyc. p. 1113.

**§ 467. Failure to account.**

Ground for removal, see ante, § 35.

[a] (Sup. 1879)

The court found a certain amount due by an administrator, and made an order that he pay the same over or stand committed, whereupon he reported that it was physically impossible for him to pay the same, but that he had arranged with the persons interested to convey certain real estate to them to secure the amount due. *Held*, that a fine of a certain sum and an order of imprisonment for a specified time were illegal, as the judgment should have been only imprisonment until the administrator had complied with the order of the court or had been discharged according to law.—*Ex parte Wright*, 65 Ind. 504.

[b] (Sup. 1884)

The pendency of a suit against a joint obligor and against the administrator of the deceased joint obligor is no reason for delay in the settlement of the estate of the deceased obligor; *Rev. St.* 1881, § 2311, forbidding the joinder of the administrator in such a suit.—*Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 1996–1998.

See, also, 18 Cyc. p. 1115.

**(B) PROCEEDINGS FOR ACCOUNTING.**

Proceedings for distribution, see ante, §§ 314, 315.

**§ 468. Nature and form of remedy.**

[a] (Sup. 1891)

The rules of procedure in civil causes should be applied whenever applicable, but in most matters relating to the filing, examination, and

approval or disapproval of reports of administrators strict formality is not required.—*Good-bub v. Hornung's Estate*, 26 N. E. 770, 127 Ind. 181.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. § 1999.

See, also, 18 Cyc. p. 1115.

**§ 469. Jurisdiction of courts.**

[a] (App. 1906)

The filing of an administrator's final report and the giving of notice thereof confer jurisdiction on the court to hear and determine the matters involved therein.—*Mefford v. Larkin*, 38 Ind. App. 33, 76 N. E. 1024, 77 N. E. 900.

[b] (App. 1910)

Where an administrator made a final settlement and paid the clerk for making a record thereof, but it did not appear that the administrator was ever discharged, the court had jurisdiction to require a second final report.—*Fletcher v. Nicholson*, 90 N. E. 910.

The estate of a decedent must be regarded as still pending until the ultimate completion of the business and the discharge of the administrator by the court.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 2000–2013.

See, also, 18 Cyc. pp. 1115–1119.

**§ 471. Proceedings by executor or administrator.**

Insufficient notice as ground for setting aside settlement, see post, § 509 (4).

[a] (Sup. 1858)

*Rev. St.* p. 280, §§ 137–139, requiring notice of distribution of surplus after payment of debts, apply only to intestate estates; and, even if they did apply to cases of distribution under wills, the receipt of the residuary legatees is evidence that they had notice of the settlement.—*Camper v. Hayeth*, 10 Ind. 528.

[b] (Sup. 1887)

*Acts* 1883, p. 160, §§ 23, 26, governing the settlement of decedents' estates, provides that notice be given by the executors or administrators of the time fixed for hearing the report for final settlement "to all persons interested in the estate," but does not provide for the signing of such notice by any particular person. *Held*, that a notice "to the heirs, creditors, and legatees," signed by the clerk, is sufficient.—*Roberts v. Spencer*, 112 Ind. 81, 13 N. E. 127.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 2018–2024.

See, also, 18 Cyc. pp. 1124, 1125.

**§§ 473, 474. Actions for accounting, and administration suits.**

Right to trial by jury, see JURY, § 19.

**[a] (Sup. 1888)**

In an action to compel an administrator to account to his successor for sums received for the sale of lands, a complaint stating that he received money for the sale of real estate of his intestate; that he has refused to account, though often requested, and that he still has the money in his hands,—is sufficient.—*Lindley v. State ex rel. Wells*, 115 Ind. 502, 17 N. E. 611.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2041-2000.

See, also, 18 Cyc. pp. 1126-1136.

**(C) CHARGES AND CREDITS.**

Allowance and payment of claims, see ante, §§ 202-287.

Liabilities on sale of property of decedent, see ante, § 391.

Necessity and requisites of appraisal and inventory, see ante, §§ 62-72.

**§ 479. Credits in general.****[a] (Sup. 1856)**

An executor was also guardian of a minor, who, as legatee of a second estate, was entitled to one-half of a sum due such second estate from the first estate. The executor of the second estate agreed with the guardian that he might retain the half due to his ward. *Held*, that the guardian could not credit himself with the ward's half as executor, or charge himself as guardian, until he had paid the half due to the other executor.—*Burtch v. Thorn*, 7 Ind. 508.

**[b] (App. 1905)**

A compromise agreement between parties interested in the estate of a decedent provided that the widow should receive a specified sum in the hands of the court and a further sum in payment of her claims to dower and distributive share in the estate, and that in consideration of receiving such sums she should deliver in escrow quitclaim deeds to the others interested in the estate, to be delivered to them on fulfillment of the agreement binding them to give the widow a bond to secure a part of the sum to be paid, and to apply a part of the proceeds of a sale of land to the payment of the sum until the same was paid. The widow agreed to settle as administratrix and account for all property received, less legal payments; the amount so received to operate as a credit on the sum to be paid her. The widow made a final report showing a balance in her hands. *Held*, that the court, on approving the report, properly credited the balance on the sum to be paid her according to the agreement, though the conditions therein specified had not been performed.—*Hartzell v. Hartzell*, 76 N. E. 430, 37 Ind. App. 481.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 2064.

See, also, 18 Cyc. p. 1139.

**§ 484. Disbursements for benefit of legatees or distributees.****[a] (Sup. 1852)**

Where money of wards was in hands of their father's administrator, and the latter, under direction of the guardian, made expenditures in completion of an unfinished distillery, the guardian having obtained an order of the probate court to invest the money of his wards in such manner, the administrator was entitled to credit in settlement of the estate with them if his expenditures were made with reasonable care.—*Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 763, 2067.

**§ 485. Counsel fees and costs.**

Appeal for allowance of, who entitled to, see APPEAL AND ERROR, § 151.

Costs of accounting, see post, § 511.

Expenditures allowable, see ante, § 111.

**[a] (Sup. 1908)**

Where an administrator pays an attorney an excessive fee, the same, in the absence of bad faith, should be corrected when the administrator reports.—*Scott v. Smith*, 171 Ind. 453, 85 N. E. 774.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. § 2068.

**(D) COMPENSATION.**

Allowance of illegal fees as ground for setting aside settlement, see post, § 500 (4).

**§ 488. Right to compensation in general.****[a] (Sup. 1877)**

An executor or administrator cannot pay himself, but, under Act June 17, 1852, § 148 (2 Rev. St. 1876, p. 545), his compensation must be ordered by the court.—*Collins v. Tilton*, 58 Ind. 374.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2069, 2071-2077.

See, also, 18 Cyc. p. 1141.

**§ 496. Amount and computation of compensation.****[a] (Sup. 1835)**

Where it appeared, by the settlement of an administrator, that he had paid out \$3,010, it was *held* that \$180 was not an unreasonable allowance to him for his services.—*Ray v. Doughty*, 4 Blackf. 115.

**[b] (Sup. 1886)**

Where the amount received by an administratrix administering upon an estate was \$2,764, and the amount disbursed \$2,164, a claim for \$600 for services rendered in managing such estate is excessive. The fact that such administratrix, living some distance from the

county seat, made a great many trips to consult with her counsel, does not warrant an allowance of such an expense. An allowance of \$300 for such services was sufficient.—*Watkins v. Romine*, 7 N. E. 193, 106 Ind. 378.

[c] (Sup. 1889)

In making an allowance to an administrator for services, the court is not bound by any absolute rule, but will consider the nature of the estate, and difficulties attending the recovery of the assets and the settlement of the estate, the peculiar qualifications of the administrator, the advantage to the estate from such qualifications, and all other such facts and circumstances which will better enable it to do justice as between the estate and the administrator.—*Pollard v. Barkley*, 17 N. E. 294, 117 Ind. 40.

[d] (App. 1893)

Under Rev. St. 1881, § 2396, the amount which the court may allow an administrator for his services is largely discretionary.—*Ex parte Hodge*, 33 N. E. 980, 6 Ind. App. 487; *In re Niles' Estate*, Id.

[e] (App. 1893)

An administrator is not entitled to recover interest on his claim for services during the pendency of an appeal in a suit to remove him and compel him to account.—*McClelland v. Bristow*, 35 N. E. 197, 9 Ind. App. 543.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2107, 2109-2113, 2115, 2116.

See, also, 18 Cyc. pp. 1154-1162.

§ 501. Proceedings and order for allowance.

[a] (Sup. 1877)

An allowance of executor's commissions, made by the court by its approval of a partial settlement report of the executor, wherein he merely credits himself with a certain sum for his services, without notice to the heirs or legatees, is not conclusive on them, and may be objected to by them on the filing of his final settlement report; and where objection and exception are so made it is the duty of the court to hear evidence on behalf of the heirs or legatees, disproving or reducing such allowance.—*Collins v. Tilton*, 58 Ind. 374.

Where objection and exception are made to an allowance to an executor by the approval of a partial report in which he credits himself with certain sums for services, without notice to the heirs or legatees, it is the duty of the court to hear evidence on behalf of such heirs and legatees disproving or reducing such allowance.—Id.

That an allowance has been made by a former judge of the court to an executor by the mere approval of a partial report wherein an allowance for services has been claimed as a credit is no reason why a subsequent judge of

the court should refuse to hear evidence regarding the same.—Id.

[b] (Sup. 1887)

What sum shall be allowed an administrator for his services is a matter very much within the discretion of the court; and the court, although it has referred the administrator's report to the master, may of its own motion dispense with a report on that question.—*Cox v. Baker*, 113 Ind. 62, 14 N. E. 740.

[c] (Sup. 1889)

In a proceeding for the setting aside of a final settlement of an administrator allowing attorney's fees for his personal services as an attorney, it was competent to receive evidence for the purpose of showing how much the services as an administrator were worth as a means of ascertaining as near as might be how much of the sum allowed to him was for service as attorney.—*Pollard v. Barkley*, 17 N. E. 294, 117 Ind. 40.

[d] (App. 1893)

Under Rev. St. 1881, § 2396, providing that the court may make allowance to an administrator for his services such as the court may think just and reasonable, its action in fixing an administrator's allowance will not be reviewed where the record does not show on what the allowance for services was based.—*Ex parte Hodge*, 6 Ind. App. 487, 33 N. E. 980; *In re Niles' Estate*, Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2072, 2142-2148.

See, also, 18 Cyc. pp. 1165-1167.

(E) STATING, SETTLING, OPENING, AND REVIEW.

§ 502. Form and requisites of account.

[a] (Sup. 1827)

An account commencing, "A. B., debtor to C. D.," and then setting out the items, dates, sums, etc., was filed in the circuit court upon the application of an executor, under the statute of 1824. *Held*, that the account was sufficiently particular.—*Sackett v. Wilson*, 2 Blackf. 85.

[b] (Sup. 1867)

By the words "final settlement," as used in section 116 of the act for the settlement of decedents' estates (2 Gav. & H. St. p. 518), is not to be understood the mere ascertainment of the final balance of cash in the hands of an executor or administrator. A payment of that balance is also included, so that nothing shall remain to be done by him in his fiduciary character to complete the execution of his trust.—*Dufour v. Dufour*, 28 Ind. 421.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2149-2152.

See, also, 18 Cyc. pp. 1169-1171.

**§ 504. Objections and exceptions.**

Right to trial by jury on exceptions to report of executor or administrator, see **JURY**, § 19.

**[a] (Sup. 1878)**

Where objections are filed to the allowance of a final settlement of an administrator, he stands as plaintiff, and the objector as defendant, in the proceedings; and a motion by the administrator in arrest of judgment, on account of the insufficiency of the objections, presents no question for decision unless defendant has answered by way of set-off, counterclaim, or other affirmative plea, and the finding of the court is founded thereon.—*Brownlee v. Hare*, 64 Ind. 311.

**[b] (Sup. 1882)**

Exceptions to an executor's account current that do not point out any error therein, but simply charge that the will has not been carried out in all its parts, should not be considered.—*Christie v. Wade*, 87 Ind. 294.

**[c] (Sup. 1882)**

An administrator's final report is not the subject of demurrer.—*Conger v. Babcock*, 87 Ind. 497.

An objection to the final report of an administrator, that the administrator has not collected debts due the estate, must show that the debts are collectible.—*Id.*

**[d] (Sup. 1884)**

As no answer can be made to an exception to an administrator's report, a demurrer to such answer raises no question.—*Dohle v. Stults*, 92 Ind. 540.

**[e] (Sup. 1884)**

A widow's remedy against the administrator for paying assets of the estate on general debts, thereby leaving unpaid a preferred claim allowed the widow and a mortgage on her interest in decedent's land, may be enforced by exceptions to his final report.—*Cunningham v. Cunningham*, 94 Ind. 557.

**[f] (Sup. 1891)**

The question as to whether or not a claim should be paid as preferred may properly be raised at the time of the consideration of a final report, and it may be raised either by a petition or by exceptions to the report.—*Goodbub v. Hornung's Estate*, 26 N. E. 770, 127 Ind. 181.

**[g] (Sup. 1891)**

Since *Elliott's Rev. St.* § 385, requires all claims against the estates of decedents to be filed within 30 days before final settlement, a creditor who had failed to thus file his claim was not entitled to object to items in the administration account, though he had filed his claim 2 days before the submission of such account to the court.—*Schrichte v. Stites' Estate*, 127 Ind. 472, 26 N. E. 77, 1009.

**[h] (Sup. 1891)**

The failure of a creditor of a decedent to object to certain acts of the administrator, it

not appearing that he knew his rights, or that his failure to object influenced the administrator's conduct, creates no estoppel in the creditor to object to the accounts of the administrator.—*Crum v. Meeks*, 128 Ind. 360, 27 N. E. 722.

**[i] (App. 1895)**

On final settlement by an administrator, exceptions cannot be filed to a prior order of the court for the sale of the real estate of the decedent.—*First Nat. Bank of Indianapolis, No. 2,556, v. Hanna*, 39 N. E. 1054, 12 Ind. App. 240.

**[j] (App. 1898)**

On a hearing on exceptions filed to the current report of an administrator, the court may make special findings, under *Horner's Rev. St.* 1897, § 551.—*Swift v. Harley*, 49 N. E. 1069, 20 Ind. App. 614.

Where, on a hearing of exceptions to the report of an administrator, the facts found are insufficient to enable the court to say, as a matter of law, whether the administrator is chargeable with certain items, a *venire de novo* should be awarded.—*Id.*

The correctness of an administrator's account may be attacked by exceptions.—*Id.*

**[k] (App. 1902)**

Under *Burns' Rev. St.* 1901, § 560, providing that, on request, the court shall state its finding of facts and conclusions of law, in the trial of exceptions to a report of an executrix the court could make a special finding of the facts and state its conclusions of law thereon.—*Taylor v. McGrew*, 64 N. E. 651, 29 Ind. App. 324.

**[l] (App. 1909)**

Special findings made upon exceptions to an administrator's report need not set out the various items of the report.—*In re Roberts' Estate*, 89 N. E. 496; *Roberts v. Dimmett*, *Id.*

Exceptions to conclusions of law and to each of them in proceedings upon exceptions to an administrator's final accounting admit the correctness of the facts found.—*Id.*

Conclusions of law that the administratrix be allowed a certain sum for services and expenses incurred, that the widow be allowed one-third of the surplus after payment of debts and liabilities, and that advancements made by decedent should be considered in distributing the estate, were sufficiently explicit to support a judgment on the issues raised by the exceptions.—*Id.*

On an administratrix's settlement, special findings *held* within the issues raised by exceptions.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2157-2167.

See, also, 18 Cyc. pp. 1171-1174.

**§ 506. Evidence.**

[a] (App. 1893)

The claims of the executor in his final report for credit against the estate are in the nature of separate complaints or allowances, and the exceptions to them or any one of them placed the burden on him, and he was required to establish the correctness of his report in respect to such matters as were embraced in the exceptions filed.—*Wysong v. Nealis*, 41 N. E. 388, 13 Ind. App. 165.

To entitle himself to a credit, the administrator must prove, not only a payment, but the correctness of the demand.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2169-2177.

See, also, 18 Cyc. pp. 1180-1183.

**§ 507. Hearing or reference.**

In proceedings for allowance of compensation, see ante, § 501.

[a] (Sup. 1883)

Where an exception to the confirmation of an executor's final settlement specified several items, including a sum of money in gold, another in currency, and a promissory note, all of which had been omitted from the inventory of the estate, and there was evidence introduced tending to sustain the exception as to each of the specifications, a charge directing the jury that if the decedent in his lifetime made a gift of the note, or any part of it, to the executor, they must find for the executor "on this exception," was error.—*Taylor v. Burk*, 91 Ind. 252.

Where, on exceptions to the report of an executor, it appeared that testator held the executor's note for \$1,800 and the executor had introduced evidence to show a settlement during testator's last illness, whereby the note had been surrendered to the executor for but little more than one-half its face, and there was evidence before the jury that testator was 80 years old, of unsound mind, and incapable of transacting business, the question of testator's mental soundness should have been considered by the jury.—*Id.*

[b] (Sup. 1884)

In the absence of statute, the court may, with the consent of the parties, refer an administrator's report to a master commissioner.—*Cunningham v. Cunningham*, 94 Ind. 557.

[c] (Sup. 1890)

Under Acts 1883, p. 160, § 23, which provides that when an administrator files his final settlement the clerk shall fix a day for hearing it, the final order rendered at such hearing is not invalidated by the fact that the time for the hearing was fixed by the court and not by the clerk.—*Williams v. Williams*, 125 Ind. 156, 25 N. E. 176.

[d] (App. 1898)

Findings that an administrator paid a mortgage on decedent's land, but that there was

no evidence that he paid it in the capacity of administrator, and that he afterwards sold the land, and converted the price to his own use, are too uncertain and ambiguous to enable the court to say, as a matter of law, whether he should be credited by the amount of the mortgage.—*Swift v. Harley*, 40 N. E. 1069, 20 Ind. App. 614.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2004, 2005, 2178-2191.

See, also, 18 Cyc. pp. 1174-1179.

**§ 508. Order or decree.**

Order or decree for distribution, see ante, § 315.

[a] (App. 1893)

After the filing of what purported to be the final report of an administrator, an order was entered that the court "does approve and confirm the same in all respects, as to everything embraced therein, and discharges administrator from further duty or liability as to the matters embraced in said report. And come now —, and file exceptions herein in the words and figures following, to wit: [here insert;] and come now said exceptors, and withdraw their exceptions as to matters embraced in said report, and consent to its approval, reserving their right to enforce and collect their claims in the future. And the estate is continued as to matters embraced in the exceptions only for further administration as the court may authorize and direct; and said — now tenders his resignation as such administrator, which is accepted, and said administrator finally discharged." *Held*, that such order did not constitute a final settlement of the estate, and the appointment of an administrator *de bonis non* was proper.—*Green v. Brown*, 8 Ind. App. 110, 33 N. E. 979.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2192-2198.

See, also, 18 Cyc. p. 1186.

**§ 509. Opening or vacating.**

By suit in different jurisdiction, see post, § 516.

Change of jurisdiction of petition to reopen final settlement from appellate to original, see COURTS, § 52.

Right to open and close at trial, see TRIAL, § 25.

Setting aside allowance or disallowance of claims, see ante, § 238.

To allow presentation of claim, see ante, § 233.

**§ 500 (1). Nature and scope of remedy.**

[a] (Sup. 1839)

Rev. St. 1881, § 2403, and 2 Rev. St. 1876, p. 537, relating to the setting aside of final settlements in the administration of estates, being

remedial, a proceeding in 1884 to set aside the settlement of an administrator must be regarded as under the statute of 1881 rather than as under the former statute in force when the final settlement was approved.—*Pollard v. Barkley*, 17 N. E. 294, 117 Ind. 40.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196-1206.

**§ 509 (2). Jurisdiction.**

**[a] (Sup. 1889)**

By the act abolishing courts of common pleas, and transferring their jurisdiction to the circuit courts, those courts have jurisdiction to set aside final settlements of administrators for fraud, mistake, and illegality.—*Pollard v. Barkley*, 17 N. E. 294, 117 Ind. 40.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196-1206.

**§ 509 (3). Persons entitled to maintain proceedings.**

**[a] (Sup. 1880)**

Under 2 Rev. St. p. 275, § 116, providing that any person interested in an estate may have the settlement set aside for mistake or fraud at any time within three years after settlement, and, if such person be under any legal disability at the time of settlement, then within three years after the removal of the disability, the disability contemplated by the statute related to a person's competency, capacity, etc., and not to a disability to prosecute his claim against the estate because of the pendency of an appeal.—*Beard v. First Presbyterian Church of Town of Peru*, 15 Ind. 490.

**[b] (Sup. 1880)**

Plaintiff never filed his claim against a decedent's estate, nor was any such record thereof made as was necessary to charge the administrator with constructive notice of its existence; and, further, the administrator had no actual knowledge of the claim prior to his final settlement. *Held*, that the court properly concluded that plaintiff had failed to show such an interest in the estate as to entitle him to have the settlement set aside for fraud, under 2 Rev. St. 1876, p. 537, § 116.—*Spicer v. Hockman*, 72 Ind. 120.

**[c] (Sup. 1891)**

Where, upon the final settlement of an estate, the administrator gave notice by publication and posting, but failed to serve any summons upon a creditor of the estate, the latter, if he did not appear at such final settlement, can have it set aside, under Rev. St. 1881, § 2403, providing that, where a final settlement has been made, and the administrator discharged, any person interested in the estate not appearing at the final settlement, nor person-

ally summoned, may have so much thereof as affects him adversely set aside for illegality, mistake, or fraud.—*Crum v. Meeks*, 128 Ind. 360, 27 N. E. 722.

**[d] (Sup. 1899)**

Under Burns' Rev. St. 1894, § 8560, authorizing the county auditor, on notice to a taxpayer, to add for any number of years omitted property to the tax duplicate, with its proper valuation, and to charge such property to the owner with the taxes thereon, the auditor has such an interest as qualifies him to move to reopen an administration to collect taxes evaded by the decedent, as provided by section 2558, for persons interested in the estate who were not summoned and did not appear at the final settlement.—*Graham v. Russell*, 52 N. E. 806, 152 Ind. 186.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196-1206.

**§ 509 (4). Grounds.**

**[a] (Sup. 1858)**

2 Rev. St. p. 275, § 116, relating to suits to set aside settlements made by administrators and executors, is intended to protect the executor or administrator from suits except for mistake or fraud, where the order making a final settlement is not appealed from.—*Camper v. Hayeth*, 10 Ind. 528.

Under 2 Rev. St. p. 275, § 116, relating to the setting aside of the administrator's settlement for mistake or fraud, a suit by a residuary legatee will lie in the common pleas court to set aside the settlement of the administrator of an estate for a mistake by him in failing to account for money.—*Id.*

Under 2 Rev. St. p. 275, § 116, providing that no final settlement of an administrator shall be revoked or reopened, except by appeal, unless for fraud or mistake and on application within three years, a settlement should be rectified, on application within the time limited, on the ground that the executor failed and neglected to account to one of the legatees for a certain sum of money shown to be on hand at the time of the testator's death.—*Id.*

Under 2 Rev. St. p. 275, § 116, providing that an administrator's final account shall not be revoked or reopened, except by appeal, unless for fraud or mistake and on application within three years, the mistake contemplated was of fact, and not of law; hence the settlement would not be reopened to review a payment by an administrator to the widow of money which he alleged was due to her under the will, there being no fraud.—*Id.*

**[b] (Sup. 1859)**

Returning a false inventory is such a fraud as will cause the final settlement of an administrator to be set aside.—*West v. Reavis*, 13 Ind. 294.

[c] (Sup. 1880)

2 Rev. St. § 116, providing that no final settlement of an administrator's accounts shall be revoked or reopened, except by appeal to the circuit court, does not deprive the court of common pleas, sitting as a probate court, of jurisdiction to set aside the settlement on the ground of fraud.—*Beard v. First Presbyterian Church of Town of Peru*, 15 Ind. 490.

[d] (Sup. 1873)

A claim was filed and allowed against an estate, but on appeal to the Supreme Court the allowance was reversed. After reversal, but before the case had been retried, the administrator made a final settlement of the estate, and the surplus was divided among the heirs of the decedent, of whom claimant was one. After receiving his share, he instituted proceedings to set aside the settlement, on the ground that his claim was still pending, but not showing any mistake or fraud. *Held* that, as there was no appeal and no fraud or mistake of fact, the settlement was conclusive and could not be set aside under 2 Gav. & H. Rev. St. p. 518, § 116.—*Reed v. Reed*, 44 Ind. 429.

Under 2 Gav. & H. St. p. 518, § 116, the final settlement of an administrator may be set aside for mistake or fraud at any time within three years by the court in which it was made.—*Id.*

[e] (Sup. 1874)

Partial settlements of estates by executors and administrators, made to and approved by the court, are only prima facie correct, and on final settlement may so far be opened up as to correct frauds or mistakes therein, though not excepted to at the time or appealed from.—*Goodwin v. Goodwin*, 48 Ind. 584.

[f] (Sup. 1878)

Where, through the failure of an executor to use due diligence in collecting a note due to his testator's estate, whereby the note became worthless through the insolvency of the maker, this was *held* to be sufficient ground, under Act Gen. Assem. June 17, 1852, § 116, to reopen the final settlement of such executor, in which he had asked for and received a credit for the amount of such note, as being uncollectible by reason of such insolvency of the maker.—*Miller v. Steele*, 64 Ind. 79.

The final settlement of the estate of a deceased person may be set aside for fraud or mistake on the part of the executor or administrator.—*Id.*

[g] (Sup. 1879)

Judgment having been rendered against A. for costs, in a suit by him against B.'s executors, A. appealed, and during the pendency of the appeal the executors made a final settlement of the estate, without making provision for the payment of whatever might be finally determined as due A., as required by statute in the case of pending claims against an estate. The judgment against A. having been reversed

on the appeal, and judgment given in his favor, *held*, that such settlement might be set aside on petition filed by A. within the statutory period.—*Heaton v. Knowlton*, 65 Ind. 255.

Where a final settlement of decedent's estate is had, pending an appeal by a creditor of the estate from a judgment against him, without making provision for payment of whatever may be finally determined as due such creditor, the fact that no appeal bond was filed, and no supersedeas procured, or that the appeal, after dismissal for failure of the creditor to file a brief, was reinstated, is no defense to a petition by the creditor to set aside the settlement.—*Id.*

[h] (Sup. 1879)

Testator devised to a married daughter a specified sum of money, "to be paid to her at such times and in such sums as she may be in need of it, and put it not into the hands of her husband, as I will it to be kept clear from all his claims." *Held*, in a suit against the executor by the devisee, that the report made by him upon final settlement could be set aside, in order to compel him to account for interest on the money in his hands representing the proceeds of the estate.—*Zeek v. Reed*, 69 Ind. 319.

[i] (Sup. 1882)

The final settlement of an intestate estate will not be disturbed because of an overpayment by a debtor to the administrator, where the debtor has been negligent in allowing the mistake to be made, and has not shown reasonable diligence in seeking its correction after ascertaining it.—*Dickey v. Tyner*, 85 Ind. 100.

[j] (Sup. 1889)

The allowance to an administrator of attorney's fees for his personal services in the administration, which is prohibited by sections 2396-2398, is an illegality, within Rev. St. § 2403, providing that the settlement may be set aside for fraud, illegality or mistake.—*Pollard v. Barkley*, 117 Ind. 40, 17 N. E. 294.

[k] (Sup. 1890)

It is no ground for setting aside an administrator's final settlement that he sold, as an asset of the estate, land in which a third person had an interest, where the administrator at the time of his discharge paid into court a sum largely in excess of the value of such interest, and it is not shown that the court has made any disposition of such sum.—*Williams v. Williams*, 125 Ind. 156, 25 N. E. 176.

[l] (Sup. 1891)

In an action by a creditor of a decedent to set aside the final settlement of the administrator, he is not estopped from charging the administrator with crediting himself with funds misappropriated, by the fact that in another suit he sought to set aside a sale by the administrator on the ground that the land sold too cheaply.—*Crum v. Meeks*, 128 Ind. 360, 2. N. E. 722.

[m] (App. 1894)

Procuring administration on an estate by a fraudulent representation that the owner is dead warrants the setting aside of the judgment approving the administrator's final report, under Rev. St. 1881, § 2403, authorizing such a judgment to be set aside for mistake, fraud, or illegality.—*Jaap v. Digman*, 8 Ind. App. 509, 36 N. E. 50.

[n] (Sup. 1899)

Ignorance of the administrator that his intestate had failed to list and return all his property for taxation will not defeat reopening of the administration to subject the estate to payment of delinquent taxes.—*Graham v. Russell*, 52 N. E. 806, 152 Ind. 186.

[o] (App. 1902)

A complaint against an administrator alleged that plaintiff had obtained a judgment against defendant's decedent, which was a lien against the estate, and that defendant gave assurance that he would settle it, but that, notwithstanding said administrator was aware that the estate was insolvent, he proceeded to settle it as a solvent estate, and made a final settlement without notice to plaintiff, applying all assets to preferred claims, and that plaintiff was misled by the fraud, and prevented from calling the court's attention to said claim. The prayer was for revocation of the order settling the estate. *Held*, that a cause of action was stated under Burns' Rev. St. 1901, § 2558, providing for the setting aside of a final settlement for fraud on application within three years.—*Kingan & Co. v. Hawley*, 64 N. E. 620, 29 Ind. App. 376.

[p] (App. 1904)

A final settlement of a decedent's estate without payment of or provision for taxes is illegal, within Burns' Ann. St. 1901, § 2558, and may be set aside for the purpose of compelling its payment.—*Cullop v. City of Vincennes*, 72 N. E. 166, 34 Ind. App. 667.

[q] (App. 1906)

Where an administrator procured a final settlement on a final report showing that he and another were the only heirs at law of the decedent, and procured an order of the court directing the clerk to pay them the amount remaining for distribution, when in fact a third person was the sole heir and they had no right to the fund, the heir had a right to have the final settlement set aside.—*Mefford v. Lamkin*, 76 N. E. 1024, 77 N. E. 960, 38 Ind. App. 33.

[r] (App. 1909)

Defendant was appointed administrator to sue on a cause of action for death by negligence and compromised for a certain amount, the order which authorized the compromise directing payment of the money received to plaintiffs, but he was discharged on final settlement, made without notice to plaintiffs, without having distributed the money as directed. *Held*, that he could not apply the money to any other purpose than that for which he held it, and

plaintiffs could set aside the order approving the administrator's final account and discharging him.—*Fox v. Rhodes*, 43 Ind. App. 573, 88 N. E. 92.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196-1206.

#### § 509 (5). *Limitations and laches.*

[a] (Sup. 1880)

An action to set aside a final settlement of a decedent's estate must be brought within three years after such settlement, and such an action is not within any of the provisions of the general statute of limitations.—*Spicer v. Hockman*, 72 Ind. 120.

[b] (Sup. 1882)

Under section 110 of the act for the settlement of a decedent's estate, providing that any person interested in an estate which has been settled may have the settlement set aside for mistake or fraud at any time within three years after said settlement, where, in a settlement between plaintiff and the executor of an estate to which the former was indebted on promissory notes, a credit in plaintiff's favor indorsed on one of the notes was overlooked, the estate remaining unsettled for four years after the mistake occurred, and the discovery thereof not being made until two years later, plaintiff was not entitled to have the settlement opened and corrected, it not appearing how the discovery of the mistake was made, and why by proper diligence it might not have been made sooner.—*Dickey v. Tyner*, 85 Ind. 100.

[c] (App. 1909)

Burns' Ann. St. 1908, § 2925 (Burns' Ann. St. 1901, § 2558), providing that any person interested in an estate and not appearing at the time of the settlement may have the settlement set aside, and the estate reopened by filing his petition therefor within three years from such settlement, qualifies a special proceeding granted by statute, and must be complied with by one asserting a right thereunder, and hence an action brought under the statute more than three years after the approval of the final report and the discharge of the executrix was barred.—*Clark v. Schindler*, 43 Ind. App. 269, 87 N. E. 44.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196-1206.

#### § 509 (6). *Application.*

[a] (Sup. 1876)

In a suit by the widow to set aside the final settlement of the administrator with the will annexed of her husband's estate, and to obtain an order on him for the \$500 allowed her by law, she alleged that, although he had



received sufficient assets to pay the amount, he had failed to pay it, but had reported it in his final settlement as paid. No demurrer was interposed, and on the trial all the material facts of the complaint, except that anything was due to the plaintiff, were admitted by the defendant; and the case was tried upon an agreement that personal judgment might be rendered against the defendant for the sum found due the plaintiff, should there be a finding in her favor. *Held*, on appeal from a judgment in favor of the plaintiff, that the agreement, finding, and judgment cured all defects in the complaint.—*Lyon v. Roy*, 54 Ind. 300.

[b] (Sup. 1878)

A superfluous allegation of fraud in a complaint to reopen an executor's final settlement does not vitiate the complaint when it is otherwise good.—*Miller v. Steele*, 64 Ind. 79.

[c] (Sup. 1882)

In an action against the executor and heirs of an estate to set aside a final settlement thereof, a complaint alleging that in a settlement between plaintiff and the executor plaintiff was found indebted to the estate in a certain sum, evidenced in part by promissory notes, that by reason of the notes being all pasted together at one end a credit of \$500 indorsed on one of them was concealed and overlooked, and the note was counted in the settlement against plaintiff for the sum of \$703, when in fact there was only due and unpaid the sum of \$15, sufficiently shows that the sum for which the credit was indorsed on the note was actually paid.—*Dickey v. Tyner*, 85 Ind. 100.

A complaint in an action against the executor and heirs of an estate to set aside the final settlement thereof, alleging that in a settlement between plaintiff and the executor a credit indorsed on one of the notes due from plaintiff to the estate was overlooked, whereby he was found indebted to the estate in a greater sum than was actually due, and which he paid, that the surplus of the estate which was greater than it ought to have been by the amount of the credit was distributed to defendants, and that plaintiff did not discover the mistake until after final settlement of the estate does not state facts sufficient to entitle plaintiff to recover directly against the heirs or legatees under Rev. St. 1881, §§ 2442, 2453.—*Id.*

[d] (Sup. 1883)

An averment in a petition under Rev. St. 1881, § 2403, to set aside the final settlement of an administrator, that on the hearing of the final report no proof was made to the court that the proper notice of such hearing had been given, is not equivalent to an averment that such notice had not been given, and is insufficient to authorize a setting aside of the final settlement.—*Chase v. Beeson*, 92 Ind. 61.

In a proceeding under Rev. St. 1881, § 2403, to set aside the final settlement of an administrator, the charge that the final report was made and filed to defraud a certain person inter-

ested in the estate out of her claim was too general to be available as a charge of fraud, as the specific facts should have been stated.—*Id.*

[e] (Sup. 1888)

Rev. St. 1881, § 2403, provides that when final settlement shall have been made, and an executor or administrator discharged, any person interested in the estate, and not appearing at the settlement, nor personally summoned to attend, may have such settlement, or so much as affects him adversely, set aside, by filing in the court where the settlement was made, within three years from its date, his petition, etc. Where plaintiff attended, by counsel, at the final settlement, and does not aver in his petition that he was not personally summoned to attend, he can have no relief under this statute. His proper course would have been to appeal from the decree of final settlement.—*Dillman v. Barber*, 114 Ind. 403, 16 N. E. 825.

Where a petition to have an administrator's final settlement set aside alleged that the petitioner appeared at the final settlement by his attorney, a reply averring that he did not appear at the final settlement is a departure, and must be disregarded.—*Id.*

[f] (Sup. 1890)

Under Rev. St. 1881, § 2403, which provides that the final settlement of an estate may be set aside upon the petition of any interested person who did not appear at such settlement, and was not personally summoned to attend, a petition which, after reciting the making of the final settlement, alleges that in such settlement the administrator represented that all debts of the estate had been paid; that the court thereupon accepted the settlement; that at the time the petitioner had a just claim against the estate, which he would have filed had not such settlement been made before the close of the year allowed for filing claims; and that he did not appear at such settlement, and was not summoned to attend the same,—is sufficient.—*Shirley v. Thompson*, 123 Ind. 454, 24 N. E. 253.

[g] (Sup. 1890)

Under Rev. St. 1881, § 2403, which provides that an administrator's final settlement may be set aside for fraud, illegality, or mistake upon the petition of any interested person who did not appear at the settlement, and was not personally summoned to attend it, a petition which fails to allege that the petitioner was not served with summons to be present at the day on which the settlement was set for hearing is insufficient, though it does allege that he had no notice by summons or otherwise that the settlement would be heard at the adjourned day at which it was finally heard.—*Williams v. Williams*, 125 Ind. 156, 25 N. E. 176.

[h] (Sup. 1894)

A complaint in a suit to set aside the settlement of a deceased partner's estate, which alleges an outstanding firm indebtedness at de-

cedent's death; that, during the administration of decedent's estate, several judgments were rendered on the indebtedness against it and the surviving partners, complainant and another; that all the firm assets had been exhausted in paying firm debts; that decedent left \$10,000 worth of property liable for his debts; that his administratrix refused to pay any part of the judgments; that complainant had to pay them in full from his separate means; and that the administratrix, without complainant's knowledge, procured a final settlement, without paying any part of the judgment,—need not allege the particular debts, amounts, and persons to whom paid, in exhausting the firm property, nor allege more particularly decedent's ownership of property.—*Harter v. Songer*, 138 Ind. 161, 37 N. E. 595.

[I] (App. 1898)

Under Burns' Rev. St. 1894, § 2558 (Hornor's Rev. St. 1897, § 2403), providing for setting aside final settlement of an estate after the administrator has been discharged, on a person interested in the estate filing his petition, setting forth the fraud or mistake in the settlement or prior proceedings, "affecting him adversely," it is not enough to allege that plaintiffs were creditors of the estate, and had claims allowed which were not paid, and that the administrator did not account for funds received, but it should show that their claims were for more than nominal sums; and, having alleged that the estate was settled as insolvent, it should show that, after payment of any claims entitled to a priority, there would be a balance to be applied on their claims.—*Smith v. Miller*, 51 N. E. 508, 21 Ind. App. 82.

Under Burns' Rev. St. 1894, § 2558 (Hornor's Rev. St. 1897, § 2403), relating to setting aside the final settlement of an estate, the estate may be reopened only on the petition of those whose pecuniary interests have been adversely affected by the settlement, and the complaint must therefore show that the illegality, mistake, or fraud worked pecuniary damage to the petitioners.—Id.

[J] (Sup. 1899)

Under Burns' Rev. St. 1894, § 2558 (Rev. St. 1881, § 2403), authorizing a person interested who was not summoned and did not appear at the final settlement to move to reopen an administration, a county auditor moving to reopen to collect delinquent taxes against the estate need not aver failure of summons, since the auditor would have had no authority to appear, and the state could not be compelled to appear.—*Graham v. Russell*, 52 N. E. 806, 152 Ind. 186.

[K] (App. 1906)

Under Burns' Ann. St. 1901, § 2558, authorizing the setting aside of an administrator's final settlement on a petition setting forth any illegality or mistake in such settlement or in the prior administration proceedings, a petition, filed by the widow, showing that the set-

tlement was made without payment of her allowance, and averring that the approval of the administrator's final report and the decree of final settlement were procured by a fraudulent statement that the heirs had settled with the widow and paid her allowance, when in fact they had not done so, and further showing a taking of improper credit by the administrator, and the wrongful application of assets which should have been used in payment of the allowance, states sufficient grounds for setting aside the settlement.—*Rush v. Kelley*, 73 N. E. 130, 34 Ind. App. 449.

Under Burns' Ann. St. 1901, § 2558, authorizing the setting aside of a final settlement of an administrator on the petition of a person interested in the estate, setting forth the illegality in the settlement, or in the prior proceedings of the administration, it is not necessary for a petition by a widow to set aside a final settlement for failure to pay her allowance, under Burns' Ann. St. 1901, § 2424, to allege that she had not lost or waived her right to the allowance.—Id.

Under Burns' Ann. St. 1901, § 2558, authorizing the filing of a petition by a person interested in an estate who did not appear at the final settlement, and was not personally summoned, to have the settlement set aside for fraud or mistake, the petition must show that the petitioner did not appear and was not personally summoned.—Id.

[L] (App. 1909)

Under Burns' Ann. St. 1908, § 2925 (Burns' Ann. St. 1901, § 2558), providing for an action to reopen an estate and for the appointment of an administrator d. b. n., a petition by a county auditor to reopen for the purpose of collecting omitted taxes, which alleged that the property omitted consisted of money loaned and credits, and on certain dates of different years was of specified amounts, but which did not allege that the property was subject to taxation, nor charge fraud, nor show an attempt to ascertain the amount of the omitted property subject to taxation, no value being alleged, was insufficient for the appointment of an administrator d. b. n.—*Clark v. Schindler*, 43 Ind. App. 260, 87 N. E. 44.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2219, 2233, 2234.

See, also, 18 Cyc. pp. 1106-1206.

§ 509 (7). *Parties and process.*

[a] (Sup. 1889)

In a suit against an executor for the correction of an erroneous statement in the executor's report that a claim in favor of plaintiff had been paid, it is not necessary to make the heirs of such executor, he being deceased, parties, nor is it necessary to make his administrator a party.—*Harrell v. Seal*, 22 N. E. 983, 121 Ind. 103.

[b] (App. 1909)

Under Burns' Ann. St. 1908, § 2925 (Burns' Ann. St. 1901, § 2558), providing that in a proceeding to set aside the final settlement and reopen an estate, and for the appointment of an administrator de bonis non, the executor must be made a defendant thereto, that one in her capacity as heir was made a party was not equivalent to making her a party in her capacity as executrix.—Clark v. Schindler, 43 Ind. App. 269, 87 N. E. 44.

§ 509 (10). *Operation and effect of opening or vacating settlement.*

[a] (App. 1898)

Where, after the final report of an administrator is approved, and the administrator discharged, the court, on the administrator's petition, sets aside the order of confirmation and discharge to enable him to prosecute a pending suit, the estate is left as if no report had been filed. Hence a claim subsequently filed against the estate is not barred because not filed before the filing of the vacated report.—Chicago & E. R. Co. v. Harshman, 51 N. E. 343, 21 Ind. App. 23.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2199–2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196–1206.

§ 509 (11). *Correction of errors in intermediate or partial accounts.*

[a] (Sup. 1889)

Under Rev. St. 1881, § 2404, allowing the correction of accounts and reports until the final settlement is made, the court has the power to make corrections in the record in a probate proceeding and cause mistakes in accounts current to be rectified.—Harrell v. Seal, 22 N. E. 983, 121 Ind. 193.

When an administrator allows a legatee a bequest made to her, and reports in his annual account that the same has been paid to her, and the report is approved, and the administrator dies before he is discharged, and another administrator is appointed, action will lie against the latter to have the account corrected, if the bequest has not in fact been paid.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2199–2219, 2233, 2234.

See, also, 18 Cyc. pp. 1196–1206.

§ 510. Review.

Appeal from partial settlement, see APPEAL AND ERROR, § 69.

Courts invested with appellate jurisdiction, see COURTS, § 220 (1, 2).

[a] (Sup. 1871)

Where an administrator has reported, and exceptions are taken to his report, and the administrator charges that the decedent has made unequal advancements to the heirs, and such

charge is denied, on appeal to the circuit court such administrator is entitled to have the open and close on the trial.—Hamlyn v. Nesbit, 37 Ind. 284.

[b] (Sup. 1873)

Under 2 Gav. & H. St. p. 518, § 116, any party interested in the final settlement of an administrator may appeal from the common pleas to the circuit court, and have the settlement set aside for any irregularity in the proceedings.—Reed v. Reed, 44 Ind. 429.

[c] (Sup. 1874)

The allowance by a probate court of an annual account of an executor or administrator is not a final judgment from which an appeal can be taken.—Goodwin v. Goodwin, 48 Ind. 584.

[d] (Sup. 1875)

Where a judgment creditor of a decedent's estate orally objected to the confirmation of the administrator's final report, and the parties appeared and tried the objections, without any question as to said creditor being properly a party, such question could not be first raised on appeal.—Price v. Cavins, 50 Ind. 122.

[e] (Sup. 1878)

Under 2 Rev. St. 1876, p. 238, § 550, authorizing appeals to the Supreme Court from final judgments, an order approving an administrator's report and directing the administrator to pay into court a certain sum of money out of the assets of the estate for the benefit of a ward of the decedent is appealable.—Covey v. Neff, 63 Ind. 391.

[f] (Sup. 1878)

Judgment was rendered against an administrator, without objection or exception of record, that he be attached as for contempt of court should he fail to pay over certain trust funds in his hands within a certain time. It appeared by bill of exceptions that, at the time of the rendition of the judgment, he objected to the same as exceeding the power of the court. Held, that no question as to the form or substance of the judgment was presented, as, to present such question, the record should show an objection to the rendition of the judgment, the overruling of the objection, and an exception to the ruling.—Brownlee v. Hare, 64 Ind. 311.

[g] (Sup. 1882)

An assignment of error that an administrator's final report did not state facts sufficient to constitute a cause of action presents no question for the decision of the Appellate Court.—Conger v. Babcock, 87 Ind. 497.

[h] (Sup. 1883)

Under Rev. St. 1881, §§ 2454, 2455, giving to one aggrieved by a decision of the circuit court in a matter growing out of the settlement of the estate of one deceased the right of appeal, one aggrieved by the allowance of an executor's final account may appeal without

waiting for the final discharge.—*Taylor v. Burk*, 91 Ind. 252.

[i] (Sup. 1884)

Under Rev. St. 1881, § 2454, providing that any person aggrieved by the decision of the circuit court in reference to a decedent's estate may appeal therefrom on filing a bond within 10 days; section 2455, providing that the transcript of record shall be filed 10 days after the bond; and section 2457, that an administrator need not file a bond,—the administrator must nevertheless file the transcript within 20 days.—*Yearley v. Sharp*, 96 Ind. 469.

[j] (Sup. 1884)

An order of the circuit court directing an administrator to pay into court a balance in his hands, resulting from the sale of real estate, to make up a deficit in the widow's allowance, and thereupon granting his discharge, is a decision of the circuit court "growing out of a matter connected with the decedent's estate," wherefrom an appeal must be taken in 10 days.—*Browning v. McCracken*, 97 Ind. 279.

[k] (Sup. 1886)

An appeal from a judgment on a petition to set aside a final report of an administrator must be taken within 10 days, under Rev. St. 1881, §§ 2454, 2455.—*Webb v. Simpson*, 105 Ind. 327, 4 N. E. 900.

[l] (Sup. 1887)

An administrator must adopt such precautions against loss, and exercise such forethought for the security, of property which comes into his care, as ordinarily prudent men are accustomed to employ in regard to their own property; and, where there is evidence tending to show a want of such care and prudence on his part, the supreme court will not reverse a judgment against him on the mere weight of the evidence.—*Cooper v. Williams*, 109 Ind. 270, 9 N. E. 917.

[m] (Sup. 1889)

An exception to a master commissioner's report, charging an administrator with all the solvent claims due the estate, raises no question as to the correctness of the findings when the testimony is not preserved by bill of exceptions.—*Bristow v. McClelland*, 122 Ind. 64, 22 N. E. 299.

[n] (Sup. 1891)

Where the record shows that when an administrator filed his final report a creditor filed a petition asking that his claim be paid in full as preferred, and that the court, after argument of counsel, overruled said petition, and there is no statement as to the introduction of evidence, it will be presumed on appeal that the petition was overruled as insufficient on its face, and not because it was unsupported by proof.—*Goodbub v. Hornung's Estate*, 127 Ind. 181, 26 N. E. 770.

[o] (Sup. 1897)

Under Burns' Rev. St. 1894, § 2610, providing that an appeal in settlement of a decedent's estate must be taken within 30 days from the filing of a bond, and that such bond shall have been filed within 10 days after the decision was made, where the full merits of the case were not determined, and the final adjudication on the issues was not rendered until June 13, 1895, the time allowed commenced from such date, and not from prior and incomplete entry of the court's judgment.—*Galentine v. Brubaker*, 46 N. E. 903, 147 Ind. 458.

[p] (App. 1898)

An administrator's report cannot be looked to, on appeal from an order disapproving it, for the facts on which the trial court based its conclusions of law.—*Swift v. Harley*, 49 N. E. 1069, 20 Ind. App. 614.

[q] (Sup. 1904)

Under Burns' Ann. St. 1901, § 2546, permitting any person interested in the administration of an estate to except to and contest the correctness of the accounts of the administrator, an exceptor does not stand for nor represent the estate in such a manner as to be a sufficient appellee, and to dispense with the necessity of joining the administrator in an appeal from an order favorable to the estate.—*Moore v. Ferguson*, 72 N. E. 126, 163 Ind. 395.

Where the judgment or order of the circuit court entered on the report of an administrator was favorable to the estate, and unfavorable to the administrator as an individual, in that it refused certain allowances asked by the administrator, charged him with costs, and ordered the allowance made him for his services to be set off against a debt due from him to the estate, an appeal by the administrator from such judgment or order should be taken by him as an individual, and the estate, represented by him as administrator, should be made an appellee and not joined as appellant.—*Id.*

[r] (Sup. 1905)

In the absence of the evidence, it must be presumed on appeal that the ruling of the court in allowing the administrator credit for payment of a certain sum as a demand against the estate was proper.—*Spray v. Bertram*, 74 N. E. 502, 165 Ind. 13.

[s] (App. 1910)

The action of the probate court in refusing to recognize a contract made in advance of the performance of services, by an administrator with attorneys, by which he contracts to pay the attorneys one-half of the entire amount that should be recovered for the death of his intestate will not be disturbed by the appellate court.—*Richey v. Cleet*, 92 N. E. 175.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2235-2256.

See, also, 18 Cyc. pp. 1207-1215.

§ 511. Costs and expenses.

[a] (App. 1893)

Expenses of an appeal taken by the administrator to save himself from accounting for

funds in his hands, and not to protect or benefit the estate, are not chargeable to the estate.—*McClelland v. Bristow*, 9 Ind. App. 543, 35 N. E. 197.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2257-2266.

See, also, 18 Cyc. pp. 1216-1220.

**§ 512. Operation and effect.**

As to contest of will, see WILLS, § 225.

Conclusiveness of adjudication as against sureties on bond, see post, § 535.

Discovery of assets unadministered ground for appointment of administrator de bonis non, see ante, § 37.

Effect of setting aside, see ante, § 509 (10).

Effect on liability of sureties on bond, see post, § 530.

Presumptions in will contest, see WILLS, § 288.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2267-2292.

See, also, 18 Cyc. pp. 1188-1195; note, 86 Am. Dec. 143.

**§ 513. — In general.**

[a] (Sup. 1830)

A settlement of an administrator's account in a probate court is not conclusive, and the account may be re-examined in a court of chancery.—*Brackenridge v. Holland*, 2 Blackf. 377, 20 Am. Dec. 123.

[b] (Sup. 1835)

In the absence of any proof to the contrary, the sum with which one of two administrators is charged on their final settlement is conclusive of the amount of assets which had come to their hands, although the inventory and sale bill show a larger sum.—*Ray v. Doughty*, 4 Blackf. 115.

[c] (Sup. 1861)

Suit for breach of the conditions of an executor's bond, in that the executor, having taken a note for money improperly loaned, persuaded one B. to sign the note as surety, for the purpose of enabling him to settle the estate, promising, after settlement thereof, to release B., and to become surety himself; that, concealing these circumstances, he passed the note for money, and afterwards refused to become surety thereon; and, further, that B., being sued, had been discharged. *Held*, that parol evidence of the agreement with B., not being admissible to vary the written note, could not, therefore, invalidate his signature of it, and that consequently, since the note was valid, there was no fraud which would authorize a setting aside of the settlement of the estate; and *held*, also, that the fact of the successful resistance of B. to the suit against him upon the note could have no effective bearing upon the decision of this case.—*State ex rel. Campbell v. Overturf*, 16 Ind. 261.

[d] (Sup. 1873)

After final settlement of an estate, a suit cannot be maintained against one individually to recover an excess of money alleged to have been paid to him while administrator, under a mistake as to the amount due to his intestate.—*Bell v. Lewis*, 44 Ind. 129.

[e] An administrator's settlement with the probate court cannot be collaterally attacked.—(Sup. 1878) *Sanders v. Loy*, 61 Ind. 298; (1881) *Peacocke v. Leffler*, 74 Ind. 327; (1886) *Carver v. Lewis*, 2 N. E. 705, 104 Ind. 438; (1886) *Id.*, 105 Ind. 44, 2 N. E. 714; (App. 1899) *State ex rel. Goodhue v. Burkam*, 55 N. E. 237, 23 Ind. App. 271.

[f] (Sup. 1879)

A settlement by an administrator on resigning his trust, while the estate remains unsettled, is not a final settlement, within Decedent's Estate Act, § 116, but binds all interested, as to matters embraced in the report, until it is set aside in some direct proceeding.—*Lang v. State ex rel. Lang*, 67 Ind. 577.

[g] (Sup. 1883)

Under Rev. St. 1881, §§ 2402-2403, requiring executors and administrators to make final settlements, such settlements are, when confirmed by the court, conclusive until set aside.—*Ferguson v. State ex rel. Hagans*, 90 Ind. 38.

[h] (Sup. 1884)

An action to collect a debt against an estate or against the heirs to set aside a fraudulent conveyance by decedent cannot be brought after final settlement.—*Vestal v. Allen*, 94 Ind. 268.

[i] (Sup. 1884)

After a final settlement the widow cannot sue the administrator for damages for using money in paying general debts against the estate which should have been applied in payment of a mortgage against decedent's land, whereby her interest in the land was sold under foreclosure of the mortgage.—*State ex rel. Sparrow v. Kelso*, 94 Ind. 587.

[j] (Sup. 1886)

While the final settlement of the estate of one deceased stands, an administrator who has received his discharge is not liable, at the suit of interested parties to such settlement, for converting to his own use assets that he should have inventoried and accounted for. The settlement cannot be thus attacked collaterally.—*Carver v. Lewis*, 104 Ind. 438, 2 N. E. 705.

[k] (Sup. 1888)

Rev. St. §§ 2390, 2391, 2406, provide that, on the filing of an administrator's account, two weeks' notice of the day fixed for hearing shall be given to heirs, and, if such account be final, the heirs shall be notified to appear and prove heirship. On such notice the account may be contested before the master, who may hear proof of heirship or other title to the surplus, and final distribution may be ordered. In such

order, directing plaintiff's share to be paid to defendant as assignee, in accordance with the master's report which so found, it was recited that due notice was given, but whether the heirs were notified to prove title to the surplus did not appear. No pleadings were filed setting up defendant's claim as assignee further than the report of the master, and plaintiff did not appear. *Held*, that the filing of the account and the giving of notice, though the latter was defective, gave jurisdiction to decree as to the surplus, and the order could not be collaterally attacked.—*Jones v. Jones*, 115 Ind. 504, 18 N. E. 20.

## [l] (Sup. 1890)

Where a claimant against the decedent's estate did not appear and was not personally summoned to appear at a final settlement, he is not concluded by the judgment of the court.—*Shirley v. Thompson*, 24 N. E. 253, 123 Ind. 454.

A final settlement of an estate, made before the expiration of the year allowed by law for filing claims against estates, though made without notice that there were any claims not then filed, is illegal, and does not cut off the right to file such claim.—*Id.*

## [m] (App. 1893)

The final settlement of an estate by an administrator on such notice as the statute prescribes is an adjudication of all matters properly involved in the settlement.—*Barnett v. Vanmeter*, 33 N. E. 666, 7 Ind. App. 45.

## [n] (Sup. 1894)

Where final settlement of a deceased partner's estate is made in the face of judgments against the estate for partnership liabilities, a surviving partner who pays a part of the judgment before and a part after the settlement has an interest in the estate to the extent of the ratable proportion of the judgments owing thereby; the fact that he had not paid all the judgments and filed a claim for contribution before final settlement not excusing the administratrix from paying the proportion owing by the estate.—*Harter v. Songer*, 138 Ind. 161, 37 N. E. 505.

## [o] (Sup. 1896)

An administrator's report, which purports to be a complete accounting of receipts and disbursements, showing a payment by the administrator to redeem decedent's lands from mortgage foreclosures, and that no funds remain in his hands, and which is excepted to by certain claimants, and accompanied by the administrator's resignation, is not a final settlement, but leaves the estate open for further administration by an administrator *de bonis non*.—*Green v. Brown*, 44 N. E. 805, 146 Ind. 1.

## [p] (App. 1896)

An administrator of a decedent presented his petition to settle the estate as insolvent, and creditors objected to a settlement, alleging that decedent conveyed certain real estate to his

children and heirs without a consideration and with a fraudulent intention of defrauding his creditors. The trial court found the facts alleged in the statement of objections to be true, and rendered a decree ordering that the lands be sold and subjected to the payment of decedent's debts, and denied the petition to settle as insolvent. *Held* that, the grantees of the deeds set aside not being parties to the proceedings, the judgment may nevertheless be valid to the extent that it denied the petition of the administrator to settle the estate as insolvent, and as an order to proceed against the grantees to set aside the conveyances as fraudulent under *Burns' Rev. St. 1894, § 2488 (Rev. St. 1881, § 2335)*, declaring that the administrator before proceeding to sell lands transferred to defraud creditors must bring the parties into court by proper action.—*Cray v. Wright*, 44 N. E. 1009, 16 Ind. App. 258.

## [q] (App. 1899)

Under *Burns' Rev. St. 1894, § 2457*, providing that, when claims due an estate are desperate, have been administered, and remain uncollected, the executor or administrator, with the circuit court's approbation, may file them in said court for the benefit of creditors, heirs, or legatees, and section 2459, which allows such beneficiaries, when their claims are unpaid, to sue upon such desperate claims, a creditor's complaint, founded upon said sections, does not state a cause of action when it fails to state whether or not the claim sued on was so filed or was administered, and fails to allege any attempt by the creditor to collect his debt, or that it was ever filed against the estate, or what disposition was made of it, if any.—*Postal v. Kreps*, 54 N. E. 816, 23 Ind. App. 101.

After final settlement a creditor may sue on such claim in his own name, when part or all of the debt due him is unpaid, as the administrator, after such settlement and discharge, has nothing more to do with the estate in his representative capacity.—*Id.*

*Burns' Rev. St. 1894, § 2457*, provides that, when claims due an estate are desperate, have been administered, and remain uncollected, the executor or administrator, with the circuit court's approbation, may file them in court for the benefit of creditors, heirs and legatees of the estate. Section 2459 provides that any creditor or legatee whose debt or legacy remains unpaid may sue for any claim so filed. Section 2463 provides that a party entitled to sue may bring the action in the executor's or administrator's name, "or otherwise, for his own use," but the estate shall not be liable for costs. Sections 2460-2462 provide that amounts thus collected shall be paid into the circuit court, and shall be applied—First, to debts; secondly, to legacies; and, thirdly, to distributees according to their respective rights. *Held*, that such suit may be brought while the estate is pending, or after final settlement and discharge of the executor or administrator.—*Id.*

[r] (App. 1901)

A deed provided that after the grantor's death the grantee should pay a certain sum of the purchase money to the grantor's heirs. After such grantor's death, the heirs met, and agreed that such sum should be paid to a certain person, who should be appointed administrator, and distributed by him. The sum was so paid to the administrator, and he turned it over to the clerk of the court, who paid it out; all of the parties, including plaintiff, who was guardian of an heir, receipting for their several shares; such guardian having full knowledge of the agreement and all the facts. The final report of such administrator was approved, and never set aside, and the guardian retained the money paid to him. *Held*, that the latter could not maintain an action to recover from the grantee an extra amount as his ward's share, since such action would be a collateral attack on the final settlement of the estate.—*Kuhn v. Boehne*, 61 N. E. 199, 27 Ind. App. 340.

[s] (App. 1905)

An administratrix filed her final report. On the hearing additions to sums in her hands were made, which additions consisted of property not inventoried and a sum received for property in excess of the appraisement. *Held*, that the corrected report, whether corrected by the court or by the administratrix on the court's order, became the final report, which the court properly approved and then discharged her from further liabilities.—*Hartzell v. Hartzell*, 76 N. E. 439, 37 Ind. App. 481.

[t] (Sup. 1906)

Under Burns' Ann. St. 1901, §§ 2545-2547, 2557, providing for the settlement of estates of deceased persons and declaring that if the debts, legacies, and expenses of administration have been paid, and the assets of the estate accounted for, and all claims disposed of, the executor shall pay into court any money remaining in his hands or distribute the same under the court's order, etc., when such executor shall be discharged, an order approving an executor's final account, though conclusive of the correctness thereof, is not conclusive of the validity of the will.—*Stuckwisch v. Kamman*, 77 N. E. 349, 166 Ind. 672.

[u] (Sup. 1906)

Under statutes providing that a will may be contested within three years and authorizing the settlement of the estates of deceased persons, testate and intestate, at the expiration of one year after notice of the granting of letters, an order of final settlement is not res judicata of the validity of the will.—*Foley v. O'Donaghue*, 77 N. E. 352, 167 Ind. 134.

[v] (App. 1906)

A judgment approving an administrator's final report is conclusive, so long as it stands, and it is immaterial whether he distributes the money directly or procures an order to pay it to the clerk for designated purposes; such or-

der being a part of the final settlement.—*Melford v. Lamkin*, 38 Ind. App. 33, 76 N. E. 1024, 77 N. E. 960.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2267-2291; 30 CENT. DIG. JUDGM. §§ 1067, 1070.

See, also, 18 Cyc. p. 1188.

#### § 514. — Partial account.

[a] (Sup. 1877)

The allowance by the court of an *ex parte* current, or partial report of an executor or administrator is not conclusive on heirs or devisees.—*Fraim v. Millison*, 59 Ind. 123.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. § 2292.

See, also, 18 Cyc. p. 1194.

#### § 515. Private accounting and settlement.

[a] (Sup. 1881)

Where all the parties interested agree on a settlement and distribution under a will without an inventory, and it becomes necessary afterwards to show the amount of the testator's property, it may be done by parol.—*Smith v. Smith*, 76 Ind. 236.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2293-2296.

See, also, 18 Cyc. p. 1215.

#### § 516. Actions to open or set aside settlement.

Action in same court, see ante, § 509 (10).

Causes in which new trial is authorized, see NEW TRIAL, § 2.

[a] A court of chancery will not disturb a settlement of an administrator's account in the probate court, except in clear cases of mistake or fraud.—(Sup. 1830) *Allen v. Clark*, 2 Blackf. 343; (1830) *Brackenridge v. Holland*, Id. 377, 20 Am. Dec. 123; (1832) *Murdock v. Holland's Heirs*, 3 Blackf. 114; (1835) *Ray v. Doughty*, 4 Blackf. 115.

[b] (Sup. 1832)

Mistakes in the settlement of administrator's accounts in the probate court may be corrected by a court of chancery.—*Murdock v. Holland's Heirs*, 3 Blackf. 114.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2199-2207, 2220-2232.

See, also, 18 Cyc. pp. 1196-1206.

### XII. FOREIGN AND ANCILLARY ADMINISTRATION.

Garnishment of foreign administrator, see GARNISHMENT, § 61.

Taxation of property of estates under ancillary administration, see TAXATION, § 99.

**§ 517. Foreign appointment.**

[a] Letters testamentary or of administration granted in another state were not recognized here by the statute of 1824 (Rev. Code 1824, pp. 324, 325), until recorded in a circuit court of this state; but they are now so recognized, under the statute of 1831 (Rev. Code 1831, pp. 170, 171), upon their being filed with the clerk of the court in which they are to be introduced. —(Sup. 1832) *Naylor v. Moody*, 3 Blackf. 92; (1840) *Yandes v. Patterson*, 5 Blackf. 301.

[b] (Sup. 1861)

The laws of this state in regard to executors appointed in another state must be substantially complied with before such executor can be recognized in this state.—*Lucas v. Tucker*, 17 Ind. 41.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2297, 2298.

See, also, 18 Cyc. pp. 1220–1222.

**§ 518. Ancillary appointment.**

Liability of sureties on administrators' bond for default of ancillary administrator, see post, § 527.

[a] (Sup. 1834)

Where administrations on the estate of a decedent are granted in different states, that granted in the state in which the intestate was domiciled is the principal administration and all others are ancillary; and, where an intestate was domiciled and died outside of this state, there can be no valid grant in the state of administration on his estate, unless he left assets or assets of such intestate have come into this state after his death.—*McCord v. Thompson*, 92 Ind. 565.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2290–2309.

See, also, 18 Cyc. pp. 1222–1226.

**§ 519. Collection and disposition of assets.**

[a] (Sup. 1861)

Acts 1848, p. 10, enacting "that all sales heretofore made by executors or administrators with the will annexed, made in accordance with the will, are hereby confirmed," does not apply to executors, appointed and qualified in another state, who sold lands within the state, under a power contained in the will, without attempting to conform to the laws on the subject of foreign wills.—*Lucas v. Tucker*, 17 Ind. 41.

[b] (Sup. 1832)

An administrator appointed in this state must use diligence in collecting claims due the estate in the state, though there was another administrator, first appointed, in the state where the intestate was domiciled at his death. —*State ex rel. McClamrock v. Gregory*, 88 Ind. 110.

[c] (Sup. 1884)

A. purchased of an administrator in another state property belonging to the intestate, and gave his note therefor, which was deposited at a bank in Indiana, and which, on maturity, he paid to an ancillary administrator in Indiana. *Held*, that this was no defense to a suit on the note by the principal administrator.—*McCord v. Thompson*, 92 Ind. 565.

An administrator is accountable to the tribunal under which he exercises his trust, and administration on assets, which have properly come to the hands of an administrator under his appointment, and for which he is accountable to such legal tribunal, cannot be impaired or abridged by a grant of administration to another person in another state, and each portion of the estate should be administered in the state in which possession was taken by an administrator pursuant to lawful authority.—*Id.*

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2310–2322.

See, also, 18 Cyc. pp. 1227–1231.

**§ 520. Sales and conveyances under order of court.**

[a] (Sup. 1871)

A sale of real property in Indiana by a foreign executor is to be authorized in the same manner, and upon the same terms, as in the case of an executor appointed within the state, except that, if it is shown that sufficient surety for the application of the proceeds has been given in the state or county where the executor was appointed, and a duly authenticated copy of such bond is filed in the court where the petition is made, no further bond will be required.—*Rapp v. Matthias*, 35 Ind. 332.

A petition of a foreign executor for leave to sell lands to pay debts, under 2 Gav. & H. St. p. 506, § 75, requiring such petition to state certain facts, must further show that the will of the testator has been duly admitted to probate.—*Id.*

A petition of a foreign executor for leave to sell lands to pay debts, under 2 Gav. & H. St. p. 506, § 75, requiring such petition to show certain facts, must further show that such executor had filed in the court an authenticated copy of his appointment.—*Id.*

[b] (Sup. 1896)

Rev. St. 1894, § 2763 (Rev. St. 1881, § 2593), provides that a probated foreign will may be produced to the circuit court, and if it is satisfied that the instrument ought to be allowed it shall order the same to be filed and recorded by the clerk, and the will shall then have the same effect as if originally admitted to probate in the state. Section 2519, Rev. St. 1894 (section 2363, Rev. St. 1881), provides that a foreign executor may file an authenticated copy of his appointment in the circuit court of any county in which there is land of the deceased, and then be authorized by the court to sell land



for payment of debts or legacies, as in case of a domestic executor. *Held*, that though the failure of the circuit court to require a foreign executor to file an authenticated copy of his appointment, and the foreign will to be allowed and recorded, before granting his application to sell land, is an irregularity or error, such error does not deprive the court of jurisdiction over the subject-matter, and render the order void.—*Bailey v. Rinker*, 140 Ind. 129, 45 N. E. 38.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 2323-2325.

See, also, 18 Cyc. pp. 1232, 1233.

#### § 524. Actions by foreign executors or administrators.

For death of intestate, see DEATH, § 31.

##### [a] (Sup. 1829)

Foreign executors and administrators cannot begin or prosecute a suit in this state until they have filed their letters testamentary, or an attested copy. *Laws* 1845, pp. 49, 50, §§ 1, 2.—*Naylor v. Moody*, 2 Blackf. 247.

##### [b] (Sup. 1853)

Under Rev. St. 1843, in a suit by a non-resident administrator, the declaration need not state that his letters were produced and filed, etc.—*Jelly v. Stevens*, 4 Ind. 510.

The statute requiring a foreign administrator bringing a suit in this state to produce and file a copy of his letters applies only to the rules of evidence, and not to those of pleading.—*Id.*

[c] The right of a foreign administrator to sue as such can only be questioned by a plea under oath.—(Sup. 1860) *Matlock v. Powell*, 14 Ind. 378; (1866) *Jeffersonville R. Co. v. Hendricks' Adm'r*, 26 Ind. 228.

##### [d] (Sup. 1866)

2 Gav. & H. Rev. St. p. 528, § 159, relating to the right of a foreign administrator to sue in the courts of the state, and providing that a copy of his letters, duly authenticated, being produced and filed in the court in which the suit is brought, shall be sufficient evidence of his due appointment, does not require that a copy of the letters shall be filed in the clerk's office before the suit is commenced.—*Jeffersonville R. Co. v. Hendricks' Adm'r*, 26 Ind. 228.

##### [e] (Sup. 1867)

The right of a foreign executor or administrator to sue in the courts of this state is not made dependent upon his filing here a copy of his letters, by the statute which provides that, when the authority of the executor or administrator is properly put in issue, a copy of his letters, produced and filed in the court, shall be sufficient evidence of his appointment.—*Upton v. Adams' Ex'rs*, 27 Ind. 432.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 2330-2343.

See, also, 18 Cyc. pp. 1237-1244; note, 4 L. R. A. (N. S.) 637.

#### § 525. Actions against foreign executors or administrators.

##### [a] (Sup. 1855)

An action cannot be maintained upon a judgment against an administrator of an intestate appointed in one state against another administrator appointed by the authority of another state.—*Slaughter v. Chenowith*, 7 Ind. 211.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 2344-2349.

See, also, 18 Cyc. pp. 1244-1247.

#### XIII. LIABILITIES ON ADMINISTRATION BONDS.

Injunction against judgment till surety is secured against liability, see JUDGMENT, § 450.

Laws relating to as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 151.

Liabilities on bonds of surviving partner, see PARTNERSHIP, § 250.

Liabilities on special bonds for sale of property, see ante, § 392.

Liability as between sureties on general bond and on special bond for sale of realty as affected by rule that personalty is primary fund for payment of debts, see ante, § 272.

Liability on administrator's bond of indemnity to a sheriff, see SHERIFFS AND CONSTABLES, § 145.

Necessity and sufficiency of bond, see ante, § 26.

Right of surety to apply for removal of administrator, see ante, § 35.

Suit on bond as discharging charge of legacy on land, see WILLS, § 825.

#### § 527. Nature and extent in general.

##### [a] (Sup. 1860)

A bond was given by an administrator, conditioned for the faithful discharge of his trust; and subsequently, on petition for a sale of the decedent's land to pay debts, another bond was executed, with other sureties. *Held*, that the sureties on such additional bond did not assume the relation of cosureties with those on the first bond, and hence are not liable to contribute at the instance of the first sureties, who were compelled to pay on account of the misappropriation by the administrator of the proceeds of the sale.—*Salysers v. Ross*, 15 Ind. 130.

##### [b] (Sup. 1860)

A surety on a second, or additional bond of an administrator, given on application of a former surety to be discharged, is liable for failures of duty on the part of the adminis-

trator occurring after the execution of such bond, if not before, as for a failure to account for moneys before that time received, and still in his hands.—*Bales v. State ex rel. Pennington*, 15 Ind. 321.

[c] (Sup. 1865)

The sureties on the second bond of an administrator, in any case where such bond is required by an order of the court, are liable for any breach of the conditions of the bond occurring after its execution.—*Lane v. State ex rel. Albert*, 24 Ind. 421; *Owen v. State ex rel. Owen*, 25 Ind. 371.

[d] (Sup. 1865)

Where a second bond was given by administrators because the sureties on the first bond were insolvent, the sureties on the second bond would not be liable until the remedy on the first bond had been exhausted.—*Lane v. State ex rel. Albert*, 24 Ind. 421.

[e] Where joint administrators unite in giving the same bond, they are jointly and severally liable, not only each for his own acts, but also each for the acts of his co-administrator.—(Sup. 1865) *Braxton v. State ex rel. Albert*, 25 Ind. 82; (1875) *Moore v. State ex rel. Atkinson*, 49 Ind. 558.

[f] (Sup. 1870)

Where co-administrators execute a joint bond as such, each is liable thereunder for the acts and omissions of the other.—*Prichard v. State ex rel. Keller*, 34 Ind. 137.

[g] (Sup. 1889)

Where an ancillary administrator fails to account for money of the estate which, before his appointment, he had collected as attorney for the principal administrator, his sureties, when sued therefor, may show in defense that the administrator was insolvent when appointed.—*State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2355-2374.

See, also, 18 Cyc. p. 1248.

### § 528. Property covered.

[a] (Sup. 1864)

The obligors in the bond given by an administrator, under the Revised Statutes of 1831, on receiving his letters, were responsible for the proper application of the assets derived by him from the sale of the real estate.—*Salzer v. State ex rel. Tyner*, 5 Ind. 202.

[b] (Sup. 1863)

Under 2 Gav. & II. St. p. 489, § 19, providing that an executor or administrator shall execute a bond of not less than double the value of the personal estate to be administered, and, in case real estate is to be sold by the terms of the will, also double the value of such real estate, conditioned that he will faithfully discharge his duty, the bond so given only se-

cures the faithful administration of the personal property, and the proceeds of the sale of such real estate as shall be sold in pursuance of the will, and does not cover breaches of trust growing out of a sale of additional real estate, since an additional bond is provided for in the latter instance by 2 Gav. & II. St. p. 510, § 82.—*Worgang's Adm'r v. Clipp*, 21 Ind. 119, 83 Am. Dec. 343.

[c] (Sup. 1865)

A surety on the bond given by an executor upon assuming his trust is not responsible for the proper administration of the proceeds of real estate not directed to be sold by the will.—*Reno v. Tyson*, 24 Ind. 56.

[d] The general bond of an administrator does not extend to his acts or omissions in accounting for sales of the intestate's real estate, but extends only to the management and disposal of the personal estate.—(Sup. 1883) *State ex rel. Jones v. Cloud*, 94 Ind. 174; (App. 1901) *Rogers v. State ex rel. Beatty*, 50 N. E. 334, 26 Ind. App. 144.

[e] (Sup. 1889)

Rents and profits received by an administrator from lands descended to the heirs cannot be recovered in an action on his bond, as, under Rev. St. 1881, § 2369, he is entitled to these only on petition and order of court, in which case additional bond would be required.—*State ex rel. Homer v. Barrett*, 121 Ind. 92, 22 N. E. 969.

[f] (App. 1902)

Where an administrator sells realty of the estate under order of court directing that one-third of the proceeds be paid to the widow of the intestate, as authorized by Burns' Rev. St. 1901, § 2503, and pays out for the estate a sum exceeding two-thirds of the total proceeds of the sale, but fails to account to the widow for the balance, he is not liable to the estate on his bond for a devastavit, as the sum for which he failed to account belongs to the widow, and not to the estate.—*Cullen v. State ex rel. Brown*, 62 N. E. 759, 28 Ind. App. 335.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2375-2394.

See, also, 18 Cyc. pp. 1253-1259.

### § 529. Functions and acts covered.

[a] (Sup. 1844)

An executor's bond was conditioned that if A. "shall well," etc., "perform his duties," etc., "as executor of B., deceased, then the bond to be void," etc. *Held*, that the surety in the bond was not liable for any previous acts of the executor.—*State ex rel. Bird v. Hood*, 7 Blackf. 127.

[b] (Sup. 1882)

Where a will makes the same person executor and trustee, the executor's bond cannot be construed as conditioned for the performance

of the duties belonging to the trustee. A separate bond should be ordered.—*Hinds v. Hinds*, 85 Ind. 312.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2395-2403.

See, also, 18 Cyc. p. 1260.

**§ 530. Settlement and discharge of principal.**

Removal as condition precedent to action, see post, § 537 (2).

**[a] (Sup. 1875)**

The accounts filed in court by an administrator, until final settlement, are to be regarded as only prima facie correct, and frauds or mistakes in them may be corrected. Therefore, in a suit on an administrator's bond, it is not error to permit him to prove, over objection, that a certain sum, reported in an account current filed by him as being a balance to be accounted for, consisted of uncollected notes taken at the sale of the personal property of the estate, or on sale of real estate of the decedent, and that he had no money of the estate from the time of making such report until after the suit was brought.—*State ex rel. Nave v. Wilson*, 51 Ind. 96.

**[b] (Sup. 1879)**

Where an administrator submitted his final report before the estate was settled, and the report was confirmed by a proper court, which thereupon discharged the administrator, *held* no bar to an action on such administrator's bond.—*Parsons v. Milford*, 67 Ind. 489; *Lang v. State ex rel. Lang*, Id. 577.

**[c] (App. 1899)**

A complaint against the surety of an administrator alleged that plaintiff was entitled, as nephew, to share in the intestate's estate; that the administrator was appointed, filed a final report, and was discharged; that the appointment and final settlement were without notice; that plaintiff, at the time of such settlement, was a minor, and the administrator was appointed his guardian; that the record does not show that plaintiff was in any way represented at the final settlement, other than that the administrator claimed in his report to have paid to himself a certain sum as guardian of plaintiff; that no money was paid to any one entitled to receive same for plaintiff; that plaintiff had no knowledge of the administrator's appointment as his guardian, or of the final settlement, until he was of age; and that the administrator and the co-surety of the defendant died insolvent. *Held* to state a sufficient cause of action.—*State ex rel. Goodhue v. Burkam*, 55 N. E. 237, 23 Ind. App. 271.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2404, 2405.

See, also, 18 Cyc. p. 1261.

**§ 531. Discharge of sureties.**

**[a] (Sup. 1866)**

Where the sureties upon the bond of an administrator filed an application, under section 29 of the statute (2 Gav. & H. St. p. 493), to be released, and the record showed that, in response to a citation issued against him on that application, the administrator appeared and filed a new bond, which was approved, *held*, that the sureties on the first bond were discharged, without a formal order of the court to that effect. The right of the sureties, under the statute, to a discharge from further liability, either by the removal of the administrator or by executing a new bond, is an absolute one, not dependent on the discretion of the court; and the filing of a new bond in answer to the application operates as a discharge.—*Lane v. State ex rel. Harmon's Adm'r*, 27 Ind. 108.

**[b] (Sup. 1875)**

Where two persons who were administrators of the same estate joined in executing a bond with others as their sureties, an agreement afterwards made by one of the administrators by which a part of the heirs relinquished all further claim to the estate did not release him as surety for the other administrator.—*Moore v. State ex rel. Atkinson*, 49 Ind. 558.

**[c] (Sup. 1882)**

An answer to a complaint on an administrator's bond which alleges that before breach the sureties were, by order of court, released, and a new bond given, is good on demurrer.—*State ex rel. McClamrock v. Gregory*, 88 Ind. 110.

**[d] (Sup. 1889)**

It is a sufficient defense for a surety sued on an administration bond to allege that prior to the breaches assigned a co-surety had, upon proper proceedings, been released, and a new bond filed, since by that proceeding the old bond was at an end, except as security for breaches thereof committed before the new bond was taken.—*State ex rel. Homer v. Barrett*, 121 Ind. 92, 22 N. E. 969.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2406-2430.

See, also, 18 Cyc. pp. 1261-1266.

**§ 532. Breach or fulfillment of condition.**

**[a] (Sup. 1850)**

Under the statute of 1843, if an administrator commit waste his sureties are liable to a suit in chancery by the person interested.—*Anthony v. Negley*, 2 Ind. 211.

**[b] (Sup. 1859)**

For an executor to convert any portion of the testator's property to his own use is a breach of the condition of his bond.—*State ex rel. Leach v. Scott*, 12 Ind. 529.

[c] (Sup. 1863)

A. executed a mortgage on his land to B., in which his wife joined, to secure the payment of a debt. A. died after the taking effect of the Code of 1852, his wife him surviving, and said debt remaining unpaid. C. became administrator of his estate, and there came into his hands, as such, assets sufficient to pay the expenses of administration, the expenses of the intestate's last illness, and funeral expenses, and said mortgage debt; but he failed to pay the mortgage debt, and suffered the mortgage to be foreclosed, and the property to be sold to pay said debt, and applied said assets to the payment of other debts not liens on the real estate. *Held*, that it was the duty of the administrator to pay said mortgage debt out of said assets, and that his neglect to do so constituted a breach of his official bond.—State ex rel. Lockhart v. Mason, 21 Ind. 171.

The widow of A. had a right to have said assets applied in payment of said debt before the payment of general debts, and was damaged by the failure of the administrator to so apply it; and, for such damage, she had a right of action against him and his sureties on his official bond.—Id.

[d] (Sup. 1865)

The heirs-at-law of an intestate may sue upon the bond of the administrator to recover for assets converted to the administrator's own use and not accounted for.—State ex rel. McNeal v. Bennett, 24 Ind. 383.

[e] (Sup. 1866)

Breaches of the bond assigned were failure to pay money into court and conversion thereof by the administrator to his own use. *Held* that, so long as there are debts of an estate to be paid, a creditor cannot complain that the administrator does not pay money into court.—State ex rel. Judah v. Lemonds, 29 Ind. 437.

[f] (Sup. 1870)

The fact that there are no assets in the hands of the administrator, out of which to pay a judgment obtained against the estate, is a good defense to an action on the administrator's bond.—State ex rel. Lawrence v. White, 33 Ind. 298.

[g] (Sup. 1881)

A suit may be maintained on the bond of an executor or an administrator with the will annexed for failure to pay a legacy, even though there has been no previous order of court that the legacy be paid, and though the officer has not been previously removed.—Gould v. Steyer, 75 Ind. 50.

[h] (Sup. 1885)

Suit may be brought on an administrator's bond to recover the amount of a judgment against the estate, where the same is solvent and the administrator has always had money

in his hands to pay the claim; the same being the only outstanding one against the estate.—Pence v. Makepeace, 75 Ind. 480.

[i] (Sup. 1881)

Where an administrator pays on general debts money arising from the sale of land on which are judgment liens, so as to render himself unable to pay such liens, the holder of the liens may sue on his bond.—State ex rel. Wright v. Brown, 80 Ind. 425.

[j] (Sup. 1882)

A complaint in an action on an administrator's bond by distributees, assigning as a breach that the administrator had wrongfully delayed the settlement for more than four years, to the great damage of plaintiffs, was good.—Stanton v. State ex rel. Green, 82 Ind. 463.

A complaint in an action on an administrator's bond by distributees, assigning as a breach that the administrator had wrongfully withheld distribution for more than four years, though it had been demanded, was good.—Id.

[k] (Sup. 1889)

Where an executor solvent at the time of his appointment, and, on the maturity of a note due the estate from himself, fails to pay the note, he cannot, on becoming insolvent, return the debt as uncollectible, so as to relieve his bondsman.—State ex rel. McClamrock v. Gregory, 119 Ind. 503, 22 N. E. 1.

[l] Rev. St. 1894, § 2534 (Rev. St. 1881, § 2378), designates the order in which claims against an estate are to be paid. Section 2541 (2385) directs the administrator to pay off claims allowed, giving preference as provided in the section above. *Held*, that payment by an administrator of debts in an order different from that provided is not a breach of his bond, unless a creditor of the estate or the estate has suffered by reason of such payment.—(App. 1895) Masterson v. Cauble, 41 N. E. 477, 15 Ind. App. 515; (1896) Id., 44 N. E. 377, 15 Ind. App. 515.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 2431-2451, 2484, 2485.

See, also, 18 Cyc. pp. 1267-1272.

### § 533. Necessity of accounting and default by principal.

Demand as condition precedent to action, see post, § 537 (2).

[a] (Sup. 1881)

Where an executor failed to pay a legacy as directed by the will, a suit may be maintained against the sureties on his administration bond without any previous order of the probate court directing payment of the legacy.—Gould v. Steyer, 75 Ind. 50.

[b] (Sup. 1881)

In an action on an administrator's bond to recover the amount of a judgment against the estate of his intestate, an answer that the estate is unsettled, with a large amount of claims uncollected, is solvent, and will be able to pay all claims when the assets are fully realized, is no defense.—Pence v. Makepeace, 75 Ind. 480.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 2452-2461, 2500.

See, also, 18 Cyc. p. 1281.

§ 534. Necessity and sufficiency of proceedings for recovery against principal.

[a] (Sup. 1827)

A creditor cannot sue on an administration bond until he has obtained judgment against the estate of the intestate.—Eaton v. Benefield, 2 Blackf. 52.

[b] (Sup. 1845)

Where an administrator has been removed from office for waste committed against the estate, a suit may be brought against him and the sureties on his administration bond, on relation of his successor in office, without recovering a previous judgment against the administrator.—State ex rel. Adams v. Johnson, 7 Blackf. 529.

[c] (Sup. 1878)

Where the executors under a will were directed to invest the proceeds of certain property and apply the interest to the education of certain legatees, an action by the state on the relation of one of the legatees could be maintained on the bond of the executors for failure to pay the legacy, without an order of court having been first procured directing the executors to apply the interest on the money to his education.—Heady v. State ex rel. Heady, 60 Ind. 316.

[d] (Sup. 1881)

A judgment creditor of a deceased person was not bound to enforce his lien against the decedent's real estate, nor wait until the removal or final settlement of the administratrix, nor file his claim against the decedent's estate, but was entitled to rely on the administratrix to apply the assets of the estate in payment of the judgment before paying the general debts, and in case she did not do so to sue her for breach of her bond.—State ex rel. Wright v. Brown, 80 Ind. 425.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 2458-2461, 2492, 2502.

See, also, 18 Cyc. p. 1272.

§ 535. Conclusiveness of adjudication against principal.

[a] (Sup. 1825)

After a judgment against an administrator on a bond of the intestate, and a recovery

against him in an action on that judgment, suggesting a devastavit, the plaintiff sued on the administration bond. *Held*, that neither the principal nor his surety could plead plene administravit.—Goodwin v. Wilson, 1 Blackf. 344.

St. 1821, p. 141. changes the rule of the common law that if an administrator when sued for a debt of the intestate omit to plead plene administravit, and judgment be given against him, assets are admitted, and he cannot afterwards plead that plea in an action on the judgment suggesting a devastavit, and admits the plea in such a case, though it does not extend the privilege to a suit on the administration bond, brought subsequent to the recovery for a devastavit.—Id.

[b] (Sup. 1826)

The surety in an administrator's bond is concluded by a judgment of devastavit against the principal.—Governor v. Shelby, 2 Blackf. 26.

[c] (Sup. 1854)

A surety on an administrator's bond is estopped from controverting the validity of a decree rendered against the administrator on a bill in equity filed by a creditor to open the administrator's final settlement, on the ground of waste.—Salyer v. State ex rel. Tyner, 5 Ind. 202.

In 1847, a final settlement was made by an administrator in the probate court. In 1850, certain of intestate's creditors filed a bill to open the settlement on the ground of waste; and the court found that there was then in the possession of the administrator a large sum, and decreed that the settlement should be opened, and that complainants should recover of the administrator, as such, a certain sum, etc. An execution on said decree having been returned unsatisfied, the creditors brought suit upon the administrator's bond. *Held*, that such a decree was a sufficient conviction of waste.—Id.

[d] (Sup. 1881)

In an action on an administrator's bond for failure to pay a judgment against the estate, an answer averring that plaintiff's claim was not a judgment, but an allowance made by the court for a debt owing by decedent and filed by plaintiff against the estate for a demand having no priority over any other demand, and, though so alleging that the estate was not liable to pay plaintiff's demand because plaintiff was indebted to defendant on a much larger sum on a note, stated no defense by way of set-off or otherwise.—Pence v. Makepeace, 75 Ind. 480.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 2462-2475, 2503.

See, also, 18 Cyc. p. 1272; note, 52 L. R. A. 187.

**§ 537. Actions.**

Actions of bonds of surviving partners, see **PARTNERSHIP**, § 250.

Admissions, as evidence, see **EVIDENCE**, § 215.

Aider by verdict or judgment, see **PLEADING**, § 433.

Best and secondary evidence, see **EVIDENCE**, § 158.

Competency of witness, see **WITNESSES**, § 133.

Departure, see **PLEADING**, § 180.

Filing written instruments with pleading, see **PLEADING**, §§ 308, 311.

Jurisdiction as dependent on amount or value in controversy, see **COURTS**, § 168.

New trial, see **NEW TRIAL**, § 9.

Second suit for items left out by mistake, see **JUDGMENT**, § 599.

Setting out written instrument in pleading, see **PLEADING**, § 32.

Verdict on several counts or issues, see **TRIAL**, § 330.

**§ 537 (2). Conditions precedent.****[a] (Sup. 1862)**

Under Rev. St. 1843, p. 561, § 400, providing that an action will lie on an executor's bond where the amount of the claim has come to the executor's hands and the claim has been admitted to be just, or has been allowed and demand has been made, suit cannot be maintained on a demand which the administrator admitted to be just, without showing a demand.—State ex rel. Pierson v. Bowden, 3 Ind. 504.

**[b] (Sup. 1865)**

The statute authorizes a suit upon an administrator's bond on the relation of the heirs, and such suit may be brought before the removal of the administrator.—Owen v. State ex rel. Owen, 25 Ind. 371.

**[c] (Sup. 1866)**

When an administrator resigns his trust, it is his duty to pay the money in his hands belonging to the estate into court, or to his successor in the trust, and no demand is necessary before suit is brought upon his bond by the administrator de bonis non.—Lane v. State ex rel. Harmon's Adm'r, 27 Ind. 108.

**[d] (Sup. 1878)**

An action by the state on the relation of a legatee under a will is maintainable on an executor's bond for failure to pay the relator's legacy without first procuring the removal of the executors.—Heady v. State ex rel. Heady, 60 Ind. 316.

**[e] (Sup. 1881)**

A judgment allowing claim against decedent's estate makes it the administrator's duty to pay the claim; hence a suit may be brought on his bond without alleging demand.—Pence v. Makepeace, 75 Ind. 480.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

**§ 537 (3). Defenses and set-off or counterclaim.****[a] (Sup. 1889)**

An administrator may apply moneys coming into his hands as such to the liquidation of claims allowed by the court, and, in an action on his bond, such claims may be allowed as a counterclaim.—State ex rel. Homer v. Barrett, 22 N. E. 969, 121 Ind. 92.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

**§ 537 (4). Jurisdiction and venue.****[a] (Sup. 1858)**

The circuit court has exclusive jurisdiction of suits on the bonds of administrators, etc., where the damages claimed are laid at \$1,000 or upwards.—State ex rel. Clark v. Turner, 10 Ind. 411.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. EX. & AD. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

**§ 537 (6). Persons entitled to enforce liability.****[a] (Sup. 1823)**

An action on an administration bond payable to the associate judges must be in their names on the relation of some person beneficially interested.—Songer v. Manwaring, 1 Blackf. 251.

**[b] (Sup. 1827)**

A legatee, distributee, or creditor, until his claim has been exhibited and established according to law, and payment thereof has been refused by the executor or administrator, is not a party injured within the meaning of Rev. Code 1824, p. 323, authorizing suit on the bond of an administrator or executor.—Eaton v. Benefield, 2 Blackf. 52.

**[c] (Sup. 1848)**

The executor of A. gave bond, with surety, conditioned for the performance of his duty, in 1846, and after the executor's death the administratrix of the surety was sued on said bond for a devastavit committed by the executor. The suit was brought in the name of the state on the relation of the administrator de bonis non of A. *Held*, that the suit would not lie on the relation of the administrator de bonis non.—State ex rel. Pierson v. Gooding, 8 Blackf. 567.

**[d] (Sup. 1857)**

An administrator de bonis non can bring an action against the administrator of the surety of the original administrator.—State ex rel. Wright v. Porter, 9 Ind. 342.

**[e] (Sup. 1863)**

So far as a widow takes by descent from her husband, under the provisions of 1 Gav. &

H. St. p. 291, c. 46, she takes also as his heir; and therefore she may, under 2 Gav. & H. St. p. 529, § 162, maintain an action against an executor or administrator on his bond.—*State ex rel. Lockhart v. Mason*, 21 Ind. 171.

[f] (Sup. 1874)

An administrator de bonis non may sue a former administrator of the same estate on his official bond.—*Myers v. State ex rel. McCray*, 47 Ind. 293.

[g] (Sup. 1876)

Where an administrator refuses to obey an order directing him to pay over money in his hands escheating to the state, but the court did not remove him, as it should have done in order that a successor might be appointed, who might bring action against the defaulting administrator, the attorney general had authority to institute proceedings for the money, under 1 Rev. St. 1876, p. 152, providing that, where an officer whose duty it is to collect money escheating to the state shall fail to do so for 12 months, the attorney general shall institute proceedings.—*Fuhrer v. State ex rel. Attorney General*, 55 Ind. 150.

[h] (Sup. 1877)

The administrator of a devisee may maintain an action against the surety of the testator's executor for a conversion of the devise.—*Nelson v. Corwin*, 59 Ind. 489.

[i] (Sup. 1879)

Where two administrators executed a joint bond, and one resigned, the other could, under 2 Rev. St. 1876, p. 500, § 19, maintain an action against him and his sureties upon such bond as upon a separate bond.—*State ex rel. Wyant v. Wyant*, 67 Ind. 25.

[j] (Sup. 1891)

Under Burns' Rev. St. 1894, § 2613 (Rev. St. 1881, § 2453; Horner's Rev. St. 1897, § 2458), providing that an administrator may be sued on his bond by a succeeding administrator for failure to pay money of the estate into court according to law, or for embezzling or concealing or converting the estate's property to his own use, an administrator de bonis non may maintain an action on the bonds of prior administrators for the malfeasance of such administrators.—*Sheeks v. State ex rel. Alexander*, 60 N. E. 142, 156 Ind. 508.

FOR CASES FROM OTHER STATES.

SEE 22 CENT. DIG. EX. & AD. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

§ 537 (7). *Parties and process.*

[a] (Sup. 1865)

In a suit by an administrator de bonis non upon the bond of a deceased executor of his testator's estate, the administrator of the executor and the surviving sureties may be made joint defendants.—*Braxton v. State ex rel. Albert*, 25 Ind. 82.

[b] (Sup. 1874)

In an action by an administrator d. b. n. on the bond of the former administrator, the executor of a surety on such bond may be joined.—*Myers v. State ex rel. McCray*, 47 Ind. 293.

[c] (Sup. 1882)

In an action by a creditor of an estate against the sureties on the bond of a deceased administrator for the misconduct of the administrator during life resulting in injury to the creditor, the administrator of the deceased administrator's estate while a proper party is not a necessary party.—*Embree v. State ex rel. Federer*, 85 Ind. 368.

To a suit on an administrator's bond on the relation of a creditor, neither other unpaid creditors nor the administrator's administrator are necessary parties.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

§ 537 (8). *Pleading.*

[a] (Sup. 1823)

In a suit on an administration bond, the declaration must show the official character of the plaintiff, and it must appear for whose benefit the action is brought.—*Songer v. Manwaring*, 1 Blackf. 251.

[b] (Sup. 1827)

The declaration on the bond of an executor or administrator must show the relator to be a creditor, legatee, or distributee.—*Eaton v. Benefield*, 2 Blackf. 52.

[c] (Sup. 1847)

In debt by the state on the relation of A. against B. on his bond as administrator, the declaration stated that the relator was a creditor of the estate, but it did not allege that he had recovered a judgment against the estate, nor did it show the nature or amount of his demand. *Held*, that the declaration was insufficient.—*Wright v. State ex rel. Howe*, 8 Blackf. 385.

[d] (Sup. 1851)

In a suit before a justice against an administrator and his sureties, the demand stated that the plaintiff was the widow of the intestate, and entitled, under the statute, to certain personal property of the estate, which property she had demanded of the administrator. That statement was filed, with a copy of the administration bond, as the cause of action. *Held*, that the cause of action was sufficient, under the statute.—*Walker v. Prather*, 3 Ind. 112.

[e] (Sup. 1852)

In a suit upon an administrator's bond, executed for the faithful application of the proceeds of real estate of the decedent, which the administrator had procured an order to sell,

the defendant pleaded nil debet. *Held*, that the plea was not a nullity, and the relator under the issue should have proved all the material averments in his declaration, except the execution of the bond.—*Kirkpatrick v. State ex rel. Kirkpatrick*, 3 Ind. 521.

[f] (*Sup.* 1859)

Under the Code, a complaint on an executor's bond by one legatee, claiming as damages the property due to him, is good, for the court may, notwithstanding the form of that claim, render a proper judgment in favor of the general estate.—*State ex rel. Leach v. Scott*, 12 Ind. 529.

[g] (*Sup.* 1862)

Where, in a suit on an administrator's bond, several breaches are assigned, if one be well assigned a demurrer to all must be overruled.—*Whitehall v. State ex rel. Jones*, 19 Ind. 27.

[h] (*Sup.* 1863)

A complaint upon an administrator's bond alleged his receipt of certain assets and his failure to apply them according to law. The answer set up an alleged disposition, and the report thereof to the proper court, according to law. *Held*, that the answer, since it did not set out, and was not accompanied by, a copy or transcripts of the records alluded to, was bad.—*State ex rel. Stevens v. Marshall*, 20 Ind. 287.

[i] (*Sup.* 1865)

Under the practice of this state, a demurrer will not lie to a part of a paragraph of a pleading; but in a suit upon an executor's bond, regarding each separate breach assigned, when taken in connection with the introductory averments in the complaint, as a separate paragraph containing a distinct cause of action, a demurrer may be properly filed to each breach.—*Reno v. Tyson*, 24 Ind. 56.

[j] (*Sup.* 1865)

It is a sufficient assignment of a breach of an administrator's bond to aver that there came to his hands as administrator assets of a certain value, which he converted to his own use and wholly failed to account for.—*State ex rel. McNeal v. Bennett*, 24 Ind. 383.

[k] (*Sup.* 1865)

The complaint in an action upon an administrator's bond alleged that the bond was given "for the purpose of continuing the letters of administration." *Held*, upon demurrer filed by the sureties, that this language showed that a former bond had been given, as letters of administration cannot issue except upon the filing of a bond, and that the complaint was insufficient, as it contained no allegation as to why a second bond was required.—*Lane v. State ex rel. Albert*, 24 Ind. 421.

[l] (*Sup.* 1865)

In an action by an administrator de bonis non upon an executor's bond, a copy of the will

need not be filed with the complaint.—*Braxton v. State ex rel. Albert*, 25 Ind. 82.

[m] (*Sup.* 1865)

Suit by the heirs upon a bond executed by an administrator with the will annexed, by order of the court. The breach assigned was that the administrator had appropriated to his own use the sum of \$8,000 belonging to said estate, which was in his hands at the time of the execution of the bond. *Held*, that the complaint was not demurrable because it did not allege that the money came into the hands of the administrator after the execution of the bond.—*Owen v. State ex rel. Owen*, 25 Ind. 371.

[n] (*Sup.* 1878)

A testator appointed his sons E. and J. his executors, and directed that certain personal property, including a chose in action against E., be sold, and a certain residue of the proceeds be loaned out, "and the interest be appropriated to the education of my two sons T. and H." In an action brought on the relation of H. upon the executor's bond, the complaint alleged that the defendants had sold, etc., except the chose in action against E., who was solvent, leaving in their hands \$2,848 to be loaned, and the interest applied to the education of T. and H.; that said sum could have been loaned, etc., and the executors ought to account for interest at 10 per cent.; that T. had completed his education at a certain date; that thereafter H. commenced and completed his education at his own expense, the defendants having failed to defray any of the expense thereof; and that he had arrived at his majority and demanded repayment, which was refused. *Held*, on demurrer, that the complaint was sufficient, as it was not necessary to allege that the whole interest had not been expended in educating T.; that the breach assigned fell within 2 Rev. St. 1876, p. 549, § 162, cl. 10, as to "any other violation of the duties of his trust"; and that an answer that, by the terms of the will, the defendants were only to pay for the education received by H. prior to his attaining his majority, which they had done was insufficient.—*Heady v. State ex rel. Heady*, 60 Ind. 316.

In an action by the state on the relation of a legatee on the bond of executors for failure to pay money due to the relator under the will of testator creating a trust fund and directing the interest thereon to be appropriated to the education of the relator and his brother, a complaint averring that the relator's brother completed his education two years after the fund came into the hands of the executors, and that plaintiff commenced his collegiate course two years after the brother completed his education, is sufficient to show that the executors had in their hands the amount of interest accruing on the fund after the relator's brother had completed his education, since it will not be presumed that the executors ap-



plied the interest to the education of the legatee in advance of it being earned.—Id.

[o] (Sup. 1881)

In an action on an administrator's bond to recover the amount of a judgment against the estate of his intestate, which was solvent, the judgment being the only unpaid claim, an answer alleging that the plaintiff was indebted to defendant in a much larger sum on a note which he failed to pay, and refused to allow the judgment to be credited on the note, was insufficient as an answer of set-off, or for any other defense.—Pence v. Makepeace, 75 Ind. 480.

[p] (Sup. 1883)

The complaint in an action on the general bond of an administratrix alleged that the administratrix received money as proceeds of the sale of the personal property of the decedent, and alleged that she wasted a part of the estate. There was nothing to show that the money wasted was derived from the personal estate and for anything that appeared on the face of the complaint the sum so derived was duly administered. The complaint showed that the administratrix sold real estate. *Held*, that an answer alleging that the administratrix had fully administered all the personal estate of the deceased was sufficient.—State ex rel. Jones v. Cloud, 94 Ind. 174.

A complaint in an action on an administratrix bond alleged the removal of the administratrix before the bringing of the suit. The answer alleged that the estate of decedent had been fully administered. *Held*, that the answer sufficiently showed that the estate was administered before the institution of the action.—Id.

[q] (Sup. 1889)

In an action on an administrator's bond, an answer that defendant had fully administered the estate, and all the rights, credits, etc., which came to his hands, and that said estate is now indebted to him in a certain sum, is good on demurrer, though it might have been required to be made more specific as to the manner of the indebtedness.—State ex rel. Homer v. Barrett, 121 Ind. 92, 22 N. E. 969.

In an action on an administrator's bond, the administrator may set up a counterclaim for money paid out in excess of receipts; and the objection that, owing to insolvency of the estate, he paid claimants more than they were entitled to, must be raised by reply.—Id.

[r] (App. 1897)

Where a complaint, in an action on an administrator's bond, alleges that he received a certain sum and converted it to his own use, and that he knew of assets which he failed to preserve for the estate, an answer setting up a defense as to the special sum alleged to have been converted, but not answering the charge as to the failure to preserve the assets, is bad.

—State ex rel. Wright v. Tomlinson, 45 N. E. 1116, 16 Ind. App. 662, 59 Am. St. Rep. 335.

[s] (App. 1901)

In an action on the bond of an administrator c. t. a. to recover a legacy to be paid to the relator when she reached the age of 21 years, the complaint did not show that she had arrived at that age, or that the debts of the testator had been paid, or that after paying the legacy there would be sufficient to pay paramount claims, or that the legacy would not be needed to pay such claims, or that there would have been enough derived from the assets, but for the derelictions of the administrator, to pay all such claims in addition to the legacy. *Held*, the complaint did not state facts sufficient to constitute a cause of action.—Rogers v. State ex rel. Beatty, 59 N. E. 334, 26 Ind. App. 144.

Where, in an action by the state, on relation of a legatee, against an administrator de bonis non c. t. a., and the sureties on his bond, and his predecessor to recover a legacy, the second paragraph of the complaint did not make any reference to the administrator's bond, such paragraph did not state a cause of action, in favor of the state, as the state, on the relation of the legatee, could sue the defendants to recover the legacy, only on the administrator's bond.—Id.

#### FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. Ex. & Ad. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

#### § 537 (9). Evidence.

[a] (Sup. 1832)

A judgment against an executor is not evidence in an action against the administrators of a surety of such executor.—Nicholson v. Carr, 3 Blackf. 104.

[b] (Sup. 1860)

In a suit against an administrator and his surety on a second or additional bond given on application of a former surety to be discharged, the surety cannot prove declarations of the administrator, made before the execution of the second bond, tending to show that he had converted the money then in his hands to his own use.—Bales v. State ex rel. Pennington, 15 Ind. 321.

[c] (Sup. 1865)

It will be presumed in a suit upon an administrator's bond, in favor of the action of the court, that the order requiring the execution of the bond was authorized by law.—Owen v. State ex rel. Owen, 25 Ind. 371.

[d] (Sup. 1866)

In a suit upon an administrator's bond, an account current filed by the administrator is at least presumptive evidence that the amount therein stated was in the hands of the admin-

istrator at the time of filing the account.—Lane v. State ex rel. Harmon's Adm'r, 27 Ind. 108.

[e] (Sup. 1881)

In an action on an administrator's bond, evidence showing the amount and kinds of property owned by the decedent just before his death, and at the time when his son, afterwards appointed administrator, took possession of the property, was competent.—Beal v. State ex rel. Beal, 77 Ind. 231.

In a suit by the heirs against an administrator and his sureties, *held*, that his final report, showing plaintiffs as heirs entitled to distribution, was sufficient proof of their heirship.—Id.

[f] (Sup. 1882)

In an action by a creditor against the sureties on an administrator's bond, the complaint alleging conversion of the assets of the estate by the administrator, evidence that creditors of the estate had demanded of such administrator payment of their claims and that he failed to pay the same was not sufficient to establish a conversion of the assets.—Embree v. State ex rel. Federer, 85 Ind. 368.

In a suit on an administrator's bond at the relation of a creditor, something more than mere delay in the payment of a claim against the estate must be proven to make out a case of conversion of the assets.—Id.

[g] (Sup. 1884)

Where suit is brought on an administrator's bond, parol evidence of the amount received for land is admissible.—State ex rel. Wells v. Lindley, 98 Ind. 48.

The record of proceedings for the sale of land by an administrator is not inadmissible in an action against him on his bond, for the reason that the land sold was defectively described, where it appears that many distinct parcels of land were embraced in the proceedings, and the greater number of them were described accurately.—Id.

FOR CASES FROM OTHER STATES,

SEE 22 CENT. DIG. EX. & AD. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

§ 537 (10). *Trial.*

[a] (Sup. 1876)

Special findings of the court, in an action on the bond of an administrator, brought on the relation of an heir at law of the intestate, were to the effect that the administrator and re-latrix were children of the decedent; that the decedent during her lifetime had conveyed to the defendant, her son, by deed, a certain quantity of land, in consideration of his acceptance of a condition imposed upon him in such deed, that he would support the mother during her lifetime; that subsequently, upon his agreement to make other and satisfactory provision for

her maintenance and support, she joined with him in conveying the land to a third party; that pursuant to a mutual agreement between the mother and the son the purchaser paid to the mother a part of the purchase price, and executed his notes, secured by a mortgage, for the balance, the son verbally agreeing with the mother, prior to and at the time of execution of the notes, that they were to be given to her for her maintenance and support, and that in case they should prove insufficient he would furnish additional means after they were exhausted, and that, if any residue of such notes remained unexpended at her death, it should revert to the son, and should become his individual property; that upon the death of the mother, leaving unexpended a portion of such money and notes, the son, as administrator of her estate, took charge thereof; and that he refused to charge himself therewith as administrator, claiming it as his individual property. *Held*, that the proper conclusion of law arising upon these findings was that the son was not liable to the re-latrix for any portion of such residue claimed as his individual property.—Irwin v. State ex rel. Spoor, 54 Ind. 137.

[b] (Sup. 1877)

Where an action on relation of an administrator *de bonis non* on the bond of his predecessor was referred to a master to report what sum was due to the estate, etc., the master was authorized to allow interest and penalty.—Reid v. State ex rel. Frybarger, 58 Ind. 406.

§ 537 (12). *Judgment and review.*

[a] (Sup. 1870)

In an action on a joint bond of co-administrators, where judgment is rendered for the plaintiff, the sureties on the bond have a right to an order directing that the execution to be issued on the judgment be first levied on the property of the principals, although one of the principals may have taken possession of the entire assets of the estate and administered the estate, so far as it has been administered, and the other administrator has never received any of the assets.—Prichard v. State ex rel. Keller, 34 Ind. 137.

[b] (Sup. 1875)

Where there are claims against an estate in a suit on the relation of the heirs upon the bond of the administrator, it is proper for the court to direct that the amount received be retained by the clerk until the further order of the court.—Moore v. State ex rel. Atkinson, 49 Ind. 558.

[c] (Sup. 1888)

An administrator *d. b. n.*, who has obtained a judgment on the bond of his predecessor for converting the assets of the estate, may enforce the judgment against land fraudulently conveyed by such predecessor, without issuing execution against him or his sureties, and

though there are no debts due from the estate.—*Duffy v. State*, 115 Ind. 351, 17 N. E. 615.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 2453, 2484-2581.

See, also, 18 Cyc. pp. 1280-1309.

**XIV. EXECUTORS DE SON TORT.**

Intermeddling with administration in general, see ante, § 6.

**§ 538. Acts which constitute one executor de son tort.**

[a] (Sup. 1832)

A man left home, on a trading voyage, leaving his wife and five children, and debts exceeding the amount of his property, and did not live to return home; and his wife, within a year, and before having certain knowledge of his death, used the property he left in supporting herself and children, and in the payment of his debts. *Held*, that she was not liable, as executrix de son tort, to the creditors of her husband.—*Brown v. Benight*, 3 Blackf. 39, 23 Am. Dec. 373.

[b] (Sup. 1835)

If a widow continue in the possession of her deceased husband's goods, and use them as her own, she is liable as an executrix de son tort.—*Hawkins v. Johnson*, 4 Blackf. 21.

[c] (Sup. 1864)

Mere acts of kindness and charity touching the property of a deceased person, such as taking care of it, feeding stock, providing for children, etc., will not constitute the person who does them an administrator de son tort.—*Brown's Adm'r v. Sullivan*, 22 Ind. 359, 85 Am. Dec. 421.

[d] (Sup. 1871)

Under a will the estate was given to the widow of testator for her use during her natural life, and at her death all said property not so used was given to another. One acting under her direction sold a horse and some hogs belonging to the estate, and paid some debts, and purchased supplies for the use of the widow, and put the remainder at interest for her. *Held*, that the sale was unauthorized, and that the person making it was an executor de son tort.—*Leach v. Prebster*, 35 Ind. 415.

[e] (Sup. 1871)

Although a creditor of a decedent's estate cannot sue the heirs where there has been no administration, yet, if any one has, without an administration, taken possession of any of the decedent's property, he may be sued by an unpaid creditor, as an executor de son tort.—*Wilson v. Davis*, 37 Ind. 141.

[f] (App. 1898)

A complaint not alleging that defendant came into possession of property of a decedent

unlawfully, nor showing that he was an intermeddler in the estate of such decedent, is insufficient to charge him as an executor de son tort.—*McAfee v. Montgomery*, 51 N. E. 957, 21 Ind. App. 196.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. §§ 2582-2589.

See, also, 18 Cyc. pp. 1355-1359.

**§ 539. Operation and effect of unauthorized acts.**

[a] (Sup. 1863)

A person sued as an administrator de son tort, to recover the value of assets of the estate which he had converted to his own use or disposed of, is entitled to be allowed, in reduction of damages, the amount of such assets applied by him to the proper uses of the estate, in the payment of debts, or otherwise.—*Reagan v. Long's Adm'r*, 21 Ind. 264.

[b] (Sup. 1870)

Where an executor de son tort had possession of a horse belonging to decedent's estate and assented to its sale, and the money derived therefrom was applied to pay a note of the decedent on which the executor was indorser, the proceeds went to the executor's benefit.—*Ramsey v. Flannagan*, 33 Ind. 305.

[c] (Sup. 1871)

An executor de son tort is entitled to credit for debts paid by him on account of the estate, where there are sufficient assets to pay all the debts; otherwise, in proportion to the amount of the assets as compared with the debts of the estate.—*Leach v. Prebster*, 35 Ind. 415.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. § 2590.

See, also, 18 Cyc. pp. 1359-1362.

**§ 540. Liabilities to rightful executor or administrator.**

[a] (Sup. 1880)

A., as administrator of B., sued C., as administrator de son tort. C. filed a cross complaint, in which he alleged a contract, made with B. in his lifetime, by which B. transferred all his property to C., and that a part of the same consisted of A.'s notes, which A. had wrongfully taken and withheld. *Held* that, it being apparent that A. held the notes as administrator, the cross complaint was sufficient, if true, to entitle C. to a judgment and an order for the return of the notes, but that a personal judgment could not be rendered against A. on the notes.—*Fessler v. Crouse*, 73 Ind. 64.

[b] (Sup. 1882)

To a complaint by an administrator against an executor de son tort of the same estate, charging conversion by the latter of personalty belonging to the deceased, a plea alleging that defendant paid all debts and liabilities on ac-

count of the matters set forth in the complaint is improper.—*Collier v. Jones*, 86 Ind. 342.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. § 2591.

See, also, 18 Cyc. p. 1360.

**§ 541. Liabilities to creditors.**

[a] (Sup. 1843)

The fact that a widow has possession of some of a decedent's goods is not sufficient to render her personally liable to a suit at law by a creditor for a debt due from the estate, though she be considered as holding the goods as an administratrix de son tort.—*Chandler v. Davidson*, 6 Blackf. 367.

[b] (Sup. 1879)

The widow of a testator, who had bequeathed to her all his property, converted it to her own use without probating the will or administering the estate. *Held*, that she had become an executrix de son tort, but that she was not, under 2 Rev. St. 1876, p. 495, § 15, personally liable on a note upon which her husband was surety.—*McCoy v. Payne*, 68 Ind. 327.

[c] (Sup. 1883)

Under the direct provisions of the act for the settlement of decedents' estates (2 Rev. St. 1876, p. 495, § 15), a creditor can only recover from an administrator de son tort to the extent of the damages occasioned by intermeddling.—*New Market Nat. Bank v. Locke*, 80 Ind. 428.

**FOR CASES FROM OTHER STATES,**

SEE 22 CENT. DIG. Ex. & Ad. § 2592.

See, also, 18 Cyc. p. 1360.

**§ 544. Actions.**

[a] (Sup. 1834)

Under Rev. Code 1831, p. 168, providing that, if any person unlawfully intermeddle with or embezzle the property of a decedent, such person shall be chargeable as an executor of his own wrong, and shall be liable in an action at common law by the creditors or other persons injured, or such creditor or other person may sue the wrongdoer in chancery, and compel him to answer under oath concerning the premises, and on final hearing have a decree according to justice and equity, an administrator may file a bill in chancery, instead of proceeding at law, against a person who intermeddled with or embezzled any of the goods of his intestate.—*Thorn v. Tyler*, 3 Blackf. 504.

[b] (Sup. 1860)

Suit against an executor de son tort by the administrator for intermeddling laid the offense on a day certain, which was after the date of the plaintiff's letters. He was allowed to amend by substituting a day before the grant of administration, it being *held* that the amendment did not change the claim or defense.—*Sipe v. Sipe*, 14 Ind. 477.

[c] (Sup. 1863)

In an action against an executor de son tort to recover the value of the assets of the

estate, the defendant, under the general denial of the complaint, may give evidence generally tending to disprove the plaintiff's right to recover or to damages.—*Reagan v. Long's Adm'x*, 21 Ind. 264.

[d] (Sup. 1870)

A complaint alleged that plaintiff held a note for fees as attorney, which was to become due when a certain suit was decided, and that judgment had been rendered in such action, that the note was due, and that subsequent to the rendition of such judgment the maker had died, and defendant had wrongfully, and with intent to defraud complainant, sold certain property of the decedent and appropriated the proceeds, amounting to a large sum above the amount due on the note. *Held* sufficient to charge defendant as an executor de son tort.—*Ramsey v. Flannagan*, 33 Ind. 305.

[e] (Sup. 1877)

An action by an executor or administrator against an executor de son tort of his decedent's estate should be instituted for the benefit of all the creditors, and not for his sole benefit.—*Ferguson v. Barnes*, 58 Ind. 169.

An heir at law or next of kin of a decedent cannot, simply as such, maintain an action against an executor de son tort of the estate of such decedent.—*Id.*

An executor or administrator may maintain an action against an executor de son tort of his decedent's estate. Where such action is instituted by a creditor of the decedent's estate, it should be instituted, not for his sole benefit, but for the benefit of all the creditors.—*Id.*

In an action against an executor de son tort of the estate of an intestate, brought by an heir of the latter, either for his own personal benefit or for that of the estate, the complaint, to be sufficient, must allege that there are no debts outstanding against such estate.—*Id.*

A complaint against an executor de son tort is not rendered bad on demurrer by the mere fact that it appears from its allegations that the property converted by the executor was the proceeds of a void sale by deceased and her second husband of lands inherited by her from her former deceased husband.—*Id.*

[f] 2 Rev. St. 1876, p. 495, relative to the liability of an executor de son tort, does not authorize a creditor of the decedent to maintain a personal action or recover a personal judgment against such executor, but only to commence an action to compel him to account to the court for the full value of the decedent's property with which he has unlawfully intermeddled, with 10 per centum thereon.—(Sup. 1879) *McCoy v. Payne*, 68 Ind. 327; (1881) *Goff v. Cook*, 73 Ind. 351.

[g] (Sup. 1881)

In a suit against an executor de son tort, under 2 Rev. St. 1876, p. 495, § 15, plaintiff, if a creditor, must show by his complaint that the

property intermeddled with was such as an administrator would be entitled to take possession and control of.—*Goff v. Cook*, 73 Ind. 351.

[h] (Sup. 1881)

An action cannot be maintained by the creditor of an estate against an executor de son tort, unless the complaint affirmatively shows that the creditors were entitled to have the property, with reference to which the defendant is alleged to have intermeddled, placed in the hands of the administrator.—*Kahn v. Tinder*, 77 Ind. 147.

Where, in an action by creditors against an alleged executor de son tort, defendant answered that the property of the estate did not exceed \$500 in value, which was set off to the widow in anticipation of an order directing it, who transferred it to the defendant for value, who transferred it to the defendant for value, such answer alleges a complete defense.—*Id.*

[i] (Sup. 1882)

Under Rev. St. 1881, § 2258, providing that an executor of his own wrong shall be liable to an action "by any creditor or other person interested in the estate of the decedent," an executor de son tort when sued by the administrator of the estate of the decedent to recover a sum of money misappropriated by the defendant cannot object that plaintiff's appointment as administrator was not fully consummated until after the beginning of the action.—*Collier v. Jones*, 86 Ind. 342.

An action against an executor de son tort may be maintained by the administrator of the estate. He is a "person interested," within the language of a statute giving such right of action to "any creditor or other person interested in the estate."—*Id.*

[j] (App. 1895)

In an action by a creditor of a decedent's estate, to charge defendant as administrator de son tort with property of decedent converted to his own use, the jury returned a general verdict for defendant, and also specially found that he had converted certain property belonging to decedent. *Held* that, as the general verdict carried with it the inference that plaintiff was not a creditor of decedent, the special finding

was not in irreconcilable conflict with the general verdict, and therefore a judgment for plaintiff for the value of such property was erroneous.—*Burke v. Gardner*, 11 Ind. App. 475, 39 N. E. 290.

FOR CASES FROM OTHER STATES,

SEE 22-CENT. DIG. EX. & AD. §§ 2594-2603.

See, also, 18 Cyc. pp. 1362-1367.

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## EXECUTORY TRUSTS.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

[END OF VOL. 4.]

*by J. L. S.*  
12/28/11

















